

CRIMES AGAINST PUBLIC HEALTH IN CROATIA AND BOSNIA AND HERZEGOVINA

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SUMMARY

The criminal protection of human health, public health is based on the punishment procedures doctor, pharmacist, ordinary citizen, manufacturers and merchants. It is justified to single out these crimes in a special group of criminal offenses within the particular part, which is particularly true for those offenses where the focus is not on false threats to the health of a particular individual, but when it may lead to more people lose their lives or get to poor health of more people. This paper will point out the fundamental characteristics of these criminal offenses, their justification to identify a separate chapter in the criminal law, the importance of respect ethical standards in scientific activity, the criminal liability of doctors as fundamental carriers of health activities with regard to the offenses for which the perpetrators appear primary doctor.

Key words: *criminal offenses against public health - criminal liability of doctors – malpractice – transplant - quackery*

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Introduction

In the hierarchy of generally accepted values of life and body health are guaranteed on the first place. A man goods are in front of the protection of the state. Therefore, law and medicine are facing harder common goal. Similarly medicine that protects human health, and medical law regulates and protects human rights in relation to health, recognizing it as a particularly important segment of human rights protection at all. *Ignorantia iuris nocet* is one of the fundamental principles of law. Ignorance of the law harms all people, especially applies to those who perform health activities since the occasion of her performing almost always a matter of life and death. No one can make excuses for ignorance in connection with certain applicable regulations. Knowledge of the law is absolutely necessary for lawyers, and the other rule is that knowledge of the law makes the difference between successful and unsuccessful man in occupation which performs and raises the level of professionalism. We live in a knowledge society. Raising the level of personal professionalism is something we have to work every day. The legislator mandatory prescribe the training of health workers in the Art. 5 of the Law on Health Care: "The Republic of Croatia their rights, obligations, tasks and objectives in the field of health care is achieved by:" ... *provides facilities for training of health personnel*. "The necessity of familiarity with the legal norms concerning all aspects of the relationship health worker - patient, comes to the expression and talk about it the last two decades. The consequence of the rapid development of medicine and the biomedical sciences is rapid growth of the number of laws and other regulations and legal science in general. In order to

regulate complex issues through legal norms legal science is facing challenges that are created daily as a result of performing medical activities. The essence of this paper is to point on the underlying determinants of offenses against public health, the importance of training health workers on actions that lead to their criminal responsibility, with the aim of general prevention the same, and crimes where the perpetrators appear as doctors considering their role in the performance health activity.

The basic characteristics of crimes against public health

The crimes that touched on human health are usually covered to criminal offenses against life and body, when it's about health harm of a specific individual, or offenses against the public safety and property, when it comes to acts general dangerous character, such as, the spread of infectious diseases. Although, because of the type of protected object (physical integrity) these crimes can be considered covered by the criminal offenses against life and body, one must still emphasize their uniqueness and difference resulting from the specific character of the perpetrators of crimes against public health (Babic & Roksandic 2006). While crimes against life and body, in principle, can not commit any person, individual criminal acts from the group of criminal offenses against human health can be committed only by the perpetrator with special characteristics (eg, doctor or other health worker), and it is about special crimes, *delicta propria*. In addition, with these crimes we protect human rights in the field of health especially "primarily patients' rights" (Turkovic 2007).

Despite being in a particular part of the system rarely is a special chapter with crimes against public health, we can conclude that it is justified to single out them in a specific group of offenses. In doing so, the legislator has to take the fact that the performance of health services is very responsible, but also a risky business, and the fact that health workers carry out their activity that have to be performed with a very high degree of caution and responsibility, resulting in the most need to be aware of high risk which can occur when providing health care. Crimes against public health attack the human health as a public good, public health, the health of the nation (Bacic & Pavlovic 2001).

