

Concluding, it should be stated that the introduction of mixed punishment into the Polish Criminal Code was to be useful especially in case of serious misdemeanors and was connected with the radical reduction of the possibility of imposing deprivation of liberty with conditional suspension of its execution. Such a reduction could, in the opinion of M. Królikowski and R. Zawłocki lead to some not desired consequences – the imposing of the not-suspended deprivation of liberty too often<sup>107</sup>. It should be mentioned here that the same statute from 20<sup>th</sup> February 2015 restricted the possibility to impose deprivation of liberty with conditional suspension of its execution by limiting the use of this institution only to the punishment of deprivation of liberty not exceeding 1 year (earlier it used to be 2 years). This means that the executions of the other punishments cannot be suspended at all.

The presented doubts connected with the interpretation of art. 37b of the Criminal Code, which is a novelty in Polish criminal law, show only some of the difficulties that the courts will have to cope with while imposing the mixed punishment in practice.

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### **OMISSION OF MEDICALLY UNNECESSARY TREATMENT AT THE FINAL STAGES OF HUMAN LIFE AS A PROBLEM OF CRIMINAL LAW**

Slovenia is one of those countries, where omissive acts are being incriminated in one of two possible ways: by direct incriminations of omissions (so called proper omissive incriminations) and by omissions by commission (in Slovenian criminal legal terminology: improper omissions). In the Slovenian Criminal Code, the so-called CC1, adopted in the parliament in 2008 (entered into force on November 1<sup>st</sup> 2008, OJ RS Nr.: 50/12 from 29<sup>th</sup> of June 2012, including amendments, adopted until present), in Art. 17 under the title “The Manner of Commission of Criminal Offence” one can find the following legal definitions: “(1) *A criminal offence may be performed by commission or by omission. (2) A criminal offence may be performed by omission only when the perpetrator has failed to perform the act, which he was obliged to perform. (3) A criminal offence may also be performed by omission, though the criminal offence is not prescribed as omission in the statute, when the perpetrator has*

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107 M. Królikowski, R. Zawłocki, Prawo karne, Warszawa 2015., p. 345.

*not prevented the prohibited consequence. In such cases, the perpetrator shall be punished for omission only if he was obliged to prevent the occurrence of the prohibited consequence and insofar as the omission for occurrence of such a consequence is of the same significance as the commission.”*

Commissions by omission are in Slovenian criminal legal theory rather neglected and very seldom dealt with in practical criminal jurisprudence. Nevertheless, in the last years in Slovenia there were some theoretically very interesting cases, where physicians were brought to criminal court because of alleged omissions to prolong life of patients in the final stages of their lives, in the process of patients' natural dying because of different illnesses (cancer, heart failures etc.) or injuries of the patients. Those omissions by medical experts seemed to be causal with the death of those patients. Therefore, the courts had to deal with the question of unlawfulness of such omissions and of several other special questions of omissions in the light of the general notion of crime. But the central question to answer in these cases for the court was, if we are dealing with a crime of murder through commission by omission.

Regarding the question, under which conditions a physician in Slovenia is allowed to omit life-prolonging medical treatment of dying patients, the main legal source is the Law on Patient's Rights, adopted in Slovenia in 2008 (parallel to the above mentioned CC1). Under this law, there are two possible circumstances in deciding about life-prolonging medical treatment regarding dying patients:

a) on the basis of the so called patient's testament in the sense of Art. 34 of the Law on Patient's Rights (the wording of this Article below)

*“(1) The patients, who is capable of making decisions regarding himself and has fulfilled 18 years of age has the right that his will is respected about what medical treatment he doesn't allow if incapable to provide a proper consent, if:*

*- he suffers from a severe illness, that according to medical science in a short period of time leads to death even in spite of professional medical operation or treatment and such an operation or treatment doesn't give hope for his recovering or improving health or prevent suffering, but merely prolongs life;*

*- a medical operation or treatment would prolong his life in a situation, where an illness or injury would cause such a severe invalidity, that he would terminally lose his physically or mentally capability to care of himself.*

*(2) The will from the first allinea of Paragraph 1 is for the physician binding, whereas the will from the second allinea from Paragraph 1 has to be respected as a guideline in decision making regarding medical treatment.*

*(3) This will has to be respected when the situation occurs, foreseen in the will-statement and at the same time, there are no circumstances from which a conclusion could be derived, that there is considerable doubt, that the patient would revoke such a will in these circumstances.”*

b) without any known patient's testament in the sense of Art. 34 of the Law on Patient's Rights (the wording of this Article above).

It is self-evident, that the argumentation of certain circumstances from which a conclusion could be derived, that there is considerable doubt, that the patient would revoke his will in these very circumstances, can only be a very rare exception in practice. Routinely claiming such circumstances would be contrary to the very existence of the Law on Patient's Rights, especially several articles regulating and guaranteeing patient's autonomy, including the teleology of Article's 34 patient's testament itself.

In Slovenian medical administrative law as well as in widely recognized norms of biomedical ethics, regulating this field, a decision of omitting or revoking medically unnecessary but at the same time life prolonging treatment at the final stages of human life in the sense of (1.) recognizing a situation, where the will of the patient in the sense of Art. 34 of the Law on Patient's Right has to be searched for and potentially respected as well as in the sense of (2.) deciding which forms of medical treatment have to be omit or revoked and how, is a consilliary matter: it has to be done by a team of medical experts (consillium). If this decision is reached with full respect of the Law on Patient's Rights as well as the rules of medical science, the revoking or omitting life prolonging medical treatment cannot be unlawful in the sense of medical criminal law.

Such consilliary decisions can of course also be contrary to a decisive wish of relatives of the dying patient, to prolong the patient's life under all circumstances. In this sense, the consilliary decision in Slovenian medical law plays the role of judiciary decisions about the most important human right of any individual – his life and has to be explained similarly extremely precisely and thoroughly in written form in any given practical case. The probability, that patient's relatives in such cases will experience the consilliary decision as a form of murdering their loved-one, is in practice not minute at all. That is why it can't come as a surprise, that after the enacting of the Law on Patient's Rights a few years ago, the criminal courts in Slovenia have to deal relatively often with cases of alleged omissions to prolong life of patients in the final stages of their lives. In such cases relatives of deceased patients claim, that their loved-ones have been murdered by physicians with commission by omission and that there was no case of unnecessary medical treatment in the sense of Art. 34 of the Law on Patient's Rights.

It is interesting, that these judicial cases are a significant generator of the newly aroused interest of Slovenian legal theory about omissive acts in substantive criminal law and as a sort of fresh wind promise a long awaited necessary development in this traditionally neglected important field of legal scientific research as well as criminal legal jurisprudence.