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Processing of personal and medical data by judicial institutions in the context of the enforcement of Regulation EU 2016/679 - General Data Protection Regulation (GDPR)

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Abstract

The protection of patients' personal and medical data has always been an important subject for medical practice, with explicit regulations being implemented. Whether we are talking about civil and criminal codes or laws governing the medical profession, they all seek to protect fundamental human rights. The confidentiality of medical data is maintained even after the death of the patient, this aspect being governed since the profiling of the physician profession through the Hippocratic Oath. Discussions on privacy and confidentiality occupy an important place in sociological, medical, legal, ethical and anthropological literature.

There are references to the benefits gained by improving accessibility to data as they migrate to computer environments. Along with the technological evolution, all of this data has been transferred to electronic systems. A major concern with the trend towards electronic health records focuses on protecting privacy and patient confidentiality (Vanderminden and Potter, 2016). Data transfer, as well as their processing through many computer systems belonging to different public and private entities, brings new challenges at the individual and social level. Under the protection afforded by the right of individuals to access to information and the current tendency to ease access to information, a number of institutions have created online portals that manage a huge amount of data. The way these data are processed in accordance with the rights of the individual remains an issue that is not fully resolved.

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On the occasion of a doctoral research on medical malpractice, I conducted the interrogation of the portal of Romanian courts (<http://portal.just.ro>). A huge amount of data can be obtained easily in a short time. In the context of the expected impact of the implementation of the GDPR (General Data Protection Regulation) in relation to the functioning of the public institutions, I conducted a qualitative research looking at how medical data and personal data are managed by the courts. Decisions of the courts published in the jurisprudence section have been analyzed.

The paper analyzes the compliance of the judicial public institutions with the data protection legislation considered in the paradigm of institutional logic. We can assume that the individualistic principle exercised by the professional institution (the medical profession) can conflict and require a balancing with the utilitarian, collective principle, which can explain some of the state institution's actions (courts of justice).

GDPR aims to reinforce existing legal provisions. GDPR does not seem to bring about changes in the substance of laws or doctrines on data confidentiality, but appears to be a form of supra-state control. The way in which GDPR will influence policies and practices regarding the processing of personal and medical data will be analyzed with the passage of time.

Keywords

Personal data, medical data, medical malpractice, privacy, GDPR

Introduction

Patricia Thornton revised the Friedland and Alford inter-institutional scheme (Friedland and Alford, 1991) into six institutional orders: market, corporations, professions, state, family and religions (Thornton, 2004). Friedland and Alford (1991) have defined the Institutions as “both supraorganizational patterns of activity by which individuals and organizations produce and reproduce their material subsistence and organize time and space. They are also symbolic systems, ways of ordering reality, thereby rendering experience of time and space meaningful” (pp. 243). Thornton and Ocasio define institutional logics as “the socially constructed, historical patterns of material practices, assumptions, values, beliefs, and rules by which individuals produce and reproduce their material subsistence, organize time and space, and provide meaning to their social reality” (Thornton and Ocasio, 1999). From this perspective, the judiciary and the medical system can be regarded as representing a part of the state institution, and the second, a part of the professional institution. From this perspective, the judicial system can be regarded as a part of the state institution, and the medical system as part of the professional institution. From a personal perspective, institutions are social structures based on formal and informal regulations. They work according to certain socially

accepted values and involve a number of accepted, expected, repetitive and predictable social roles.

When collecting data for my doctoral thesis on malpractice, I noticed that institutional logic on how personal and medical data are processed and transmitted differs between the medical and the judicial system. The medical profession seems to focus on the individual wellbeing in terms of data protection, while the judiciary system appears to prioritize the collective good, supported by the principles of jurisprudence. Medical practice is subject to normative rigor that stems from the Hippocratic traditions and is directed to more recent programmatic statements, such as ethical codes. In addition, there are a number of legislative, civil and criminal texts that also favors the individualistic vision. This type of legal rigor is present, as a functional framework, for other social actors, such as the media. Although the paradigm of legal texts seems to be unitary in defending individual rights, the current practice in the judiciary seems to be different. This aspect has been sought to be empirically observed in this work.

It is clear, therefore, that privacy and confidentiality are an increasingly provocative area of policy and practice in which technology development, civil liberties, surveillance, health and welfare become inseparably intersected (Chris Clark and Janice McGhee, 2008, pp.). The debate on proportionality and necessity in balancing individual privacy and public interest cover an important place in the context of the current information society. Implications are major for those considered to have less autonomy in information sharing decisions, on day-to-day politics and practical issues that occur in the management of personal information under the impact of new technologies.