According to their structure, these acts are divided into generally dangerous offenses and endangering the health of a particular individual. Generally, dangerous acts are those whose action is such that it may lead to endangering the health of a large number of usually closer to unspecified people, for example, causing an epidemic of a dangerous contagious disease, the production of harmful drugs and foods, the risk of toxins that are widely used and so on. An individual, who is professionally engaged in the public, health services needs to get in touch with many people, and his unprofessional actions affects the individual as a member of the community: although it affects the individual, such a lack of professionalism and has a generally dangerous character in the sense that it can be repeated to other people, and this acts in its own way give meaning generally dangerous. We all remember of his number poisoning people (in Spain) with harmful oil, or human drama caused by harmful drugs. These are the reasons that it is precisely in this sense, the protection of human health an important social issue and one of the important tasks of the modern state.

Perpetrators of crimes against public health

Considering the role of doctors in the protection of human life and health in the first place the responsibility for conscientious, timely, professional and human treatment is right on them. Doctors are obliged to conscientious manner to provide health care, regardless of age, gender, race, ethnicity, religious or political belief and social status, while respecting human rights and dignity of every person, and taking into account the rules and deontological guidelines (Solbakk 1998). The principles of performing medical activities legislator prescribed in Article 2 of the Law on Medical Practice of the Republic of Croatia (and in Article 7 of the Law on Medical Practice Federation of Bosnia and Herzegovina), and in addition to the above principles, the doctor is also forbidden any activity that is incompatible with the reputation, dignity and independence of the medical profession. The importance of ethical components of medical activity legislator pointed out several times repeating the obligation to respect the provisions of the Code of medical ethics

and deontology containing ethical guidelines in carrying out medical activities, but also incriminating violation of the Code as a disciplinary violation for which it may pronouncement disciplinary measures and punishment.

In addition to doctors, all other health care providers must meet appropriate professional and legal criteria that are prescribed and mandatory for all those who are, as professional interest, engaged in the provision of health services. The fact that health workers professionally engaged in the provision of health care as a public activity puts them in a position of increased responsibility. Specifically, the special criminal offenses against public health, health worker will not be prosecuted only because he caused a certain threat to the health of individuals, but also because it could indirectly hurt the overall health security, which constitutes one of the fundamental factors of social justification health activities. Even more the Croatian Constitution stipulates that everyone shall, within their powers and activities, to pay special attention to the protection of human health, nature and the environment. Therefore, if health law is defined as a set of legal rules governing the enforcement and the provision of adequate health care through professional performance of health services by authorized healthcare professionals, we need to predict which are the most serious violations that merit criminal reaction. Most crimes against human health are the blanket nature which means that the Criminal Code in their description does not specify the content of criminal conduct but merely states that this behavior consists in the violation of some regulations that govern individual health area (eg. "... That doing their activities do not apply measures for the protection of patients in accordance with the medical profession...").

The responsibility of health care providers for crimes against public health in the Republic of Croatia are regulated primarily by the Criminal Code, a separate chapter (Chapter XIX, offenses against public health), and in Bosnia and Herzegovina, Federation of Bosnia and Herzegovina Criminal Code (Title XXI, crimes against health people). From certain crimes we notice that the addressees of the same are medical doctor, dentist medicine, pharmacist, veterinarian and other health professionals.

Separation of offenses against public health in a separate chapter of the Criminal Code is fully justified due to the fact that health and the right to health is the highest good, which is protected as a number of international and European conventions and Croatian Constitution, or the entity Federation Constitution. The Council of Europe, primarily through the (European) Convention for the Protection of Human Rights and Fundamental Freedoms has important implications for the regulation of health care provision in Europe, and in particular the situation of the patient as well as users of health services in the health system. Also, the European Court of Human Rights (hereinafter: ECHR) issued a

number of judgments in the area belonging to the health care law, the right to reproduction (See Lamackova 2008), abortion (See decision of the European Court of Human Rights, *Tysiac v. Poland*, no. 5410/03), protection of data confidentiality and access to medical records (See decision of the European Court of Human Rights *K.H. and Others v. Slovakia*, European Court of Human Rights, (Application no. 32881/04), admission to a psychiatric institution (See judgment *Rakevich in Russia* (Application No. 58973/00), insane patients and the right to self-determination (See judgment of the European Court of Human Rights *Glass v. The United Kingdom*, Application No. 61827/00. 2004), or euthanasia (See judgment of the European Court of Human Rights, *Pretty v. United Kingdom*, no. 2346/02, especially par. 61 and 67).

