THE CONFIDENTIALITY OF THE MEDICAL ACT IN THE DEPRIVATION OF LIBERTY ENVIRONMENT

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Abstract

Respecting the medical secrecy is one of the essential conditions underlying the protection of private life. Medical information obtained from patients in the context of a physician - patient relationship should be protected by confidentiality. Disclosure of personal health care data without the agreement of the person is a touch brought to private life. One particular feature of the health care system is the healthcare provided to patients in detention. Even though the doctor-patient relationship in the penitentiary environment has a number of peculiarities, it is coordinated according to the same ethical principles as in the public one. The penitentiary physician's duty is not limited to consultation and treatment, he often becomes the prisoner's personal physician, and the means of relationship must respect the fundamental rights of the patient, regardless of his or her status.

In the penitentiary system, there are also many dilemmas arising from the duties of the medical staff, the first of the detainee's personal physician and the second of the penitentiary administration's counselor.

The medical specialist in a penitentiary must take into account that communicating with the patient is essential in the doctor-patient relationship and she must be sincere. In determining the attitude of the patient towards the doctor and the medical act, the context of the first contact with the doctor, the way in which the first medical consultation takes place, is of great importance. Trust is gradually gaining, and medical staff must strive to demonstrate that they can ensure the protection of prisoners' medical records.

Keywords*: medical secret, penitentiary, health condition, detainee, secret.*

1. Introduction

Exercising certain professions involves, in many cases, getting the relevant professional from another person to have information about it and which, if disclosed to someone else, could cause injury. All this information obtained by a person in the exercise of his profession or practicing his profession falls within the broader concept of professional secrecy. Professional secrecy, though it seems a simple notion, involves many nuances, involves many facets, determined not only by the multitude of professions / professions in which the obligation of professional secrecy is imposed. But the issue of determining the extent of the obligation of professional secrecy is as old as the secret itself. It was born in the context in which it was obvious that the strict application of the principle of professional secrecy can have disastrous consequences[1].

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[1] Ilie Dumitru, *Legal considerations on medical professional confidentiality, between the obligation to preserve and the obligation to disclose it*, Universul Juridic Magazine, no. 9, 2016, pp. 85-99.

Human health is the ultimate goal of the medical act. The duty of the physician is to protect the physical and mental health of the human being, to alleviate suffering, and to ensure the respect for the life and dignity of the human person, without any discrimination[2].

In order to establish the attitude towards the patient and the medical act, the physician, in the exercise of his profession, prioritizes the patient's interests, whatever the status of the patient. Confidentiality is one of the most important values of the medical act that underlie the doctor-patient relationship, representing, and an obligation, stipulated in olden times, the Hippocratic oath being the basic principle[3]. Hippocrates, the father of medicine, wanted to bring attention to the importance of medical consultation and the status of doctor-patient relationship. This oath that all graduates of a faculty of medicine complete when completing their studies and receiving the right of medical practice and who has become a moral code of any practitioner in the exercise of his / her lifetime profession, gives the moral and ethical view of a physician: Whatever I see and hear while doing my job, or even beyond it, I will not talk about what is no need to be revealed, considering that under such circumstances keeping the mystery is a duty[4]. "

The protection of personal data is a fundamental right enshrined in the Charter of Fundamental Rights of the European Union, in art. 8. These data may be used only for specified purposes and on the basis of the consent of the person concerned or another legitimate reason provided by law.

2. Paper content

In Romania, according to the provisions of art. 21 of Law no. 46/2003 on patient's rights, all information about the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, are confidential even after his death. The exceptions to the confidentiality principle set out in the legislation are: situations where the law expressly requires it, if the information is needed by other healthcare providers involved in the patient's care, if the patient is a danger to himself or if the patient is a danger for public health[5].

Any breach of confidentiality (except as permitted by national or international law) is considered to be a violation of professional secrecy, with legal and criminal legal consequences for the physician[6]. Thus, according to Romanian criminal law "the disclosure, without right, of data or information concerning the private life of a person, capable of causing injury to a person, by the one who has become aware of them by virtue of his profession or function and who has the obligation of confidentiality with respect to these data shall be punished by imprisonment from 3 months to 3 years or by fine[7]."

[2] Extract from the Medical Deontology Code, adopted by the Romanian College of Physicians, published in the Official Journal no. 418 of 18 May 2005.

[3] Mihaela-Catalina Vicol, *The limits of medical secrecy*, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 29.02.2018.