The way personal data are handled, as well as medical data, has been an important issue for both doctors and health care providers. The situation has become an intensely discussed issue in the context of the coming into force of Regulation (EU) 2016/679, hereinafter referred to as GDPR (General Data Protection Regulation) (The European Parliament, 2016). The Regulation aims at protecting individuals with regard to the processing of personal data and on the free movement of such data; at the same time, this document abrogates Directive 95/46/CE and will apply directly in all Member States of the European Union as from May 25, 2018.

Research methods

The present paper is part of a doctoral analysis of the medical malpractice phenomenon in the Romanian society. A consistent amount of data was collected using the information obtained by querying the Romanian Courts' Portal at the address: <http://portal.just.ro/SitePages/acasa.aspx>.

This domain is managed by de Romanian Ministry of Justice and is part of a project implemented with the financial support of the European Union under the Specific Programme "Criminal Justice". The project title was "Developing the use of electronic tools by managing the procedures for communication of subpoenas and for inserting within the Court's portal of general search engine". Through the portal we can get a series of information organized as follows: presentation and organization of the court,

Court's area of competence with the possibility of searching of cities/villages, streets, street numbers and postal codes assigned to the court, the schedule of hearings and the lists of hearings, pending dossiers, search of dossiers by dossier number, party, object of the dossier, relevant jurisprudence of the court with the possibility of searching by number, year, field, publishing of subpoenas, searching of subpoenas, by the name of the summoned party, display of the subpoena's content (the summoned party, the other parties, the place and date of court appearance, the dossier).

The portal was interrogated by using two key words: jurisprudence and malpractice generating a number of 59 documents that were analyzed from the point of view of relevance to the subject under investigation; the duplicates and various documents and activity reports of the courts were eliminated, with only the court judgments of the various courts dealing with legal solutions to lawsuits dealing with medical malpractice being kept. A total of 14 such court judgments have been analyzed qualitatively by looking at how personal data are processed, as well as data of a specific nature related to health.

In the initial qualitative analysis of the texts I started by the principles of open coding described by Babbie: "open coding is the initial classification and labeling of concepts in the qualitative analysis of data; in open encoding the codes are suggested by the researchers when examining and querying the data"(Babbie, 2010). Open codes appear to be the first of many filters in which senses and themes are extracted from raw data. The followed themes by coding were: elements of identification of the person (name, domicile), elements of identification of the medical personnel (name, specialty, the medical unit in which they operate, the locality), diagnostic elements and anthropometric data, documents attesting the state of health (disability decisions, retirement decisions, medical or autopsy reports) and social values explicitly considered by the courts in making decisions.

This analysis has based on the GDPR provisions and aimed at identifying weaknesses or inconsistencies in the way these data are processed. From the outset, it should be noted that this data is public and does not require registration within the portal or login with a username, password or other means of securing access (such as electronic signature).

Results and empirical findings

The general analysis of the selected documents observes the action of concealing the identity of the procedural parties (the doctors involved, the sanitary units where the incriminated medical treatment was made, the name of the patients who claimed the error or the negligence during the treatment and the name of the insurance company to which they were the civil liability insurance of the doctors and hospitals concerned was concluded). Hiding identity seems to be a commonplace rather than a clear procedure because the way in which it is made differs in the documents analyzed; Sometimes the initials are past, otherwise they are replaced by a single letter (capital letter) or a sequence of points. The inconsistency in the process of concealing the identity was

clearly met in two of the documents analyzed: in the court decision no. 2254 the initials were used in capitals, but throughout the text, on page 2 the full name of the patient appears (The First Instance of Pitesti, 2010). In another court closure a situation similar to the name of the incriminated physician has been identified, which is revealed by the citation of witnesses and the applicant's statements; In the rest of the text, capitals are used for people involved and for medical offices (The First Instance of Bacau, 2015). Hiding identity is unnecessary given the way the court portal works. The number and date of the court decision shall be presented in all documents; by entering this information on the portal, you can quickly obtain complete information on the dossier number, the full name of the parties (patients and doctors) as well as other data. In 4 of the documents analyzed, the file number is presented so that it can easily be searched according to the information on the front page of the portal; in the court decisions no. 39/04.03.2009 (The First Instance of Dragasani, 2009) respectively the one with no. 144 of 26.03.2014 the disclosure of the file number appears from the document header (The First Instance of Ramnicu Valcea, 2014). In the rest of the documents, the file number is protected in the same way as the name of the parties, given the ease with which this information leads to the information that should be protected; in the case of the decision no. 36/R of 23.02.2015 the hiding of the file number is only partial by keeping in the coding the number identifying the court and the year of the filing of the donor making unnecessary the whole data protection process (The Tribunal of Satu Mare County, 2015).

