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Summary of a doctoral dissertation entitled
“Criminal liability for performing a medical treatment without the patient’s
consent”

The right to autonomy is one of the governing principles for providing health care services, including the performance of medical treatments, and has a significant impact on the general system of medical law in its broad sense.

At the borderline between law and medicine there is a conflict between the personal properties protected by law, such as health and life on one hand, and the right to self-advocacy. The development of medical sciences and the introduction of regulations that ensure patients have the right to self-advocacy have instigated the transition from a paternalistic to a partnership model, and includes the patient in the whole therapeutic process. The change in relationship between a medical doctor and a patient is based on the assumption that patients are the ones who know what is best for themselves. Obviously, this applies to those patients who are conscious, properly informed and clearly express their will. A medical doctor acts here only as the patient’s advisor and carries out the patient’s will using their knowledge and experience.

An individual licensed to perform a medical profession who proceeds with a medical treatment without the patient’s consent is subject to criminal liability (Article 192 of the Criminal Code (“CC”). This dissertation aims to provide a comprehensive analysis of criminal liability for performing a medical treatment without the consent of a patient. This paper presents numerous issues that come to light in the area of patient consent, along with disputable issues and proposed resolutions. Imposing criminal liability for performing a medical treatment without the consent of a patient constitutes a significant instrument of counteracting this phenomenon.

The research thesis is based on the assumption that the attributes of the offence of performing a medical treatment without a patient’s consent were specified properly, though the object of the offence was described too widely, including any perpetrator; however, due to the criminalisation of performing a medical treatment, this crime may only be committed by a certain category of perpetrator.

Due to the dogmatic character of the profession, and the relatively low number of cases closed with a final decision, no files were researched. The work also contains no reference to any comparative research, due to the fact that analysing the regulations involving patient consent and legal liability in the legislature of foreign states, although undoubtedly extremely interesting, could lead to a substantial increase in the volume of this study.

The analysis of every aspect of consent for a medical procedure allows improvements to be suggested to the criminal law regulations, which are expressed in the proposed legislative amendments presented while discussing certain issues, as well as included in the final conclusions, as suggestions *de lege ferenda*.

The principal research applied in the paper was based on the formal and dogmatic method including a linguistic and logical analysis of the Criminal Code's legal provisions relating to the indicated problem, and including the performance of an exegesis of their content on the basis of the research and critical interpretation of literature and case law of the Constitutional Tribunal, of the Supreme Court, the common courts and administrative courts. The functional method was used too, taking into account the link of the right to self-advocacy with social needs. The axiology of paternalism and autonomy was the starting point of the analysis performed, followed by creating a normative reconstruction model of the institution, as well as an analysis of the right to self-advocacy and the issue of liability for performing a medical treatment without a patient's consent in the context of the history of law, sociologically and in the context of medical law. The discussed issue was, therefore, analysed from the regulatory, dogmatic, historical and judicial points of view.

The problem involving the legal performance of a medical treatment is multi-layered and complex. The study of the offence of performing a medical treatment without a patient's consent is fully justified by the theoretical and practical attractiveness of issues related to a patient's consent for performing a medical treatment in the criminal law approach, in connection with the lack of a wider discussion on this relationship in the Polish criminal law literature. The dissertation aims, therefore, to fill the gap existing both in the research and in the interpretation of criminal liability for performing a medical treatment without the patient's consent.

The vast amount of materials required a rational selection to be made and the content is clearly divided into chapters. The dissertation, apart from the introduction and conclusions, comprises ten chapters.

In Chapter I, the process of forming the liability for breaching the right to self-advocacy is presented, together with its form, from the offence of false imprisonment (Article 248 of the CC of 1932), or of forcing another person to an action, omission or endurance through violence or illegal threat, (Article 251 of the CC of 1932, Article 167 of the CC of 1969) ending with the current regulation of criminal liability for performing a medical treatment without a patient's consent (Article 192 of the CC).

Chapter II contains an analysis of the subject of protection against the offence of performing a medical treatment without a patient's consent. The protection measures are applied in order to protect freedom, as a personal right. The characteristics of two types of relations are presented between a physician and a patient: the historic, paternalistic model and the contemporary partnership relationship. The chapter also looks at the long-lasting collision of values between a patient's will and the good that is comprised of life and health. The sources of the right to autonomy are discussed, as the right itself is set out in the Constitution of the Republic of Poland.

Chapter III analyses issues related to the premises of the legality of a medical treatment, closely related with the issue of the subject party to an offence of performing a medical treatment without a patient's consent, in particular by defining the terms of "consent", the parties who may express the consent, and the criteria of the validity and forms of expressing consent.

Chapter IV presents the issue of a patient's consent in particular circumstances. This includes situations when a patient is unconscious or in a terminal condition, when he/she is about to be subject to a transplantation, a medical experiment or a clinical trial, or to cosmetic surgery, also with regards to situations when a patient gives consent to an abortion or to performing a medical treatment on an unborn child, and the issue of treatment for potential suicide victims. A significant issue is the existence of a *pro futuro* statement, particularly in the context of blood transfusions to Jehovah Witnesses.

Chapter V describes the situation when the regulations provide for treatment in the event that the patient does not give consent. This applies to drug addicts and to individuals suffering from contagious illnesses. The exemption from the self-advocacy rule is also an obligation in the rehabilitation treatment of alcoholics. A particular

situation provided for by the provisions of law is the application of a psychiatric intervention without a patient's consent.

Chapter VI contains an analysis of the subject of the offence described in Article 192 of the CC. There is some dispute in the literature, and therefore the performed inference allows answers to the question as to whether the offence of performing a medical treatment without a patient's consent under Article 192 of the CC is a common offence or an individual one. The medical professions of physician, dentist, nurse, midwife, medical aid, laboratory diagnostician and a medical assistant are discussed.

Chapter VII contains a study on the subject matter of the offence under Article 192 of the CC. In addition, the circumstances excluding or limiting the perpetrator's liability for performing a medical treatment without a patient's consent are presented, together with the state of emergency.

Chapter VIII explains the issues regarding the sanction of a penalty, penal measures, forfeiture and compensation measures. Among the discussed penal measures, the most restrictive ones include the prohibition on performing professional activity or the revoking of a certain medical profession licence, as well as making the conviction public.

In Chapter IX, the concurrence of provisions and of offences is analysed. The offences are divided by subject, and whether the medical treatment is performed by an authorised and by an unauthorised person.

Chapter X includes the issues of committed offences, the forms and the manner of prosecution. Statistical data regarding the number of declared offences under Article 192 of the CC in 1999–2013 are presented, together with the number of valid convictions for committing the offence of performing a medical treatment without a patient's consent, as a primary criminal act in 2001–2012.

In the conclusions, a summary is made in the historical, dogmatic and medical context. The performed analysis of the object of the offence under Article 192 of the CC makes it clear that this is an individual offence, and only individuals holding licences regulated by detailed provisions are liable for performing a medical treatment without the required consent of a patient.