[4] Ilie Dumitru, *Legal considerations on medical professional confidentiality, between the obligation to preserve and the obligation to disclose it*, published in the Universul Juridic Magazine, no. 9, 2016, pp. 85-99.

[5] Art. 22, Art. 23 and Art. 25 paragraph (2) of the Law no. 46/2003 on patient's rights, published in the Official Journal no. 51 of 29 January 2003.

[6] Sorin Hostiuc, Cristian George Curca, Dan Dermengiu, *Consensus and confidentiality in the medical assistance of women victims of domestic violence*, published in the Romanian Journal of Bioethics, vol. 9, no. 1, 2011, p. 41.

[7] Available at https://legeaz.net/noul-cod-penal/art-227, last access on 29.02.2018.

The legal norms speak with the ethical principles of patient rights before talking about the citizen's right to information, which in any civilized society does not rely on the right to self-determination, privacy and medical secrecy (except where the same rights of other individuals are in danger). Deontological and Legal There is no transparency in medical confidentiality (unless expressly required by the law). The medical domain of information covered by the professional secrecy is not a public domain, the data being accumulated being classified[8].

A special approach to the protection of personal data is highlighted in the deprivation of liberty when there may be suspicion of the application of insufficient measures to respect the individual interests of the persons detained.

For any human being, deprivation of liberty is a special situation with a broad resonance in the living environment, both during and after detention, in freedom[9]. The communication "works" differently in the reference public space compared to the penitentiary. Behind the pillars, the written regulation - as opposed to the initial verbal connotation and subsequently codified social relations - regulates the relations between the surveillance staff, the administration and the detainees, as well as the relationships between the "reeducations[10]".

Penitentiary, in the first phase, requires adaptation and integration to a particular pattern of life, driven by entirely different laws. The establishment of inter-human relations is made after other considerations and under other conditions, the value hierarchy acquires another face, passing through successive deformations to the normal social model, unanimously accepted. Inherent adaptive tensions are accumulated, and often the condemned person will not be aware of the culpability of the act done in the existential sense. The notion of freedom is emptied of content, completely disappearing the feeling of belonging to the social, the desire for active integration. The society that blames is also blamed for denial[11]. The peculiarities of the penitentiary environment and the psychology of the custodial persons impose that in the beginning any contact between the personnel and the detainees should have a specific connotation, the mutual mistrust and only after long periods of probation a complete communication can be established.

Once in prison, detainees have to assign specific identities, from their excluded position they have moral values that are apparently opposed to those of ordinary citizens, which would allow them to regain an honorable identity - "we are simply different from you "- they say[12].

The shock of entering the penitentiary is directly proportional to the pre-existing

[8] George Curcă, *Bioethics legal responsibility in the medical act. Bioethics as medical science. Confidentiality and consensus in medical practice. Aspects of legislation*, available at http://medic-legist.eu/confidentialitate.pdf/, last access on 29.02.2018.

[9] Gabriela-Ioana Gavriluţ, *Sociopsiological explanatory and predictive factors of juvenile delinquency and social reintegration*, unpublished doctoral thesis, University of Cluj-Napoca, Faculty of Sociology and Social Assistance, Cluj-Napoca, 2013, available at http: // www.scritube.com./sociology / environment-penitentiary, last access on 29.02.2018.

[10] Dragoş Cârciga, *Communication in the Romanian concentration area*, published in the ROST Magazine, Christian Culture and Politics Journal, no. 79, 2009.

[11] Ana-Maria Barbu, *Influence of the penitentiary environment on criminal criminology*, p. 3, available at http://drept.unibuc.ro/dyn_doc/publicatii/revista-stiintifica/Influenta-mediului-penitenciar-asupra-criminalitatii-2011.pdf, last access on 29.02.2018.

[12] Léonorore le Caisne, *Prison. Une ethnologue en centrale*, Odile Jacob Publishing House, Paris, 2000, pp. 78-79.

emotional disorder: the more sensitive, the weak, the affective and the socially immature, the sick, in general, suffer the most. Sometime later - a month or two - the victim becomes victimized when the prisoner realizes the magnitude of touch - loss from conviction and begins to imagine the handicap of the legal situation, the failure to satisfy the need for moral, emotional helplessness and dispossession accentuated by the presence the other detainees with whom they can't find affinities at first[13].