Another situation is the concealment of identity with regard to the health unit in which the litigation was carried out; the interest of the courts in this matter may contain real motivations such as affecting public confidence in the quality of health services or limiting the spread of a feeling of fear or even panic among the population. The way in which the identity of the sanitary unit is concealed is, however, not consistent and unitary. In the court decision no. 18560/31.10.2016 is done throughout the text by using the initial caps in the hospital name (The First Instance of Bucharest District 1, 2016). In other situations such as the one in Decision no. 40/C/08.10.2015 The name of the hospital unit is completely throughout the text (Targu Mures Court of Appel, 2015). Sometimes attempting to hide this aspect is purely formal using part of the hospital title (“county hospital”) as it appears in the decision no. 257/30.05.2012 (The First Instance of Bistrita, 2012); this type of hospital unit is unique in that city. The situation of identification of medical staff is all the easier for small localities in the province where the number of physicians is limited. A number of other easily accessible public information (hospital sites, doctors' registry) makes identification easy by using other existing data in texts published as jurisprudence (the doctor's specialty, the hospital department where the treatment was done, the medical decision of the case). Considering all these aspects, it can be observed that protecting individuals in the sense of GDPR is inefficient using public data within the portal.

More sensitive issues are the on-line publication of patient health data, the description of injuries, the description of events that led to additional lesions and even death, the presentation of decisions declaring a certain degree of disability and other data that can be treated similarly.

Identifying people involved becomes an easy task using the portal, but the spirit of the GDPR text even refers to anthropometric data that can lead to identification; these types of information are among those to be protected. Such an example is identified in decision no. 2254/18.11.2010 (The First Instance of Pitesti, 2010), which contains both anthropometric information and a consistent set of data on the state of health: *“due to the physical constitution of the injured party (minion, with a height of about 1.50 meters and the anthropometric parameters of the basin that made it very likely a mechanical disturbance at birth)”*. The medical descriptions are somewhat detailed, taking over whole passages of medical documents: *“In the vagina, red blood and clots in an appreciable amount; after removal of clots and vaginal lavage view commissural bilateral cervical rupture of about 3 cm (right), and 2 cm (left), bleeding [...] the col of uterus is permeable at index, which expresses a tissue residue, uterus bottom umbilicus at 2-3 cm under umbilical, mobile, retractile, painless vaginal sacs”*.

The citation of medical data is made on a non-discriminatory basis, taking full texts from medical documents, following a logical, juridical way in which the court confirms the legal classification as well as the magnitude of the damage. In the text of the aforementioned decision, we find an appreciable amount of medical data of the child born at the medical treatment identified as one circumscribed to medical malpractice; moreover, we find that this child dies after several months of treatment in various medical institutions. From the perspective of the medical profession, health data remains confidential after the patient's death; From this perspective, processing of such data becomes even more difficult, especially for ethical reasons: *“serious general condition, afebril, pale tegument, cephalhematom vertex, scalp wound, right ear necrosis, palpebral edema, purulent secretions, spontaneous breathing without rallies, clonic convulsions without active movements, absent reflexes, decerebrate posturing”*. The explicit presentation of infirmities as well as lesions that appreciably modify a person's physical appearance is a sensitive issue with an impact on the dignity of any human being. From this point of view, some assessments in the body of the court decision are all the more disturbing; a suggestive example is found in the aforementioned decision: *“In a non-academic language, accessible to any person without medical education, the injuries suffered at birth by the injured party B.I.G.M. (constituting the destruction of significant portions of the brain, areas that have been replaced with blood) brought it to the stage of ‘vegetable’. Practically, after birth, the injured party B.I.G.M. there was never a normal child. Neuropsychic, neurovegetative and neuromotor functions have been irreversibly affected by the severe destruction of the cerebral mass that occurred at birth. The girl had serious vision problems and a long delayed progression by comparison with a normal child of her age. She never communicated with the others (in fact, she did not make any articulated sounds), she did not keep her balance (not even standing alone), did not eat alone, did not cry, did not laugh (and the list of ‘did not’ could continue to infinity)”*. The content of such a decision, made public under the jurisprudence, reveals a whole series of medical documents: observation sheets, expert reports, consultations and paraclinical investigation results. The identification data of these documents as well as whole passages in these documents are reproduced in the text of the above-mentioned text.