The situation of crimes against health in Croatia and Bosnia and Herzegovina

As mentioned above, criminal offenses against public health are located in Section XIX. Croatian Criminal Code (hereinafter: CC RH). In that group of offenses under the Criminal Code in the Republic of Croatia include: expansion and transfer of infectious diseases (Art. 180), negligent treatment (Art. 181), illegal taking and transplanting human body parts (Art. 182), lack of medical care in emergencies (Art. 183) quackery (Art. 184), adulteration of medicines or medical devices (Art. 185), production and marketing of harmful products to treatment (Art. 186), malpractice in the preparation and the issue of drugs (Art. 187), production and marketing of products harmful to human health (Art. 188), negligent inspection of the meat for human consumption (Art. 189), unauthorized production and trafficking of drugs (Art. 190), enabling drug spending (Art. 191), unauthorized production and trafficking of banned substances in sports (Art. 192), and serious crimes against human health (Art. 193). In the BiH criminal legislation of this group of crimes is under the jurisdiction of the Federal Penal Code, the head XXI. includes: transmission of infectious diseases (Art. 225), failure to comply with health regulations during epidemics (Art. 226), transmitting sexual diseases (Art. 227), employment of people with infectious diseases (Art. 228) negligent treatment (Art. 229), arbitrary treatment (Art. 230), illegal transplantation of organs (Art. 231), failure to provide medical assistance (Art. 232), quackery (Art. 233), production and marketing of harmful food (Art. 234), negligent inspection of the meat for human consumption (Art. 235), pollution of drinking water and food (Art. 236), serving alcoholic beverages minors (Art. 237), unauthorized production and trafficking of drugs (Art. 238), possession and enabling the use of narcotics (Art. 239), and serious crimes against human health (Art. 240). In addition to these acts, offenses that are the subject of study of medical criminal law (Novoselec 2009) are crimes that

prohibit bans cloning and changes in the human genome (Art. 108 of the Criminal Code of the Republic of Croatia), then killing on request (Art. 112, paragraph 3, CC RH), participation in suicide (Art. 114 of the Criminal Code of the Republic of Croatia), referring to the question of the permissibility/prohibition of euthanasia and, finally, medical criminal law is interested in crime illegal abortion (Art. 115 of the Criminal Code of the Republic of Croatia). Considering that in crimes against life and body group object is protection of man, then life and body of a man, there is no doubt that some of the crimes of this chapter is directly related to criminal offenses against human health.

Regulation of crimes against health in accordance with the law of the ECtHR

The responsibility of health care providers is regulated with blanket regulations such as the Law on Medical Practice of Republic of Croatia which provides for disciplinary responsibility, the Health Care Act, which provides for penal responsibility, still the criminal liability of the health workers is the hardest. In order of regulation the same ECtHR judgments represent an important and indispensable source of health law and serve as a guide in determining how far states can go in providing or withholding of providing health care to its citizens, but also to all other users of health care. For example, thanks to the case of *Pichon and Sajous against France* (2001), a health care provider who is one of the activity and the performance of abortions, that activity they are obligated to carry out, or doctors employees of these hospitals are not used conscientious objectors unless they threaten women's right to provision of health care. Therefore, if the hospital performs as one of its activities and the termination of pregnancy, is not permitted to all her doctors are calling for conscientious objection and thus prevents the use of health care rights (Roksandic Vidlicka 2010). Special is the decision of the ECHR *Šilih against Slovenia* (See ECHR 2007/8 *Silih against Slovenia* on 28 June 2007, no. 71463/01). That judgment is relevant to the question of who is required to establish the responsibility of health activities, how and what is the significance of registration errors that have occurred in the context of treatment. According to the judgment, if the violation of the right *ultima ratio* to life or physical integrity is not caused intentionally, the positive obligation of the State to establish an effective judicial system does not require the necessary security penal remedy. Therefore, we can conclude from that judgment, criminal regulation of health care offenses should be, which leaves the way that certain offenses from the head of criminal offenses against human health *de lege ferenda* eventually become offenses. One of the most important international sources is the Convention on the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine:

