



The Interaction of Legal Justifications Relevant to the Medical Profession in Criminal Law

REZARTA DEMNERI
Criminal Law Department
Faculty of Law, University of Tirana
Tirana, Albania

Abstract:

The right to life is an unalienable right of the human being, treasured by the single person as much as by the State which provides the means for its protection. The interest of the State in providing healthcare to the citizens is two-dimensional: it implements the fundamental rights of the single person, consequently contributing to the general welfare of the community. However as stated in the Convention of Oviedo, the interests and welfare of the human being shall prevail over the sole interest of society or science. Medical procedures can harm the physical integrity of the person; therefore the physician fulfilling his duty of providing a service of public interest can be subject to criminal liability. The goal of this paper is to examine the characteristics of the legal justifications relevant to the relationship establishing between medical professionals and patients, more specifically those referring to consent, fulfilment of duty and defence of necessity. A comparative view with the Italian legal system is chosen in way to underline the specific features of the legal justifications applied to the medical field. The single dispositions of the special part of the criminal code relevant to this issue will not be addressed in this instance therefore the analysis is veered more towards a general criminal law viewpoint.

Key words: right to life, legal justifications, informed consent, physician, defence of necessity

1. Introduction

The right to receive health care is a constitutional right and is tightly linked to the right to life. It is a positive right requiring from the State to act in fulfilment of the duty to provide healthcare to its citizens in realization of the human personality. The right to receive healthcare is protected by the State through its organs and supported by private initiative. Receiving healthcare is a right; it does not imply an obligation of the patient to accept it, binding therefore the medical professionals engaged in an activity of public interest, to fulfil their duty only upon informed consent of the patient.

From a practical viewpoint, while the integrity of the human body is protected by law, medical procedures are invasive of such integrity. So where does the justification of physically invasive procedures lay legally speaking? Consent to receive medical treatment and fulfilment of the duty by medical professionals, are among the most relevant of the legal justifications. However the contours between the different legal justifications seem to blur out in a dance that provides and removes priority depending on the case examined.

This paper aims to study the nature of the legal justifications recognized by criminal law relevant to the exercise of the medical profession. Such study will be carried on by drawing a comparison between the Albanian and the Italian legal system in way to bring more into focus the specifics of each justification.

2. General Considerations on Legal Justifications

Fiandaca & Musco (2004) define “legal justification” as a circumstance deriving from the legal system as a whole (therefore applicable also in administrative and civil law and not exclusive to criminal law) which renders not punishable an act considered illicit by a legal provision (225). In this instance however discernment is made between:

- causes of legal justification or excluding circumstances¹ of administrative and civil liability.

¹ Also referred to as “scriminanti” in the Italian legal system or as “justification” in common law.

They dissolve the contrast between the illicit or unlawful act and the legal system as a whole. Their effects extend to any subject participating in the commission of the act since their existence is objective (objective cause, A/N), even when wrongfully thought inexistent or not acknowledged (*error juris*, A/N). Such is the exercise of a right and self-defence.

- causes exempting culpability or excusing causes² leave intact the unlawfulness or illicit nature of the fact but remove the possibility to reprimand legally the active subject. Here the subject acts under psychological pressure which renders impossible to act in compliance with the law or eventually the act lacks the subjective aspect required by the criminal provision. Since these causes pertain to the subject, they exempt from liability only if acknowledged by him (subjective cause, N/A) and do not extend to anyone else participating in the commission of the act. Such are offenses committed under coercion or threat.
- causes exempting from punishment³ *strictu sensu* leave intact both unlawfulness and culpability but establish the punishment is not deserved and therefore not applied having into consideration the safeguard of juxtaposed interests which would be harmed in case the punishment was applied (Fiandaca and Musco 2010, 226-227). Such would be the case of omission to report a crime pursuant art. 300 §2 of the Albanian criminal code (c.c).