In Decision no. 39/04.03.2009 (The First Instance of Dragasani, 2009) explicitly refer to the patient's congenital pathology as well as to a degree of disability; more than that, there is an extract from the autopsy report done in this case: *“The GA patient is diagnosed with Down's disease (trisomy 21), a disease that severely affects the immune system of the diseased person ... From the forensic report -autopsy no ... results in the following conclusions: - the death of the GA minor was violent; - it was due to acute cardio-respiratory failure, following an acute interstitial pneumonia in a child with acute postvaccinal reaction and congenital illness; - according to the clinical observational sheet, made at the time of admission, the child has not undergone paraclinical investigations - laboratory tests - which allow a correct and complete diagnosis to be made and, directly, an appropriate treatment; - treatment administered to the child and recorded in the clinic was incomplete by not administering medications such as antibiotics, which could have beneficial therapeutic effects and could have prevented the child's death; - it is estimated that by not carrying out laboratory investigations, failing to carry out appropriate medical treatment and by not sending the child to a higher hospital in a specialty department of infectious and contagious diseases, the child was deprived of the chance of survival”*. Specifying the degree of disability can easily fall into the category of medical data requiring particular attention in processing and maintaining confidentiality. In the decision no. 538/01.07.2009 (The Tribunal of Bihor County, 2009) the document attesting such a situation is nominated: *“by Decision no. 5575/01.07.2008, ordered disability classification code 1, which corresponds to the degree of accentuated disability”*. Physicians performing such experiments exercise their profession under the same legal and deontological norms as any other physician; the title of their specialty is the expertise of the work capacity and the documents issued by them represent medical acts similar to any other specialty being under the protection of professional secrecy. For the elucidation of some litigation cases, the courts administer evidence that discloses medical data and pre-existing conditions to the litigation; this leads to an increase in the amount of medical data that has become public. Such an aspect is found in Decision no. 257/30.05.2012 (The First Instance of Bistrita, 2012): *“The present patient and multiple other collateral diagnoses on the cardiovascular apparatus, as it results from the Work Capacity Decision no. 196/03 04.2003 - Generalized atherosclerosis, ischemia, By axillary bypass, post-ischemic stroke. She also shows that she has performed a crystalline extraction surgery by partial phacoemulsification. Given the anterior and posterior (both iris and vitreous) adhesions of the lens due to these adhesions, it was necessary to perform the mechanical extraction of the crystalline remnants after cutting the vitreous adhesions (vitrectomy)”*.

Medical data may be only partially difficult to interpret by using specific terminology; in some situations, taking the clinical description brings data that is sufficiently suggestive of lesion stretching and localization. Such an example is found in Decision no. 18560/31.10.2016 (The First Instance of Bucharest District 1, 2016): *“Having diagnosed tissue burning gr.I 1/3 prox. F. fist thigh 1,5/6 cm with decapitated flicker, moderate perilesional edema, minimal exsudation”*. A similar aspect is found in Decision no. 11163/15.10.2013 (The First Instance of Craiova, 2013): *“the defendant administered the phenobarbital to the girl 0.2 ml IM, then the puncture site showed echimosis and swelling.*

[...] Despite all the efforts made by doctors due to unfavorable health, the midwife was amputated an average third of her left thigh; intraoperatively, the femoral thrombosis artery was detected”.

The social values defended by the courts through the decisions made are found in most texts. These also look at an individualist perspective in which the human being is at the center of doctrine and he/she must be protected. For example, “the physician's duty is to protect the physical and mental health of person, to ease suffering, to respect the life and dignity of the human person, without discrimination based on age, gender, race, ethnicity, religion, nationality, social condition , political ideology (...)” (The First Instance of Bistrita, 2012). The protection of people in difficulty is assumed in the same spirit: “people with disabilities require protection measures in support of recovery, integration, social inclusion and (...) against neglect and abuse”(The Tribunal of Bihor County, 2009).

Discussions

In order to understand the ideological framework and the legal doctrine in Romania regarding the confidentiality, the keeping of the professional secret by the physician, the processing of the personal data in general and in particular of the medical ones, I made an analysis of the laws that act in this field. It can easily be noticed that the state, through the laws in force, places a particular emphasis on respecting private life and protecting people's data. Legislation governing the work of other stakeholders such as the media have the same approach. In contrast to the legal doctrine, in some situations, a decrease in the vigilance of some institutions regarding the data protection can be observed. This aspect can be interpreted as an answer to the need to defend other rights such as access to information.

Romanian legal regulations on the confidentiality of personal and medical data

In the following, we will summarize some legislative texts that temporarily precede the European regulation and aim at the protection of personal or special data (medical data).

