Anna Marcinkowska

"CRIMINAL LIABILITY OF PHYSICIANS AS PERSONS SERVING IN PUBLIC OFFICE"

INTRODUCTION

The aim of the paper is to analyze the legal regulations that apply to physicians, with particular emphasis on their criminal responsibility for the offense of passive bribery. This subject is so important that we observe a growing role of the criminal law in the medical law, the field where accumulation of many types of responsibility occurs. In the medical law, as in every area of law, important components of the culture related to its so significant aspects such as civilization, life and its protection, death, and other aspects characteristic for features of the statutory law culture can be seen. Also, this area of law is open to globalization, expressed on the basis of the legal cultures convergence concept manifested by international legislation.

This field enters the area concerning the mutual relations between law and medicine. It is a dynamic phenomenon and mainly related to the development of medicine. A substantial technological progress occurs in this discipline which in turn affects the physician-patient relationships. The problems existing in the area, where the contact between law and medicine is difficult, because the law is a system of general norms, abstract and explicit directives of conduct, and medicine is an empirical science, including knowledge of health and human diseases, about

how to prevent them and their treatment. In the criminal law theory the issue of criminal responsibility of persons who deal with the treatment process went through many publications, especially in terms of responsibility for the improper treatment. The issues related to the "medical malpractice" have been exhaustively discussed, and the problems themselves related to improper treatment where the subject of detailed studies, which were reflected in many publications.

Therefore, the subject of my interest primarily became locating the medical profession in the legal system and systematizing concepts that are related to an executive action of an offense of a physician responsible as a public official and a person serving in public office.

Such an approach of the discussed issue is primarily due to the fact that public health is perceived by the public as the most corrupt sector. This was confirmed by a series of studies conducted by various institutions, starting from Stefan Batory Foundation, Helsinki Foundation for Human Rights, through the Ministry of Health, and ending up with the European Commission and its report of 3 February 2014 and the Social Diagnosis 2015 of November 2015.

As it is known, the role of the criminal law is based primarily on the enforcement using criminal penalties, the observance of other norms regarding almost all areas of social life. Therefore, the subject of this paper is closely associated with protective, warranty and preventive function of the criminal law.

In previous publications dealing with this topic the emphasis was placed on the role of criminal law, which was to regulate the social relations. This resulted in supplementing civilistic and administrative methods with criminal method.

The problem of criminal responsibility of a physician as a person serving in public office can also be applied to the whole sphere, which is defined as public law, or also to other branches of law, including in particular the constitutional, administrative and financial laws.

The health care is a sector of the economy especially "highlighted" as the most susceptible to corruption mechanism. Distribution of large funds from the state budget raises all sorts of temptations for their misappropriation. It results especially from the interpenetration of public and private sectors. A physician is the beneficiary of such a system, both because of his/her profession and the opportunity to conduct a business activity with the use of public funds. Therefore, my intention is to determine the basis of his/her responsibility, and also to indicate the boundaries between what is reprehensible and what is permissible in the medical services sector. Corruption in the health sector has by far the greater social impact than in other sectors, which is

associated with its particular ethical reprehensibility because here the price is life and human health. It takes a variety of forms, examples of which include both bribes associated with the treatment process and the drugs prescribing in exchange for all sorts of perks for the doctor from their manufacturer. The literature emphasizes that the situation conducive to corruption is the lack of clear boundaries, both legally and culturally, as to what is actually only a proof of gratitude, and what is an ethically reprehensible event of corruption, which is subject to the sanctions provided for in the Penal Code. The problem of bribery is associated with indication of the legal interests violated by the given behavior. In the case of traditional crime, you can clearly identify the victim. Also, the object of protection in the case of other crimes seems to be more specific, as the disinterestedness of persons who are public officials and persons serving in public office, may at first glance seem an abstract category for an average citizen. This applies particularly to those situations where accepting a financial benefit may occur for a decision contrary to the applicable provision, even if that provision is widely regarded as meaningless or fanciful.