Albanian doctrine does not elaborate as thoroughly on the differences between the types of legal justifications. Salihi (2010, 234-235) comprises all of the above causes under the concept of “permissive norms” meaning legal norms which allow actions usually considered unlawful and exclude liability of the person engaged in them, without formally making a distinction

² Also referred to as “giustificanti” in the Italian legal system or “excuse” in common law.

³ Also referred to as “esimenti” in the Italian legal system or “exculpation” in common law.

between justifications and excuses. Salihu (2010 *ibid*) presents a formal categorization of such norms:

- causes excluding liability prescribed in the general part of the c.c.
- causes excluding liability prescribed in the special part of the c.c.
- causes excluding liability prescribed in other branches of the law.

Similarly to Salihu, Çela *et al.* (1982, 171-195) recognize the existence of “*circumstances removing the social threat*”, providing a formal categorization depending on whether they are prescribed in the general part or in the special part of the c.c.

The Albanian c.c. does not list consent as a legal justification diminishing or exempting from criminal liability as it does for other legal justifications in the general part ex arts.17-21⁴ or as the Italian c.c. ex art. 50⁵ does. However specific criminal provisions provide for consent as a legal justification⁶, which has to meet several requirements to be valid (Çela *et al.* 1982, 192):

- to be free, not granted under threat, coercion or deceit
- the subject granting it is in his usual state of mind
- the subject has legal ability to give such consent. When of unsound mind or of minor age, his legal representative can grant such consent in compliance with the rules set by the laws regulating the specific procedures.
- consent is given prior to the act and is valid during the act being committed. Any *a posteriori* consent is not relevant to the criminal liability as it configures rectification.

⁴ Mental incapacity, intoxication, self-defence, defence of necessity (nevojë ekstreme *alb*, referred to as “state of necessity” in the Italian legal system), exercise of a right and fulfilment of a duty.

⁵ Codice Penale italiano, art. 50: “Nobody is punishable for harming or putting into risk the right of a person who is entitled to give consent for such act.”

⁶ Art. 93 “Interruption of pregnancy without consent of the woman”, art. 112 “Violation of habitation”, art. 121 “Violation of privacy” etc.

The manifestation of such consent can be verbal or with conclusive actions and it should be specific, meaning the person has the right to point out clearly the object of his consent by setting conditions and terms (Padovani 2005, 306; Delpino 2010, 290).

Presumed consent is activated only when the person acting is aware his actions are being carried on without consent but in benefit to the beholder of the right that is being protected (Padovani 2005, 307). Riz (as cited by Delpino 2010, 292) elaborates a theory well received by doctrine according to which, presumed consent can lift criminal liability only when all three criteria are met concurrently: the existence of an objective presumption of a valid consent, the absence of dissent and a balance between the more important right which is being safeguarded by sacrificing another right of lesser importance, both of which pertain to the same subject. It is important to underline hereby the affinity between two legal justifications: consent and exercise of right, this last clearly provided ex art. 21 of the c.c. A right can be exercised personally or delegated to a third person (upon consent) to ensure protection of the interest of the delegator, if it is not against the law and is carried on in compliance with it.

Consent applied to criminal law expresses the will of the person who withdraws receiving protection of a right, accepts its violation from a third person in way to protect a more important one. It is a form of authorization, therefore revocable anytime, except when such revocation is impossible to present before the termination of the act such being the case of surgery. Indeed, when the patient has to undergo emergency procedures in life-threatening circumstances, he is incapacitated to give either informed consent or dissent to a treatment. Padovani (2005, 302) describes consent as a kind of legal act which gives the beholder the right to act in absence of a mutual “right-duty” relationship which is expected between parties in a legal act but is absent in unilateral acts.

Informed consent applied to medical care is composed by two elements: duty to inform prior to giving care on the part of the physician and right to give consent or deny it based on such information, on the part of the patient. The information concerns the nature, results and possible dangers expected from

the procedure. The medical professional is to be held responsible when such information is incomplete or inaccurate (Bigiavi *et al* 1987, 232). Art. 25 of the Code of Ethics and Medical Deontology (CEMD) states clearly that the physician cannot be held liable if he omits information to the patient with regards to his health, when such information could be harmful to his psychological and physical equilibrium. However the duty to inform the family and/or the legal tutor stands nonetheless.