The criminal code

Disclosure of professional secrecy is a criminal offense provided both by the old 1969 criminal code (Article 196) and by the new criminal code adopted by Law no. 286/2009 (Article 227): “Disclosure, without right, of data or information on a person's private life which is likely to cause harm to a person by the person acquiring knowledge of them by virtue of their 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” (The Romanian Parliament, 2009).

The patient's rights law

Law no. 46 of 21.01.2003 on patients' rights strictly refers to matters of confidentiality (The Romanian Parliament, 2003). Chapter IV *The right to privacy and the privacy of the patient* includes a series of articles with an impact on the issue in question:

Article 21. *All patient status information, research results, diagnosis, prognosis, treatment, personal data are confidential even after death.*

Article 22. *Confidential information may be provided only if the patient expressly consents or is explicitly required by the law.*

The following articles continue to place the patient at the center of the individualist doctrine; derogations from such provisions are allowed only under certain conditions, thus representing exceptions to the rule.

Article 23. *If the information is necessary for other healthcare providers accredited, involved in patient treatment, consent is no longer mandatory.*

Article 24. *The patient has access to personal medical data.*

Article 25. (1) *Any mixture in the private, family life of the patient is forbidden, unless this interference positively influences the diagnosis, treatment, or care provided and only with the consent of the patient.* (2) *Exceptions are considered cases where the patient poses a danger to himself or to public health.*

The Code of Ethics of the Medical Occupation

The Code of Ethics of the Medical Occupation includes a series of regulations that are enacted by the Romanian College of Physicians and published in The Official Journal of Romania (College of Physician in Romania, 2016); those referring to professional secrecy are outlined below:

Chapter III *Professional secrecy and access to health data*

Article 17. *Professional secret - The doctor will keep professional secrecy and will act in accordance with the legal right of each individual to respect for his private life from the point of view of his health information.*

Article 18. *Extent of the obligation of professional secrecy:*

(1) *The doctor's obligation to keep professional secrecy is also enforceable against the family members of the person concerned.*

(2) *The doctor's obligation to keep professional secrecy persists also after the person has ceased to be a patient or deceased.*

Article 19. *Transmission of data on the health of the person*

(1) *The physician will manage medical information on the basis of the provisions of this code, the legislation in force or the patient's mandate.*

(2) *The doctor's obligation to inform the patient no longer subsists if the patient decides, by signing, that he no longer wishes to be informed if the information presented by the doctor would cause him suffering.*

The juridical individualist doctrine is also found in the code of ethics of the medical profession. This is a traditional, Hippocratic one, and guides the medical practice to

protect the patient and his health-related data. Exclusions are also regarded as exceptional situations which are explicitly stated by certain law provisions.

Article 20. Derogations from the rule of professional secrecy - Exceptions to the right of every individual to respect for his private life from the point of view of health information are those expressly provided for by law.

The law on the exercise of the medical profession

In Law no. 306 of 28 June 2004 on the Exercise of Medical Profession, as well as the organization and functioning of the Romanian College of Physicians, published in The Official Journal of Romania, Part I no. 578 of June 30, 2004 refer both to direct (Section 4) as and indirect privacy (section 1, section 4) (The Romanian Parliament, 2004):

Section 1 Article 5. (3) Decisions and resolutions of a medical nature shall be taken with consideration patient interest and rights, generally accepted medical principles, non-discrimination between patients, respect for human dignity, principles of ethics and medical deontology, care for patient health and public health.

Section 4 Article 39. h) to keep professional secrecy

Article 40. - Obligations of members of the College of Physicians from Romania, arising from their special quality of doctors, are: a) to observe and to apply, in all circumstances, the rules of medical deontology; f) to respect the patients' rights.

The legal provisions regarding the exercise of the medical profession have repeated links to the ethical framework of the medical profession as stated by the code of ethics. The way this law addresses the patient's rights comes to reinforce the individualist doctrine that situates the patient at the center of legal doctrine.

Section 6, Article 69 Disciplinary Responsibility

Article 69. (1) The physician shall be liable for non-observance of the laws and regulations of the medical profession, the Code of Medical Deontology and good practice rules professional status of the Romanian College of Physicians, for non-observance of the decisions binding regulations adopted by the governing bodies of the College of Physicians in Romania, as well and for any deeds committed in connection with the profession, which are likely to prejudice honor and prestige of the profession or of the College of Physicians in Romania.

(2) The disciplinary responsibility of the members of the College of Physicians in Romania, according to the present law does not exclude criminal, contraventional, civil or material liability, according to the legal provisions.