Convention on Human Rights and Biomedicine with additional protocols (hereinafter: the Convention). The Convention represents the basis of a document to protect the rights of patients in the Member States of the Council of Europe which have ratified it, and despite the criticism that it is not comprehensive (Abbing 2005), sets out the general principles of the right to health care. Thus, in Article 4 of the Convention states that any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards. This procedure can be performed only after the person to whom the procedure applies about him is informed and given free consent to it. But, if, due to an emergency situation can not obtain appropriate consent, any medically necessary intervention may be carried out immediately in favor of the health of the individual concerned. All of those provisions are of great importance for criminal law. In the judgments of the ECHR we can notice the importance of knowing the whole matter of the health law in order to come to a fair resolution of the dispute, which applies to the decision on criminal responsibility of health workers in the Croatian and Bosnian benches. Also, the progress of medical science and technology development at the same time increase the risks of the treatment which automatically leads to an increase the responsibility of health workers who carry out treatment and provide adequate health care (Turkovic 2004).

The definition of health by the World Health Organization (Jonjic 2000) is a comprehensive set: health is not only the absence of disease or bodily infirmity, but it's totally fine human condition, physically, mentally and socially. The fundamental right of every person is to have the highest level of health that can be achieved, inequality and health opportunity in the world, especially as regards the fight against infectious diseases, dangerous for all (More details in the International Encyclopedia of Laws, Medical law 2003). Development of science and society as a whole, the question of health and equal rights to health care of every individual, as well as bioethical issues, it's unavoidable governing international acts. Accordingly, the international sources of health rights exist, and will be, more numerous (Evin 2003), and they must be taken in determining the criminal responsibility of health professionals. Although not legally binding, the Universal Declaration on Bioethics and Human Rights (Turkovic, Roksandic Vidlicka 2009), should also be a guide in the interpretation and the search for answers on complex questions that can sometimes occur in the finding punishment accountability of doctors and other health workers.

Malpractice

The crime of malpractice makes *medical doctor, dentist or other health professional that doing health activities applying an obviously inadequate remedy or treatment or otherwise clearly fails to comply with the*

rules of medical profession or obvious acts carelessly and thus causing the deterioration of the disease or other impairment of health persons. The law assumes that the health service, which is considered to be extremely useful and holy activity, must perform extremely conscientiously, respecting the rules of the medical profession. Therefore, in case of breach of duty of the person sees sufficient amount of criminal that he is penalized. The offender is a doctor, dentist or other health professional who is not taking a health activity - examination, diagnosis, care, treatment, operation, control, prophylaxis. It is a direct provision of certain professional activities in all phases of treatment: the entrance and various specialist services, such transplants, artificial fertilization, cosmetic surgery, then rehabilitation, etc. The term treatment does not include measures of euthanasia nor experiments on people to treat (Bacic 1998).

When it comes to acts of committing, acts negligently, act or omission, the doctor who is carrying out medical activities does not respect generally recognized rules of medical science and profession (doctors'); ignores them aware, neglects, or engages in undertaking certain medical acts that he knows is not skilled enough, or has generally lagged behind in knowledge of relation to the rules of the profession.

Due to the rapid development of medical science, the new better achievements, could not be reproach malpractice on the doctor, if he kept on classic rules of the profession, because the new objective new achievements were unavailable (Bacic & Pavlovic 2001). For malpractice, according to the legal description of the offense, only are relevant those unscrupulous practices in the application of funds and with treatments. This would mean that the works will be included only severe violation of professional rules of conduct (eg, exceeding the maximum dose of toxic drugs). In doing so, it must be taken that when the treatment is administered in the extreme case of an emergency, or in an emergency situation, rating the negligence of the measures taken and shall be subject to specific criteria.