Everybody is entitled to receive healthcare pursuant art. 55 §1 of the Constitution, be it provided directly by the State through its organs or supported by private initiative ex art. 59/c of the Constitution. The duality of informed consent produces two different situations: firstly, it constitutes a right on the part of the patient to receive treatment establishing eventually its modalities; secondly, it basically legitimates a medical intervention. This is due to the fact that the right to receive medical treatment does not imply an obligation to undergo it ex art. 5 of the Convention of Oviedo (1997), adhered to with Law nr. 10339 of 28.10.2010. This would also violate the principle of self-determination inherent to the right to life, protected ex art. 21 and the right to freedom ex art. 27 of the Constitution.

The Italian Constitution states that nobody shall be obligated to receive medical treatment, except when explicitly provided by law (art. 32). With the sentence 438/2008 the Constitutional Court of Italy clearly established that when consent refers to receiving medical treatment, it loses the quality of a generic legal justification becoming a right on its own, protected directly by the Constitution. The Albanian Constitution lacks an explicit provision such as art. 32 of the Italian Constitution and the courts have yet to pronounce over the matter. However as established by the European Court of Human Rights with the sentence *Pretty vs. the UK* (ECHR 2002, 4) the inalienable “*right to life protects the right to self-determination in relation to issues of life and death*”, not life itself. As a consequence, the duty of the State to act in protection of the right to receive health care (positive right) is subordinated and cannot violate the principle of self-determination covered by the right to life and the right to freedom of the patient (negative right).

Informed consent and good medical practice (which does not necessarily imply a favourable outcome from the medical procedure) must exist simultaneously in order to exempt the physician from criminal liability. Consent is truly personal but when it is impossible to be granted by the patient itself, such being the case of a minor, a person of unsound mind or incapable to communicate, it is his parents or his legal tutor entitled to give such consent, acting to his benefit ex art. 3 of the Convention of Oviedo and ex art. 28 of the Code of Ethics and Deontology (CEMD). Albanian doctrine however seems to give consent less of a priority when providing for the physician the possibility to act without consent and in some cases contrary to it if deemed to be to his benefit (Elezi *et al* 2009, 152; Çela 1982, 194).

In the case *Glass vs. the UK*⁷, the ECHR recognized that parental consent when the patient is incapable of consenting or dissenting is fundamental other than in emergency situations. The duty to preserve life is absolute except where specific limitations apply such as serving the public interests of a democratic society. Since a demonstration of a sufficient emergency that might have engaged the doctrine of necessity under which treatment could be administered had failed, a violation of art. 8 of the Convention of Human Rights (right to respect for private and family life) occurred. The main legitimating cause for medical procedures performed without consent is not that of fulfilment of the medical duty but that the defence of necessity (Bigiavi *et al* 1987, 260). This is also known as “a choice of evils”: when the pressure of circumstances coming from physical forces of nature presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil (LaFave and Scott Jr. 1986, 441-442).

⁷ The physician acted in conformity to the *lege artis* administering diamorphine to a non-terminally ill inpatient to relieve his pain but the fact that it was contrary to the will of the legal tutor (Mrs. Glass, the mother of the patient) of the incapable patient and there was no legal authorization (a Court decision) resolving the conflict, a violation of Art 8 of the Convention of Human Rights was found to have occurred.

In the medical field this condition translates into a “state of emergency”⁸ defined as “*an injury or an acute illness which poses an immediate or imminent risk to the life or health of the person*” ex art. 3 (11) of Law nr. 10107 of 30.03.2009 “On health care”. The imminent risk (not necessarily immediate as required by the legal justification of defence of necessity) for the life or the health of the person expands the application of the defence of necessity when compared to the respective legal provision, ex art. 20 of the Albanian c.c. According to LaFave and Scott Jr., the state of emergency in which the medical personnel administers non-consented medical treatment is directly linked to the duty physicians are bound to fulfil in accordance to the principle of “the good Samaritan” (1986, 454). This is yet another example of how two different legal justifications such as fulfilment of the duty and defence of necessity can interact.