The Hippocratic origin of the medical legal doctrine is also highlighted by the fact that the Hippocrates' oath is a mere part of the text of the law. This provision has not only a symbolic role but a practical one, too: in order to become a full member of the professional college and to receive a practice permit a doctor will have to sign the abovementioned oath. The form of oath is a modern one and it is adopted internationally.

In Chapter I, Section 1, Article 9 of the above mentioned Law stipulates: *“once admitted by the Romanian College of Physicians, the doctor will submit the Hippocratic Oath in the modern formulation adopted by the World Medical Association within the Geneva*

Declaration of the year 1975”: “Once admitted [...] I will keep the secrets entrusted by the patients, even after death of them”. The form of this oath is also provided in Law no. 95 of 2006 (republished in 2015) on the sanitary reform at art. 384 (The Romanian Parliament, 2015).

The International Code of Medical Ethics of the World Medical Association

The International Code of Medical Ethics of the World Medical Association was adopted by the Third General Assembly of the World Medical Association in London in October 1949: “Duties of Doctors to the Sick: A doctor owes to his patient complete loyalty and all the resources of his science. A doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him” (World Medical Association, 1949).

The regulations arising from the right to access to information

There are already known in Romania the news programs that abound the medical and even personal information of the persons involved in medical cases with potential litigation or even medical malpractice. Everything seems to be protected by the right to information, a collective right. However, in this field, legislation is one that protects the right of the individual. Legal texts call for fundamental human rights as well as for ethical considerations. GDPR can make stronger regulations and with a higher level of fines for non-compliance with rights to manage personal and medical information.

In addition to the normative acts governing the medical profession, there are a number of other civil laws prohibiting the disclosure of the names of the people involved in various accidents or victims of potentially wrong treatments that are the subject of news broadcasts on various channels of communication. An example is Decision No. 40 of 09.03.2004 on Ensuring the correct information and pluralism issued by the National Audiovisual Council (National Audiovisual Council, 2004b):

Article 8. *In the informative programs, broadcasters must comply following rules:*

Article 9. (1) *In the case of information on accidents, disasters or collective tragedies, the accusation of the state of concern shall be avoided and sources of information shall be quoted. (2) Avoid speculation on tragic events, their causes and consequences, or the repeated presentation of shocking images, in order not to cause unnecessary fears or panic among the public. (3) The names of the victims shall not be specified until their official communication or confirmation.*

Similar issues are also provided in Decision no. 248 of July 1, 2004 on the Protection of Human Dignity and the Right to Own Image issued by the above-mentioned institution (National Audiovisual Council, 2004a):

Article 2. *Broadcasters have the obligation to respect the sacred right to human dignity and to their own image and not to take advantage of ignorance or good faith of persons.*

Article 16. (1) *It is forbidden to broadcast images of the person in the victim's situation without his consent. (2) It is forbidden to broadcast images of the disrespectful or*

deceased person without the consent of the family. (3) It is forbidden to broadcast images that exploit or reveal the trauma or injuries of a person.

Article 17. (1) Everyone has the right to respect for privacy in difficult times, such as irretrievable loss or misfortune. (2) In situations of human suffering, natural disasters, accidents or acts of violence, the broadcasters are obliged not to unreasonably interfere with their private life.

Article 18. (1) Broadcasting of audiovisual material containing images of people on treatment in health care units as well as personal data on health, diagnosis, prognosis, treatment, illness related circumstances and other facts, including the result of the autopsy, is only allowed with the consent of the person (...). (2) Broadcasters have the duty to respect the dignity and anonymity of persons with mental disorders. (3) An exception to the provisions of paragraph (1) justified public interest situations in which the broadcasting of the audiovisual material is aimed at: a) to prevent criminal offenses or to remove the harmful consequences of such acts; b) to prove a crime; c) protecting public health or morals.

In the legislation regulating the functioning of the audio-visual communication domain, the derogation from the individualistic provisions only occurs in exceptional situations. The collective rights and interests seem to be subsidiary to those of the individual.

GDPR (General Data Protection Regulation)

Since May 2018, a new regulation regarding personal data protection has been enforced for all the EU States - GDPR.

GDPR will apply to anyone who processes personal data, regardless of ownership or organization. In other words, this regulation applies to medical offices, clinics, polyclinics, hospitals and public institutions involved in the regulatory, organization and control of healthcare sector.

By the definition of GDPR, “processing” means any operation or set of operations performed on personal data or personal data sets with or without the use of automated means such as collecting, recording, organizing, structuring, storage, adaptation or modification, extraction, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (Article 4(2) and(6) of the GDPR) (European Commission, 2018).