During custody, detainees must have access to a doctor at any time, regardless of the detention regime they are subject to. This is especially important when the person has been placed in a solitary confinement regime. The medical service must ensure that the doctor's consultation is promptly performed without justification[14].

Except for emergencies, every medical examination / consultation is done in a medical consulting room to create privacy, privacy and dignity. Medical confidentiality must be guaranteed and respected with the same rigor as the general population. Detainees should be examined individually, not in groups. No third person without medical specialization (other inmates or non-medical staff) should not be present in the examination room[15]. If medical staff who come in contact with prison-guards communicate openly, with a sincere mood to listen to the needs of detainees before asking them, then they will get a positive feed-back, even if not always from the first consultation.

Communicating with the patient is essential in the doctor-patient relationship and she has to be honest. Often, a "good" doctor is considered to be the one who "speaks", "listens" and "counsels", aspects that become visible in front of numerous titles or diplomas of excellence.[16] In the case of a recalcitrant prisoner, the primary objective is that health professionals involved in direct activities with detainees communicate more with those who have problems because it stimulates their confidence, and the prison doctor tries to restore the patient's calm by approaching the patient's demands, juggling with administrative solutions to pacify the patient. Most of the time, it is NOT necessary or appropriate to ask the inmate who is at risk, about his intentions of self-harm, in conversations that medical staff has with him.[17] The consulting cabinet is the place where the patient expands his or her suffering, and this applies to detainees, and for the physician, this is the most important opportunity to establish the diagnosis and treatment, as well as the physician-patient confidentiality relationship.

In the penitentiary, as in another small community, the doctor occupies a special position, recognized both by the status imposed by his profession and by his personality, through which he gains his social prestige.

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[13] Sociology Course *Specialized penitentiary intervention*, p. 6, available at https://biblioteca.regielive.ro/cursuri/sociologie/interventie-specializata-in-penitenciar-222795.html, last access on 29.02.2018.

[14] Andres Lehtmets, Jörg Pont, *Prison health care and medical ethics – A manual for health-care workers and other prison staff with responsibility for prisoners' well being*, 2014, Strasbourg, p. 12, available at https://rm.coe.int/publications-healthcare-manual-web-a5-e/16806ab9b5.

[15] *Ibidem.*

[16] Mihaela-Catalina Vicol, *The limits of medical secrecy*, 13.03.2008, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 18.01.2018

[17] Dana Făget, Cristina Pripp, Udrea Carmen – Elena *Clinical Manual of Violence Risk*, National Administration of Penitentiaries in Romania, ALFA Publishing House, Iasi, 2015, pp. 78-79.

The physician's activity is, in this environment, governed by the deontology of his profession, embodied in the set of the behavioral norms of reference.[18] The International Code of Medical Ethics states that "a doctor will keep absolute secrecy about everything he knows about the patient, regardless of his or her status, because of the patient's trust[19]."

The detainee seeks medical assistance by virtue of an acquired social role, such as sick, a role that may be temporary or permanent.

There are four features of the patient in the detention environment:

- Disease can offer the patient the possibility of diminishing tasks and responsibilities; he may gain certain rights, the healing occurring in such cases at the end of the detention;
- the patient does not want healing, he / she asks to confirm the affection he suffers, there is a tendency to exaggerate or to refuse the relationship with the physician who denies the alleged affection;
- Not all patients want to heal because the role of the patient and, implicitly, the rights they gain benefit from them[20];

In the detention environment, the situation where the patient asks the doctor to confirm a certain diagnosis, as well as the prescription of a certain treatment. In this way, the character of the disease is deviant, the disease state of the patient is illegitimate, and the doctor-patient relationship can become conflictual.

In such situations, the physician must maintain a balance between helping and refusing, advising the authorities or continuing the confidential relationship. However, and in this context, the patient must be protected and his / her personal information passed to the physician must remain confidential in accordance with the legal provisions. In this regard, the physician helps the patient for his pathological condition, refusing him for the side that gives him rewards resulting from the disease state, proving to him that the disease state can't be exploited. Thus, the legislator wanted these issues to be foreseen in the executive - criminal law. By art. 72 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial, it is stipulated that "the medical examination is carried out in confidentiality conditions, with the provision of safety measures, respectively, the presence of the surveillance staff is performed only at the request of the medical personnel (in the case of dangerous detainees, violent, with a history of attack on personnel). But also in this context, detainees should not be handcuffed during the consultation, and surveillance staff should be outside the field of vision and sound when conducting medical examination.