When it comes to applying obviously unsuitable agents or treatments, these are the most common medicines, the use of various instruments that are introduced into the patient's body, the application of various chemical substances eg. During anesthesia, hemodialysis, using X-rays, etc., methods of treatment are medical procedures different kinds for diagnosis, treatment, rehabilitation, surgery, electric shocks, radiation and others. Determining whether an inadequate remedy or method of treatment is also left to the rules and professional standards, but in general it can be considered to be inappropriate means all that means the application of which is not in accordance with the basic task of health workers, and that is respect for human life from its beginning until death, health promotion and the prevention and treatment of diseases, while maintaining the

physical integrity of the patient. Because of the specifics of determining which an asset was obviously inadequate and proving that the agent actually used and was obviously inadequate, the court uses medical experts.

The crime of malpractice, *delicta propria*, is possible to commit intentionally or negligently. The purpose consists in the fact that the perpetrator is aware that he is acting contrary to the rules of the profession and that this course of treatment he wishes or agrees to. Stop the negligence can occur not only because of the frivolity providers, but also because of inexperience, fatigue or other factors on the side of the perpetrators, which is without prejudice to the responsibility in most cases, but should be taken into account as mitigating factors in sentencing. Also, as a potential "indirect" cause at the commission of this crime, can be a lack of inadequate organization (eg. On-duty schedules, preparedness, lack of necessary materials, etc.), which definitely puts a legal provider under the question of whether it is criminally responsible.

Furthermore, the consequences of the act is deterioration of disease or impairment of health of the patient. First, it presupposes sick person as a patient, ie, that in the course of treatment there was a deterioration of the disease, and other healthy person who is subject to a medical intervention (eg. An organ donor transplant, a donor, etc.). It must be establish a causal link between the acts committed and the consequences of this (which is very complicated to prove). The procedure carried out *lege artis*, with onset of adverse consequences of legal actions being not in itself constitute this crime. Any procedure does not always guarantee a favorable outcome. Therefore, in case of the occurrence of adverse consequences as a result of taking such intervention, must clearly separate whether to adverse effects occurred with the outcome of a particular procedure or the same errors occurring due to health care providers (See more Klaric 2004, Radisic 1986). By unfavorable outcome of medical or medical intervention can occur because of complications that occurred in the process of treatment. The complication represents an unintended outcome of a medical procedure that occurs in spite of medical proper and timely performed the procedure, which is performed by using the proper equipment and the proper resources (drugs, chemicals, etc.), with optimal organization of work (Minigo, Domljan 2006). In determination of the guilt must be taken that the prediction itself in relation to the success of treatment and the very damaging consequences often limited especially in atypical cases and that it is almost impossible to look at all the reactions of the organism. For the meaning of the court of the guilt is the general situation in the respective medical institution, its (lack of) equipment according to the requirements of modern medicine, as well as in relation to the organization of medical services at the institution. If the health institution does not provide the

necessary conditions for the work of all staff, the issue of liability, including criminal, may extend to the very medical institution (See Judgment no. K-132/06-50 of the Municipal Court in Virovitica).

Illegal taking and transplanting human body parts

Transplantation - taking body parts from one person and transplanting them to another man - has become a recognized method of treatment, especially important when there are no other effective treatments. This treatment is required specific legal regulations. This is a condition that this method of treatment as smoother and more fully applied; it provides legal certainty to all participants in this operation, first of all doctors who are engaged in transplantation intervention; regulations provide answers to some ethical issues here opened, and opens the way for a new awareness of people about a number of ethical questions; regulation is important because of the risk of a variety of abuses in connection with transplantation; it is a question of international cooperation in the exchange of human body parts; adopted a more punitive sanctions. Applicable regulations are the Law of transplantation human organs for therapeutic purposes, the Ordinance of the method, procedure and medical criteria for determining death of a person whose body parts can be taken for transplantation, the Ordinance of keeping medical records conducted taking and transplanting human body parts, the Ordinance of the method cooperation with similar foreign and international organizations in order to exchange organs or tissues for transplantation, the Ordinance of the criteria for the allocation of organs and keeping the national waiting list and so on. Transplantation is especially the exceptional medical method which consists in the removal of organ or body part and replaces other. A special, world, problem that arises from the treatment through organ transplantation represents organ trafficking, which is criminalized in the Criminal Code of the Republic of Croatia as a specific criminal offense in group of crimes against life and body, Art. 107 of the Criminal Code of the Republic of Croatia: "Trade parts of the human body and human embryos". In Bosnian criminal legislation this crime is not regulated.