By the definition of GDPR, “personal data” means “any information about an identified or identifiable individual (‘the data subject’); an identifiable natural person is a person who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier, or one or more many specific elements, of his physical, physiological, genetic, psychic, economic, cultural or social identity” (Articles 2, 4(1) and(5) and Recitals (14), (15), (26), (27), (29) and (30) of the GDPR)(European Commission, 2018).

GDPR retains much of the previous legislation, but sets out how it regulates the protection of people's rights and introduces very tough penalties. The Regulation

introduces an obligation for the organizations processing data to carry out their activities in compliance with the general principles in the field. The Regulation introduces the possibility of fines of up to 4% of total annual turnover for the previous financial year or up to EUR 20 million for businesses or any other legal entity not complying with the new rules (including medical practices, dental practices, clinics, polyclinics, hospitals). However, it should be noted that the central element of this regulation is not the application of the fine but the respect for the rights of the citizens of the European Union. It is true that the fines are very high and the authority that controls the sanctions has the power to set very high fines. The fines should be proportionate to the gravity of the act of breach of the rules set out in the Regulation. This means that minor infringements will not be penalized with a maximum fine. Otherwise, it would be an abuse of authority. It is also important to point out that the regulation imposes fines which can be very high given the very important nature of protected values: personal data of individuals.

GDPR does not bring major changes with regard to the legislative or doctrinal texts, but rather to the chain of control. The EU regulations are a form supra-state control, as they must be transposed by the member states to internal legislation in order to comply to the EU accession treaty. Even the National Supervisory Authority for Personal Data Processing is to be supervised by a European authority. In addition, GDPR does not make any difference between public or private organizations with regard to fines for non-compliance. Further research is needed in order to analyze the changes in the institutional logic in terms of data protection.

The particular situation of doctors is generated at the first instance by the special category of processed personal data. In the current activity of each doctor and, especially in the documents completed by them, there is a huge amount of medical data and personal data. According to Article 9. (1) of the Regulation, “processing of personal data revealing racial or ethnic origin, political opinions, religious beliefs or philosophical beliefs or membership of trade unions and the processing of genetic data, biometric data for the purpose of uniquely identifying a of a natural person, data on the health or data on the sexual life or sexual orientation of a natural person”. However, according to paragraph 2 (h) of Article 9. of the Regulation, regulations on the list of data types presented above do not apply if the processing is necessary for purposes of preventive or occupational medicine, the assessment of the employee's work capacity, the establishment of a medical diagnosis, the provision of health or social care or medical treatment or of the management of healthcare or social assistance systems or services under Union or national law or under a contract with a medical establishment and subject to the conditions and guarantees laid down in paragraph 3. Under Article 9. (3) of the Regulation, personal data referred to in paragraph 1 may be processed for the purposes referred to in paragraph 2 (h) if the data concerned are processed: by a professional subject to or under the responsibility of professional secrecy under Union law or national law or under rules established by competent national bodies; or another person also subject to an obligation of confidentiality under Union or national law or rules established by competent national bodies.

From another perspective, the particular situation of doctors is due to their legal obligation to keep professional secrecy. This special situation implies and imposes a special approach on physicians, namely special attention, conditions (consent of the data subjects) and stricter measures (adequate safeguards) for the protection and security of personal data. What is further to be added is that physicians, through the special category of processed personal data (genetic data, biometric data for the purpose of uniquely identifying a natural person, health data, sex life data or sexual orientation) and the statutory provision professional secrecy and confidentiality are, in the case of violations of the Regulation, liable to higher fines.

Physicians are required to keep medical privacy and confidentiality, thus protecting the personal data of patients. Incidentally, the legislation on the confidentiality of the doctor-patient relationship and the professional secrecy of doctors is ample, so that the GDPR regulations do not cause direct changes in current and immediate medical practice. However, attention seems to be needed in addressing the ways in which various institutions, public or private, manage these data.

It is expected that the Romanian legislation will be amended to comply with GDPR provisions. At the same time, the change in the approach regarding the use of medical and personal data and in public institutions is prefigured, considering that GDPR brings the same legal norms for both public and private entities. Decision No. 498 of 17 July 2018 of the Constitutional Court requires changes in the Law no. 95/2006 (the main law on the functioning of the health system) regarding the texts governing the functioning of the Electronic Health File known as DES. Throughout the text of the decision, there are clear references to Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 approving the enforcement of the GDPR (paragraph 55, p. 25). The institutional logic of the legal system seems to shift from one centered on collative, utilitarian rights to one centered on the rights and freedoms of the individual. "In justifying the objection of unconstitutionality, it is argued that in the matter of healthcare provision, the legal framework must be regulated in a manner that does not collide with the fundamental rights provided for in Article 26 of the Constitution, which establishes the obligation of the public authorities to respect and protect the intimate, family and private life. In the matter of personal rights, the unanimously recognized rule is that of guaranteeing and enforcing them, that is, of confidentiality, with the State having, in this respect, a majority negative obligation of abstention, to avoid as much as possible its interference in the exercise of its right of freedom"(The Constitutional Court of Romania, 2018).