3. The Object of Consent

When analyzing the object of consent doctrine points out that firstly, the person can authorize about rights he owns and secondly, this authorization should not be unlawful. Italian doctrine as presented by Padovani, elaborates more specifically on the areas where authorization can be granted (2005, 304):

- entirely over private matters (concerning correspondence, professional, scientific and industrial life)
- partially over the physical integrity, distinguishing between:
 - a) acts capable of harming the health of the person but do not cause any permanent damage to the health
 - b) acts which could harm the interests of a third party but do not go against the law, public order and morality

⁸ Art. 8 of the Convention of Oviedo states: “*When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned.*”. Also art. 9 of Code of Ethics and Medical Deontology.

- c) acts which benefit the person, such as treatments or clinical trials, carried on only in case a balance between the foreseeable advantage and the possible harm resulting from the therapy is stricken.
- d) acts which benefit only a third party as part of a scientific experiment or organ transplantation. However these procedures should not cause a permanent damage to the person who gives consent.
- partially over honour, dignity, right to personal and moral freedom and rights concerning sexual life as long as they are within the limits of law and not against the public order and morality.

The right to self-determination explicated through consent is not absolute since consent from the patient is bound not to be against the law, public order and morality. As pointed out by Salihi, sterilization performed by a qualified physician under the consent of the patient can qualify as injury if not dictated by therapeutic reasons (1995, 197). This due to the fact that the medical profession aims to improve the health of the patient and such procedures would diminish the ability of the patient to procreate. The stand of Salihi later evolved into that sterilization upon consent does not qualify as injury when specifically prescribed by law (2010, 269).

The concept of health comprises more than just the physical dimension: it includes also the psychological and mental aspect ex art. 4 of the CEMD. The principle of social solidarity announced in the Preamble of the Constitution supports the right to self-determination of the patient when choosing a medical treatment that would in fact harm a physical aspect of his health to improve the psychological and sexual side of his life, being equally important aspects of the health of a person. Undoubtedly, procreation bears a social value, however when demographical growth is not at risk, sterilization does not harm the interests of the community nor does it go against public order. In fact, sterilization upon consent of an adult patient is configured as a family planning method ex art. 15 of Law “On reproductive health”. The psychological welfare of the patient is prominent also in cases of

non-reconstructive plastic surgeries, which do not pose a risk to the health of the patient (Salihu 1995, 198).

In the Italian legal system, an important limit to dispositive acts of the human body is set by art. 5 of the civil code. It prohibits, albeit civilly, any financial profit coming from the disposal of the human body. There is no such disposition in the Albanian civil code.

Several legal norms in the Albanian legal system indicate the body is not at complete availability of its owner. Such is art. 89/a of the Albanian c.c. with regards to illegal transplantation or any other activity involving the removal or implantation of organs, regardless if the activity is aimed at generating profits or not. Art. 21 of the Convention of Oviedo (1997) provides that nobody is entitled to financial gain from dispositive acts of the person's body or parts of it, basically recalling the limit set by art. 5 of the Italian civil code. This prohibition extends also to the financial gain granted by industrial property rights (Demneri 2013, 231). The issue of consent is regulated by the Convention of Oviedo: generally ex arts. 5-9, specifically referred to scientific research ex arts. 15-18 and even more specifically referring to organ and tissue transplant ex arts. 19-20 (which prohibit the transplantation from a person incapable to give consent, along with the exceptions applicable).