In order to ensure confidentiality, in these cases medical shields are used in front of the consultation bed for the protected medical examination. However, the Council of Europe's Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT), in its visits to Romania, has brought to light cases of privacy violations due to the presence of surveillance staff in the consulting cabinet. Another

[18] Constantin Ouatu, Beatrice Ioan, Diana Bulgaru Iliescu, *Doctor-patient relationship in the detention environment*, available at http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/344, last access on 29.02.2018.

[19] Mihaela-Catalina Vicol, *The limits of medical secrecy*, 13.03.2008, available at https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2, last access on 18.01.2018.

[20] Constantin Ouatu, Beatrice Ioan, Diana Bulgaru Iliescu, *Doctor-patient relationship in the detention environment*, available at http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/344, last access on 29.02.2018.

aspect of privacy is the protection of medical records.

According to the provisions of art. 60 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial "the personal data of convicted persons are confidential, according to the law"[21] even the lawyer or relatives can obtain, data or photocopies related to the medical history, only with the written consent of the convicted person[22]. Thus, medical staff in penitentiaries has all the necessary measures for all medical records to be kept in places that ensure confidentiality, and when presenting to medical investigations outside the penitentiary system or when transfers between prison units are made, the medical file is presented confidentially, in a sealed envelope.

However, in the penitentiary system, there are many dilemmas arising from the duties of the medical staff, the prisoner's personal physician and, respectively, the penitentiary administration's counselor. For example, the request from the penitentiary management to provide surveillance staff, knowledge of inmates diagnosed with HIV / AIDS may be a conflict with the interest of the patient who has the status of detained. In this case, the doctor is faced with a dilemma if he can consider the detainee in his / her book as HIV / AIDS as a danger to public health, given the aggressiveness of such detainees through acts of violence against the staff , blood splashes, bites, etc.), or need to protect the patient by refusing to supply a diagnosis.

We mention that, in the Romanian legislation through the provisions of Law no. 584/2002 on measures to prevent the spread of AIDS in Romania and to protect persons infected with HIV or AIDS patients, stipulates in Article 8 the obligation of confidentiality of data for these patients:

"Keeping the confidentiality of data on HIV-infected or AIDS-sick people is mandatory for: health care staff; employers of these people; civil servants who have access to these data.

Also, in connection with the transfer of detainees with infectious-contagious diseases through the means of transport of the penitentiary system, there were invoked situations of affecting the safety of the transfer missions on the grounds of contagious diseases.

We reiterate that the Patient Rights Act no. 46/2003 (Articles 21 and 22) and the Order of the Minister of Health no. 1410/2016 on the approval of the Rules for the application of the Patient's Rights Law no. 46/2003 (Article 11 (2) and Annex 5 to the Rules) clearly state that medical data may only be communicated with the consent of the patient and only to persons expressly designated by him (to this end, it is not permitted to disclose the diagnosis on documents to which several non-specifically identified people have access). The fact that most infectious-contagious diseases have a high stigmatization and discrimination potential once again supports the need to respect medical confidentiality in the penitentiary environment.

In this condition, even in art. 166 par. (1) GD no. 157/2016 for the approval of the Regulation on the application of Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings regarding the "Confidentiality of the data regarding the state of health of detainees" stipulates:

[21] Art. 60 para. (8) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

[22] Art. 60 para. (5) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

"Except the cases expressly provided for by law, health information may be provided to other persons only if the detainees or their legal representatives give their consent free, informed, in writing and in advance." In order to effectively protect the health of staff and prisoners and respect for the confidentiality of medical data, diagnostic codes were used for a short period of time, according to the International Classification of Diseases, WHO revision 10, but from practice that the use of disease codes is by no means a way of secrecy but, on the contrary, coding is done in order to find a faster (and, implicitly, more superficial) diagnosis of a patient.

Early knowledge of a prisoner's infectious status is not a means of protecting the health of the staff, as there are no legal provisions whereby operational incidents are managed differently from infected individuals to healthy ones and the separation criteria can not be decided by the members of the escort, who do not have medical training (even if they know the real diagnosis) [23].

Thus, this configuration was rethought and regulated in the Romanian penitentiary system, by cataloging the detainees as "medical-surgical vulnerable cases", so that the surveillance staff must ensure protection measures in all cases of contact directly with any detainee.