In case of the crime of bribery, out of all the functions of the criminal law the first place is taken by its motivational function, which consists in affirming people's correct attitudes. In this function, we can detect both affirming and braking factors. The first one will be associated with obtaining knowledge of the existence of the ban or rendering someone criminally responsible and such the knowledge affect the man usually in the sense of affirmation of his/her correct attitude (motivational affirming factor). Having such knowledge may also in some cases discourage from committing a crime. Then the function of criminal law should be interpreted widely - as fear of punishment, but also perspective of the entire criminal proceedings and the reaction of the environment, and then bearing any other consequences influences the motivation of conduct, which is reflected in the braking function of the law. In practice, those two factors appear in the slogan "I neither give nor take". Functions of the criminal law, including the protection and guarantee functions, are of particular importance in the crimes of corruption, because it is difficult to point out the definition of corruption which would cover all of those phenomena. Of course, such a definition should include active and passive bribery and venality, but the doctrine argued that the corruption can be even tax reliefs, subsidies or protective tariffs, and even offsets.

The first chapter presents the development of the responsibility of a physician as an official. For this purpose, I outline the historical background related to the unification of the legal system

in the pre-war period, including the evolution of the criminal liability of officials against individual codifications, both before the war and after the war. I deal with definition of such the responsibility included in the so-called small penal code and analyze the solutions adopted in determining the subject of the crime of bribery in the penal code of 1969, while taking account of the polemical standpoints of the main representatives of the doctrine and literature. It finally deal with the meaning of the Supreme Court and the Supreme Court ruling KZP 5/01 of 20 June 2001, regarding the responsibility for passive bribery of the Head of the Department in the public hospital.

The second chapter is dedicated to the criminal liability of a doctor as a person serving in public office. It describes a definition of a person serving in public office, legal definitions of the Criminal Code, and also draws attention to the causes underlying the taking of works on the adaptation of the Polish legal system in connection with the accession to the European Union. I present the evolution of this responsibility in the jurisprudence of the Supreme Court and deal with the issue as to when the doctor is responsible as a public official and when a person serving in public office, and linking those issues with the entity of passive bribery and evolution of this responsibility. Statutory designations relating to the serving in public office due to the rights and obligations of public activity and membership in the local government body, against the background of broader legislation were analyzed here. Later I outline the issue of links of the subject of passive bribery by establishing the relations between the crime and public office. chapter I include the physician responsibility for the passive bribery criminal offense by identifying subject and object of the crime offense under Article 228 of the penal code. In the next part I define the subject matter of protection, criteria specifying the causative action, qualified types and present arguments related to views on the convention as circumstances exempting the illegality. It deals with Article 228 of the penal code in conjunction with other provisions, criteria for the entities and criminal sanction. At this point I deal with the problem of use of public funds as a condition for criminal liability of a physician and their use by medical services contracting. I discuss regulations related to the financing of health care, with particular emphasis on the public finance sector, its role and both redistributive and allocative functions. I pay attention to the constitutional regulations on the receiving and the method o spending money for public purposes, with regard to health. I describe the solutions adopted by the legislature in

the field of criminalization provided for in other laws as part of the widely understood medical law, with particular emphasis on the criterion of acting "for financial gain".

The third chapter describes the position of the medical profession in the legal system, as the profession of public trust. First of all, I describe the role and importance of the profession in the context of Articles 17 and 68 of the Polish Constitution, and present the key statutory regulations related to the topic of my paper and the evolution of the physician-patient relationships, and the development of medical law. I analyze the differences between the paternalistic and partner relationships models. Then I briefly present the reorganization of the health service after 1989, in the context of the new location of the medical profession in the legal system on the example of statutory solutions. I discuss the circumstances that proof the uniqueness of the medical profession, including the conditions for its implementation. I deal with definitions of medical actions and therapeutic actions for determining executive actions of a crime.

In the fourth chapter, I draw attention to the definition of a public official in the international sources of law relating to corruption and its relation to the doctor's responsibility and application of penalties in the form of a ban on holding a particular position and occupation and confiscation of material benefit. I analyze the sources of corruption mechanisms in the physician-patient relationships and institutions and I discuss the reports on the corruption in medical services prepared by international and national organizations, and deal with proposals in the field of legislation. I also present proposals for legislative solutions. I also discussed the standards of international law which affected the legislative solutions adopted in the Republic of Poland in the fight against corruption.

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