Doctrine and jurisprudence debate is still very strong over the right to life and whether this includes also the right to death bringing to the forefront the issue of euthanasia or death upon consent as it is defined in the Italian legal order ex art. 579 of c.c.⁹. Consent given by the person to take over his life is not accepted as a valid legal justification by the Italian legal system. This is due to the fact that the person is not the owner entitled to dispose of the right to life at his own will, therefore such right cannot be an object of consent. Italian doctrine as cited by Padovani, differentiates between *active euthanasia* defined as any act deliberately aimed at shortening the life of a suffering person (except for the case when the physician applies to a terminally ill patient a treatment containing exclusively painkillers which accelerate indirectly the death of the patient

⁹ "Anyone who causes the death of a person, under his consent is punished with imprisonment from 6 to 15 years..."

by not counteracting the advancement of the pathology) with voluntary *passive euthanasia*, this last devoid of any criminal liability for the physician acting in fulfilment of the will of the patient not to receive any further treatment aimed at postponing or preventing his eventual death (2005, 2541).

On the limits to the right to self-determination, Salihu seems to agree to the extent where criminal liability is excluded for the physician who stops giving treatment to the terminally ill patient (1995, 198), a procedure in compliance with art. 38 and art. 39 of the CEMD. The right to life is protected by law as is the freedom of the patient to decide how to treat his body, having into consideration the physical dimension in unity with the spiritual one which constitute the person as a whole. However, the right to life does not imply a right to death and the right to choose the type of therapy does not imply the power to dispose of one's own body. The ECHR sentence in the case *Pretty vs. the United Kingdom* (2002) states that "... *Article 2 (right to life, N/A) could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die (whether at the hands of a third person or with the assistance of a public authority, N/A); nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.*"

Consent of the patient (or of his legal proxy) becomes prominent also in the cases of purely experimental procedures pursuant art. 16 and art. 17 of the Convention of Oviedo. According to Padovani (2005, 314-315), a physician performing the duty to provide healthcare is bound to act in accordance to the consent of the subject, with reference to:

- therapeutic treatment, striking a balance between the expected results and the risks incurring within that procedure
- experimental therapeutic treatment, striking a balance between the results expected from already approved therapies and from those yet to be approved
- purely experimental procedures which only limit is not pursue any financial gain from non disposable acts of the human body

- medical procedures of aesthetical nature which again need not to pursue any financial gain from non disposable acts of the human body.

Unlike the first two in the list which are aimed at improving the conditions of the physical health of the patient, purely experimental procedures and aesthetic medical procedures need only for the consent of the patient in way to exclude criminal liability for the physician. On a sidenote, purely experimental procedures do not entail direct diagnostic or therapeutic implications for the subject undergoing them as is the case with experimental therapeutic treatments. In absence of informed consent, the physician can act only when criteria such as presumed consent of the patient, fulfilment of duty and state of necessity all co-exist (Padovani, *ibid*).

Salihu (1995, 198) states that although the difference between criminally relevant experimentation over humans and scientific experimentation is still very debatable, the use of new means or new procedures is allowed only if they are previously tested in lab conditions, within the limits of allowed risk and under the consent of the patient as provided by art. 55 of the CEMD. This cautious approach is embraced also in art. 52 of the CEMD which in §1 states that unless otherwise provided by law or other legal acts, physicians are not allowed to conduct or take part in medical or bio-medical experiments or research projects. The bio-ethic commission approves only once the legal and ethical requirements are met. Eventually, medical protocol regulates when and how to carry on experimental therapeutic, diagnostic or preventive procedures as long as informed, specified, actual and manifested consent to undergo such procedure is obtained from the patient.

4. Fulfilment of Duty

Medicine is considered the art of healing and it represents a public interest by contributing directly to the welfare of the citizens and the community of which they are part of. As provided by art. 2 of the Convention of Oviedo, the physical and mental health of the patient represents an interest of a higher priority when compared to the welfare of the community. The term interest includes a whole range of rights:

right to life, right to freedom, right to receive health care in fulfilment of the principle of self-determination. In the Preamble to the Constitution of the World Health Organization (1948) health “*is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*”. As inalienable the right to freedom is (along with the right to self-determination), limits are set pursuant art. 27/2 (d) of the Albanian Constitution stating that the freedom of the person shall not be limited except “...*when the person is infected with an epidemical disease, mentally incapable and poses threat to society*”. The confinement of a person infected with an epidemical disease in a qualified healthcare institution, serves the purpose of treating the patient and improving his health while protecting the community. Same logic applies to the person who is of unsound mind and represents a threat to the society. Even in presence of a manifested dissent to receive inpatient care prior to or while being interned, the mental incapacity of the person nullifies from the legal point of view any manifestation of will for the time deemed necessary by the qualified physician, later validated by a court order removing the patient’s legal capacity once the state of emergency is overcome. The limits to the right to freedom as part of a therapeutic treatment in compliance with the duty to protect the welfare of the person and simultaneously that of the society to which he poses threat, is comprised within the principle of order of public reason¹⁰.

On this matter the ECHR sentence of *Plesò vs. Hungary* (2012) is insightful¹¹. The ECHR points out that Mr. Plesò did not represent an imminent danger to others or to his own life or

¹⁰ Art. 20 of Law 44/2012 “On mental health” provides that all three criteria must exist simultaneously in way to justify a inpatient treatment against consent: 1. the person suffers from a severe mental illness which limits his abilities to understand and act; 2. without treatment the person poses risk to his own life or that of the other people; 3. all the other options to receive treatment within the community have been exhausted and necessary treatment is given only through admittance to qualified mental healthcare institutions, in compliance to the principles of the less limitative alternative.

¹¹ Mr. Plesò was diagnosed with schizophrenia with grandiose delusions and interned by an order of the district court against his will after one of the doctors had considered his treatment necessary as otherwise Mr. Plesò’s health would have declined and that Mr. Plesò would not have been able to take care of himself and thus represented a significant danger to himself.

any of his limbs. The element evaluated by the Hungarian court was the medically predicted deterioration of Mr. Plesò's health and not its actual state. Striking a balance between the right to self-determination of the person and the duty of the State to provide the best health care possible to its citizens was expected but did not occur according to the ECHR. The Court also underlines that involuntary hospitalisation might be used only as a last resort in absence of a less invasive alternative, and only if it carried true health benefits without imposing a disproportionate burden on the person concerned. Finally according to the ECHR, the Hungarian courts had given no in-depth consideration to the following factors: the reasons Mr. Plesò had to refuse hospitalisation; the actual nature of the envisaged involuntary treatment or the medical benefits which could be achieved through it; or the possibilities of applying a period of observation or requiring him to pursue outpatient care. Also the Hungarian courts had attached no importance to Mr Plesó's non-consent despite the fact that his legal capacity had not been removed.

The medical profession is considered a service of public interest (SGI) for it is aimed to help the citizens receive health care. In some countries, such as Albania the expression "public service" is used instead. The European Commission (2011, p. 4) being aware of the ambiguous use of the term opts for the expression "*service of general interest*" and "*service of general economic interest*" indicating "*a service (is) offered to the general public and/or in the public interest, or (it can be) used for the activity of entities in public ownership*". A service of public interest entails availability to all, regardless of income, in fulfilment of the right of the citizens to receive healthcare and correspondently to the duty of the State to provide it. Even when public services are not directly provided or financed by the State, they are usually subject to regulation which goes beyond that applied to most economic sectors, proving the special interest of the State on protecting the citizens involved. Physicians exercising in public or private health care institutions are bound to act in compliance with the rules set by the Order of Physicians, which is an independent public entity (Sadushi 2007, 184-186) competent to regulating the medical profession. This kind of entity has a dual nature: it is formed as

a result of a collective interest to provide a service and while being legally, politically, financially and administratively autonomous (private dimension, A/N), their activity is legitimated upon recognition from the State which controls and regulates part of their activity (public dimension, A/N) so to ensure the protection of public interest and that of the patient as provided by art. 59 (c) of the Constitution (Sadushi 2007, 186). The practice of physicians, stomatologist, pharmacists and nurses as a regulated profession is subordinated to a State exam and later to continuing medical education (Law 10171/2009).