Another issue underlying the confidentiality of professional secrecy is found in the obligation of medical staff to advertise when prison services are abusive, immoral or inmates are subjected to ill-treatment, which poses a potential danger to their lives and health[24].

In such cases, even if the detainee refuses to recognize the abuse for fear of possible repercussions, the medical staff has an ethical obligation to take prompt action, since failure to take an immediate position makes it more difficult to object at a later stage[25]. International codes and ethical principles require reporting of torture or ill-treatment information to responsible bodies[26]. In the Romanian penitentiary system, this aspect is a legal requirement, so if he / she finds evidence of violence or the convicted person is accused of violence, the doctor conducting the medical examination has the obligation to record in the medical record the findings and the declarations of the convict in connection with or any other aggression, and to immediately notify the public prosecutor[27].

Another view on the confidentiality of medical data is that of disclosure after the patient's death. This approach is different in the Romanian penitentiary system compared to the national system. If in the matter of the death of a person at large, the national legislation states that "all information on the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, the personal data are confidential even after his death[28], the implementing law - 52 par. (3) of the Law no. 254/2013 on the execution of sentences and detention measures ordered by the

[23] Internal Note Dr. Laurenţia Ştefan (Director of the Medical Directorate - National Administration of Penitentiaries and Dr. Cosmin Decun - Head Physician Timişoara Penitentiary) at the Department of Prison Safety and Penitentiary Regime - National Administration of Penitentiaries no. 51084 / 11.09.2017 regarding the deficiencies found in deployments transfer of detainees published.

[24] *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (also known as "*The Istanbul Protocol*"), adopted by the United Nations, 2004, p. 23, pts. 72-72, available at http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf, last access on 29.02.2018.

[25] *Idem.*

[26] *Idem.*

[27] Art. 72 para. (3) of the Law no. 254/2013 on the execution of sentences and detention measures ordered by judicial bodies during criminal proceedings, published in the Official Journal no. 514 of 14 August 2013.

[28] Article 21 of Law no. 46/2003 on patient rights published in the Official Journal no. 51 of 29 January 2003.

judicial bodies during the criminal proceedings that "the spouse or a relative up to the fourth degree or any other person designated by them has access to the individual file, the medical certificate of death and any other act related to the death of the convicted person and can obtain, upon request, photocopies thereof, on request.

In this case, the principle of knowing the truth about the right to health is a matter of professional secrecy. The primary task of a prison doctor and other healthcare workers to ensure the health and welfare of detainees must be highlighted.

3. Conclusion

The physician-patient relationship materializes, in most cases, through a special relationship, a certain type of affective relationship.

One of the most important issues in the doctor-patient relationship - especially at the beginning but not only - is communication, which is influenced by many factors. One of the special circumstances that influence this relationship is the situation of the patient whose status is offender who executes his custodial sentence. The penitentiary environment is a special environment with specific requirements, and communication in this environment is essential.

In the patient-patient relationship, the personality of the patient is very important, but equally important is the personality and attitude of the doctor towards the patient, by the way of being the doctor, the patient being converted into believing in the value scale of the first and adopt them.

The meeting between the doctor and the patient is a meeting between two different personalities who are in different positions and who take place in different stages, which is why - during the course of the relationship - the tendency must be balancing by adapting the ideas, expectations, parties to those of the other party in order to gain confidence and then medical confession. The doctor-patient relationship detained leaves free personal trends, unconscious feelings, beliefs and prejudices. The patient must be given protection and models to develop his / her potentials so that he / she can cope with changes in his / her existence. It is important that he does not consider himself an object, as there is a risk when he enters the penitentiary system. Respect for confidentiality is essential in order to provide the atmosphere of trust that is required for the doctor-patient relationship; it is the duty of the physician to ensure such a relationship and to decide on how to observe confidentiality rules in a particular case. A doctor in the penitentiary performs his duties as a personal physician of a patient. Health professionals need to look for solutions that promote justice without violating the person's right to privacy[29].

[29] Andres Lehtmets, Jörg Pont, *Prison health care and medical ethics – A manual for health-care workers and other prison staff with responsibility for prisoners' well being*, p. 12, available at https://rm.coe.int/publications-healthcare-manual-web-a5-e/16806ab9b5, last access on 29.02.2018. The Romanian version is published with the financial support of the Council of Europe Project "Supporting the Criminal Justice Reform of the Council of Europe Project", "Supporting the Reform of Criminal Justice in the Republic of Moldova", financed by the Government of Denmark, p. 12.

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