Lack of medical care in emergencies

This crime makes medical doctor, dentist or other health worker who without delay does not provide medical advice the person to whom such assistance is required because of the occurrence of lasting adverse consequences for her health or her life. This criminal offense is in fact a specific form of the general acts failure to provide assistance (Art. 123 of the Criminal Code of the Republic of Croatia, Art. 175 of the CC FBiH). The act assumes a state of emergency, it is necessary to objectively determine that there was a

direct threat to the life of a given person and that medical assistance was necessary or urgent. What does provide "urgent medical assistance" question the rules of the profession (Rodriguez Vazquez & Mosquera 2010). The act is being described as acts of failing to provide assistance. This should include in particular: a refusal to provide such assistance, denial of those help that is beyond the scope of the given doctor, not sending aid service patients in better health institution. It is a leakage immediate help, which means medical action that in a given situation arises as urgent, unavoidable, inescapable, whose failure can lead to endanger the lives of patients. Help must be purposeful, must include what is necessary, necessary to remove a threat to life. There should also be the objective criterion to determine if what is done in the circumstances it was necessary and possible. The act will be also when the aid was provided, but was not what was needed. The act can be committed only with intent, which means that the perpetrator must be aware of the fact that the patient or person is in immediate danger of life for which she needed medical help, but, nevertheless, he does not provide such assistance, or does not provide the in the way that is needed. If it is determined the existence of mistake of fact, it will not examine whether avoidable or not, because the responsibility for negligence is not provided.

The act is complete failure to take necessary measures. It should be taken and the time dimension - the timeliness of assistance, which has the character of a time interval within which aid can effectively provide. In principle, the doctor should immediately provide assistance to be effective, but it can be done and in a span of time without losing the effectiveness of aid, that it remains urgent. If, however, due to failure to provide assistance occurred causing serious bodily injury of a person, or his health is severely impaired, or the existing illness considerably deteriorates, and performed death, failure to render aid turned into a serious crime against public health.

One of the issues with this crime is the existence or non-existence of responsibility in cases where it is necessary to provide emergency assistance at the same time more people, but not quite evident to the criteria applied in this case. The doctor must "all its capabilities to keep a noble tradition of medical profession by maintaining high standards of professional performance and ethical behavior" and medical assistance provided to everyone equally regardless of age, gender, race, nationality, religious or political beliefs, social status, respect the human rights and dignity of persons (Separovic 1997), accepting the natural priority medical condition of an individual.

Quarckery

The quarckery is the performance of medical activity by a person who has no legal training required to perform the medical profession, or qualifications for the

provision of medical assistance. The mere occurrence is in connection with a significant social problem of relations official and alternative medicine. *Ratio* criminalization is particularly at risk of entrusting treatment by unprofessional persons do not come to that, that it is not timely treatment by a doctor, and this can result in the deterioration of the health condition given person. The act is a formal felony. It's achieved with taking one act mentioned activities. It is irrelevant to the existence of acts if the measures that are taken, were possibly useful, or were harmful to the health of the person.

Conclusion

The analysis of crimes against public health, we can conclude that the criminal law has improved and awareness about the importance of separation of these crimes in a special group within specific parts of criminal law (Croatian and Bosnia and Herzegovina in this paper). Although Croatian criminal law in this direction shows its rapid growth and the rise in the regulation of these crimes, in Bosnia and Herzegovina it should be reached for amendments to the same. Human health is indisputable on the first place of the hierarchy of the highest social values. Because of this, it is very important to know the legal rules in the field of medical law not only lawyers but also health care professionals. Certainly, a primary role have a doctors who carry ultimate responsibility for their professional actions. Criminal offenses against public health in this paper are focused on those offenses where the offender appears as primarily a medical doctor. In the modern world of rapid development of medicine and biomedicine, some values still remain. Therefore, physicians and other healthcare providers important to indicate respect on ethical standards and values practicing this public, sacred activity.

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