As continuously stressed by doctrine and studies, the Albanian criminal law does not provide for a clear definition of what constitutes “public service” however jurisprudence turns to doctrine in attempt to find one (GRECO 2009, 14; Çani 2009, 6). According to Elezi (2008, 408-409), the concept of public service applied to criminal law consists in any activity regulated by legal provisions, just like that involving public officials and civil servants but in absence of any power typically held by subjects operating in these areas (legislative, administrative and judiciary power, A/N). He follows by indicating two categories of subjects exercising a public service applicable in criminal law (Elezi 2008, *ibid*):

- those exercising professions under a licence released by the State such as physicians, dentists, pharmacists, or other professions such as lawyer, notary etc including teachers and journalists.
- private subjects operating in a service of public interest or within certain administrative activities not related to the exercise of a public office such as the case of vigilantes.

It appears as if physicians would qualify only as agents of public service although not every activity they lead is aimed at directly providing a public service *strictu sensu*.

In the Italian system there is a detailed categorization of the acts undertaken by the physician, respectively qualifying him (Costanzo 2013, 4-7, 30-33):

- as a state officer producing public documents which form or help forming through their dispositive the will of the State or another public body, at which

they are called upon to exert tasks invested with powers. When exercising in a public healthcare institution or any other administrative entity providing healthcare (prison or military healthcare centre, A/N) the following are to be considered as public acts released by a state officer: medical certificate of cause of death in case this has occurred without the presence of a medical practitioner (i.e. released by the coroner or medical examiner), the medical certification of the physical status of the person applying for either a driving licence or firearm licence, the prescription recommending a diagnostic examination within a State healthcare institution.

- as an agent of public service producing administrative acts while providing a public service within an executive activity of subsidiary nature but in absence of any power. Such is the medical certification of the physical status required by subjects engaged in agonistic sports or prescriptions concerning drugs in accordance with the protocol.
- as an agent of service of public interest producing private documents, providing healthcare in exercise of his functions as a medical professional while representing only the interests of the patient and not those of the public administration. Such is the medical certification of the physical status required by subjects engaged non-agonistically in sports, pronouncement of death when this has occurred in presence of a medical practitioner, certification for interruption of pregnancy upon consent, certificates for private insurance purposes indicating the pathology.

A problematic differentiation could rise with regards to the definition of the same diagnostic and therapeutic activity led by the physician employed in a public institution versus the one employed in a private healthcare centre. To avoid this from occurring, the type of activity the physician is leading can serve the purpose of a functional and objective criteria indicating the

qualification he is acting upon: if it is strictly related to the medical activity (diagnostics and therapy) without crossing into any exercise of function pertaining to the public entity, we would be in front of an agent of service of the public interest; if it is anything involving public certifications pertaining any executive and management activity (for example a work hours declaration) of the public service institution then we are in front of a state officer. In case the physician is exercising in a private institution he then qualifies solely as an agent of service of public interest.

The criminal code makes a distinction between the subject acting in lack of a qualification (i.e. the subject was never granted one by the State) ex art. 246 of the c.c. and the subject operating after the qualification has expired or removed ex art. 249 of the c.c, this later punished less harshly¹². Acquisition of a title (art. 246 of the c.c.) is applicable for example to the case of a dental laboratory technician qualified to create a dental crown but not to implant it to the patient.

The status of the medical professional has a stronger impact on the duty to report a crime in the Italian system. The duty to report a crime of a state officer and a public officer (respectively art. 361 and art. 362 of the Italian c.c.) is set under different conditions compared to the provision of omission to refer a crime by a medical professional ex art. 365¹³. If a psychiatrist learns about his patient having had sexual relationships with a minor of 13 years old while exercising his profession in a private clinic, he cannot breach confidentiality by reporting this crime to the police and cannot be held liable

¹² Art. 246 “Acquisition of a title or office” requires the subject to have acted exercising the functions given by the title or office illegally acquired and it provides also for an aggravated circumstance constituting crime when such activity is carried on for financial gain purposes or has harmed the freedom, dignity or other fundamental rights; art. 249 “Exercising an office after its termination” provides for criminal liability once the subject has acknowledged the existence of the circumstance or decision which terminates the exercise of the office or public service.