The way in which a series of personal information is integrated into a computer system of a public institution (in this case a judicial one) can easily be joined by other intense public debates about the national health system. Similar discussions existed regarding the import of data necessary for the functioning of the health card in the SIUI system (Integrated Unique Information System) as well as the implementation of the patient's electronic file (known as DES). Uploading patient data into national electronic data base could be debatable in a setting that does not ensure adequate protection measures and a full informed consent.

There are discussions on the transition from utilitarian principles to some that put in the core of the doctrine the rights of the individual in various branches of medicine. Numerous explanations are found in bioethics, especially after the Oviedo Convention came into force: “The interests and welfare of the human being will prevail over the singular interests of society or science”(The Oviedo Convention, 1997). This convention was introduced into the Romanian legislation by the adoption of Law no. 17 of 2001.

Jurisprudence

The publication of court decisions in the jurisprudence section can be regarded as social proceeds, as a public benefit act. Jurisprudence works as an educational process for magistrates, and also outlines the direction of court interpretations of litigating in some specific situations. Jurisprudence is a qualitative synthesis in the most demanding and rigorous sense of this syntagma, a synthesis of the “written law” put in the work in the case of so numerous and diverse legal situations. It is a primordial factor of “daily” modeling of unavoidable legal norms against the terribly distorted social structure. As a rule, it is the initiating factor of the abandonment, adaptation or reconsideration by the legislator of regulations. Jurisprudence is a “guide”, a “model”, a “correction” with normative force (Deleanu and Deleanu, 2013). “Jurisprudence and doctrine are considered as indirect sources of law, because they do not act directly on the regulation of social relations, but have an indirect influence on them through the rules contained in this acts” (Hamangiu, Rosetti-Bălănescu and Băicoianu, 1996).

Conclusion

Analyzing the series of public documents on the case law of medical malpractice cases in Romania, strong evidence can be obtained to assume that the way personal and medical data are processed is a real problem. The court jurisprudence texts contain personal data (name, address) of the patients and physicians involved, as well as other data that can easily lead to the identification of persons (doctor's specialty, workplace). The way in which the identity of the patients as well as that of the doctors involved is concealed is a formal one. It was not possible to identify a unitary form or modality to ensure the confidentiality of these types of data.

The disclosure of medical data is an even more sensitive aspect as it has far greater implications at the social, ethical and moral level. Different types of medical data are released to the public. We have identified data such as: diagnoses, treatments and surgical procedures, and detailed descriptions that include anthropometric data. The description of the injuries and the sufferings of the persons involved stems from the reproduction of various medical records (clinical observation files, medical reports and even autopsy reports).

Obtaining a large amount of data can be easily accomplished by following the instructions on the homepage of the Romanian court portal. The large amount of data represents a security risk and the situation is similar for other national databases which have been subjected to public discussions (Patient's Electronic File, known as DES).

Nevertheless, the courts explicitly refer to the social values to be defended. These social values are based on the individualistic perspective and can be summarized as respecting the life and dignity of the human person, without discrimination and protecting the physical and mental health. The question of the fundamental rights of the human being established through international regulations is still actual.

General legislation on data protection and, lately, GDPR, impose strict regulations to protect privacy and confidentiality. In a society where the movement of personal and medical data is increasingly fluid and involving a large number of institutions (service providers, health insurance houses, pension funds, public health authorities) the existence of adequate data processing control policies becomes an urgent need. Such control is all the more important in the situation of those with reduced or absent autonomy (as is the case with those who died). Policies of various public institutions regarding citizens' data will have to contain clear and transparent procedures that ensure a balance between individualist and utilitarian perspectives.

The same balance should be attained between the maintenance of confidentiality, respect for the dignity of the human being and the rights of the individual on the one hand and the European principles, including the free circulation of information, on the other hand. Obtaining an explicitly informed consent for this type of data processing can be a solution. Thus, a fundamental ethical principle, that of the individual's autonomy, would be respected. Adhering to this principle is even more important as far as medical data is concerned. Public release of personal data should be founded on the free choice of the person based on the fundamental premise that individuals have the right to self-determination.

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