¹³ Art. 365 of the Italian c.c. provides that whoever has assisted or operated exercising a medical profession in cases that may be linked to a crime prosecutable *ex officio* and has omitted or delayed to report to the Authority specified in Article 361, it is punished with a fine of up to € 516” and in §2 states that this provision shall not apply when the report would expose the assisted person to criminal prosecution.

for omission to refer a crime pursuant art. 365 §2 of the Italian c.c. If the physician or psychologist comes across such information while exercising his profession in a public healthcare institution, he is obligated to report the crime without the limitation set by §2 of art. 365 of the Italian c.c. and would be held liable as a public officer in case he fails to do so pursuant art. 362 of the Italian c.c.. The Italian c.c. basically restricts the duty of the medical professional to report only when the patient is a passive subject of a crime prosecutable *ex officio*. This exemption is provided so that nobody refrains from seeking healthcare under any circumstance. Besides when concerning crimes prosecutable *ex officio* (such as murder, injury, battery, sexual relationships with minors under the 14 years of age), physicians have the duty to report also over (Di Masi n.a.):

- any accident in which the patient is injured or in guarded prognosis
- any case where the patient is a victim of failure in duty of care

However the physician is not obligated to report cases where the patient is injured as a result of other crimes prosecutable *ex officio* such as an injury suffered from the intervention of an unqualified physician.

The Albanian c.c. does not provide for the duty to report a crime specifically for subjects such as state or public officers or medical professionals. As with the Italian criminal system, the obligation to report refers only to crimes (not criminal contraventions) committed or being committed (excluding therefore any liability for imminent or future crimes) prosecutable *ex officio* pursuant art. 300 of the Albanian c.c.¹⁴ which on § 2 provides that “*the parents, children, brothers, sisters, spouse, adopter and adopted along with the persons who bear the duty to confidentiality because of their office or profession are exempted from the duty to denounce.*” Art. 23 of the CEMD addresses breach of confidentiality when providing that the medical professional can disclose any information is case the nondisclosure could be of harm to the patient or when so it is required by a legal organ. With regards to the duty to

testimony in a criminal procedure, art. 159 of the Code of Criminal Procedure provides that “*Nobody shall be obligated to testify over facts known through the exercise of their profession, except when they are subject to obligation to report to the prosecution organs;...c) physicians, pharmacists, obstetricians, and whoever exercises a medical profession.*”

In conclusion, the duty to report a crime that has occurred or is occurring on part of the physician stands with a lesser limitation compared to the Italian one ex art. 365, in that it is mandatory despite the eventuality of exposing the patient to criminal prosecution.

Conclusions

The medical procedures in which patients undergo can harm, sometimes in a permanent way, their physical integrity, exposing the physician to criminal liability. The goal of this paper is to analyse in a comparative view with the Italian criminal law, the interaction between the different legal justifications which exempt from criminal liability the physician providing healthcare. The medical professional is compared to a fatherly figure whose only prerogative is to improve the health of his patients without distinction based on religious or political views, ethnicity or social status. He is required additional skills of empathy and tact towards the patient who is in a particularly vulnerable moment, both emotionally and physically. The physician does not stand in a position to choose between good versus evil, for his sole purpose is to act in benefit of the patient. However conflict can arise when the physician is called upon choosing between two evils, violating a right in protection of another right belonging to the patient.

Fulfilment of duty on part of the physician, as an agent of public service, is subordinated to informed consent granted by the patient. The last is the true beholder of the right to life, in realization of the principle of self-determination. When it is impossible to collect consent from the patient or his legal proxy, the physician can intervene only under the conditions of a defence of necessity, thus referring yet to another legal justification, which clearly shows how a legal justification can

preponderate over the other ensuring exemption from liability depending on the circumstances they are applied to.

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