



## QLaw results and legal opinion of “JUSTeU!”

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### A. Introduction

Clinical-forensic examinations analysed as standard and future development platform? Why is the importance of the problem not to be underestimated? Physical violence is one of the biggest health risks worldwide.<sup>1</sup> (WHO) It is a common fact, that especially men are victims of 82% of homicides, but victims of personal injury are mostly female (30 percent of women) 23 percent of all minors and 6 percent of all senior citizens report regular recurring, significant physical violence.<sup>2</sup> Thus, all the cases of physical injury should be effectively enlightened and the perpetrators punished with an appropriate punishment. In criminal proceedings, the clinical-medical documentation of injuries plays a role that is almost inconceivable. For example in Germany in 2015, 658,594 people were registered as victims of assault, robbery or sexual assault.<sup>3</sup> In the Czech Republic, the police registered in the same period 40,380 people as victims of assault, robbery or sexual assault.<sup>4</sup> It also happens really often, that victims of violence do not dare to go to the police and / or file a complaint. But what is more important in this context, criminal charges often do not lead to success, or even aggravate the situation of the victims (e.g. psychological traumata).

Clarification of the facts by the police - investigation of the prosecutor, main proceedings in court -, the testimony of the victim and the defendant's admission do not always have the highest probative value. Expertise of judges, prosecutors and experts are of significant importance, but often even more the clinical-medical examination of the injuries and their documentation by competent

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<sup>1</sup> [http://www.who.int/mediacentre/news/releases/2013/violence\\_against\\_women\\_20130620/en](http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en) (1.2.2019).

<sup>2</sup> World Health Organization / United Nations Office on Drugs and Crime / United Nations Development Programme (Hrsg.): Global Status Report on Violence Prevention 2014. WHO Press, Genft, 2014. Online: <http://www.undp.org/content/dam/undp/library/corporate/Reports/UNDP-GVA-violence-2014.pdf> (1.2.2019).

<sup>3</sup> Germany - Bundesministerium des Innern (BMI): Polizeiliche Kriminalstatistik 2015. Berlin, 2016. [https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2015.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/sicherheit/pks-2015.pdf?__blob=publicationFile&v=2) (1.2.2019).

<sup>4</sup> <http://www.policie.cz/clanek/statistika-kriminality-za-rok-2017.aspx> (1.2.2019).

doctors.<sup>5</sup> The judicial authorities and the courts base their decisions most of the cases on the medical findings.

Not only in Europe there is currently no general duty of the doctors to report offenses to the authorities. Comparing the situation in the European Union there are no countries with extensive reporting requirements like in the US.<sup>6</sup> From the criminological point of view - a documentation of assault charges, without legal medical aspects complicates the work of law enforcement agencies. A proper medical documentation requirement on legal medical aspects is very important in criminal proceedings. In practice, the majority of victims are not specifically cared for and examined forensically. The (first) clinical documentation is often used as documentary evidence or as the basis for the expert opinion and due to the high degree of protection afforded to personal medical data, very high requirements must be placed on the proportionality test, when taking measures against the victim or an uninvolved third party.<sup>7</sup> Some legal systems even forbid such coercive means on victims and third parties. Forensic documentation that does not justify the requirements of the documentation may influence the determination of an appropriate judgment.

For a long time, the aspects of medical treatment were combined with legal questions, and especially legal and forensic medicine was touched by important resolutions of legal aspects playing an important role in the lives of individuals and in the system of public authorities. In most national systems and legal orders these aspects are handled more or less regulating not only the procedure of observation, data collection, scientific interpretation as a medical evidence part, but also analysing these for the purposes of important fields of law as family law, labour law, criminal law and others.<sup>8</sup> The importance of legal and forensic medicine is without doubts. It is clear, that in the field of legal and forensic medicine, a lot of experts and excellent doctors are active, but legal and forensic medicine *lege artis* requires specialized medical knowledge, studies and also very detailed knowledge of the legal system governing the place of the treatment. Especially for acquiring (objective) evidence thanks to legal and forensic medicine treatment, it is necessary to reflect not only the standards relevant for a medical treatment, but also reflect the respective legal system.

The correspondent legal system is governing the authorization of the medical practice, is setting the framework of the practice and regulating the field of the patient's rights and doctor's duties –

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<sup>5</sup> Betz, P/ Eisenmenger, W: Zur Dokumentation von Verletzungen. In: Der Unfallchirurg, Heft 09/1993, Springer-Verlag, Berlin/Heidelberg/New York, 1993, P. 493-496.

<sup>6</sup> Bentley, C/Bonnie, R: Overview of the American Justice System. In: Hammer, RM/Moynihan, B/ Pagliaro, EM (Hrsg.): Nursing. A Handbook for Practice. Jones and Bartlett Publishers, Boston/Toronto/London/Singapore, 2006, P. 175-216.

<sup>7</sup> <http://www.healthleadersmedia.com/technology/clinical-documentation-conundrum#> (1.2.2019).

<sup>8</sup> Payne-James, J: History and Development of Clinical Forensic Medicine. In <http://eknygos.lsmuni.lt/springer/584/1-36.pdf> (1.2.2019).

common activities in the medical practice attached by law. Authorization for prescriptions, duties of treatments, most situations for the application of therapeutics, informed consent, and consent to treatments and of course the diagnostic and therapeutic procedures, which are relevant to the civil and public legal aspects, are governed by the correspondent legal system as well. Further, human rights, rights of minorities and especially aspects related with to the civil and criminal system and regulations of medical malpractice, duties in emergencies, professional confidentiality and data protection are playing an important role.

The doctor-patient relationship (not only legal) has been provided for in various ways as a part of many different legal, professional or ethical regulations. Depending on the particular issue arising from the doctor-patient relationship, relevant civil law or criminal law provisions are applied. With regard to the content of the “JUST<sub>e</sub>U!”-project, related issues are most often regulated by criminal law rules (whether procedural or substantive; chapter V.). Nevertheless, in order to provide a comprehensive view of the issues related to the doctor-patient relationship, besides criminal law regulations, attention will also be paid to the level of private law (chapter III) as well as the law of medical profession (chapter IV.). Chapter 2 however will precede chapters III.-V. about the legal norms on different levels by introducing “QLaw”.

## **B. QLaw – Aims, Structure, Method and Problems**

The "QLaw" (questionnaire concerning the legal framework for doctors when dealing with a case of physical violence) is one of two questionnaires<sup>9</sup>, which the Ludwig Boltzmann Institute for Clinical Forensic Imaging (LBI CFI) had created within the scope of the "JUST<sub>e</sub>U!"-project in close collaboration with its project partners. Its aim was – as the title of QLaw suggests – to gather the legal framework and relevant medical obligations during a clinical forensic examination in at least 12 EU Member States. The results should make it possible to identify similarities and differences in the various legal orders and to serve as a basis for comparative law. This present paper has attempted to meet these goals as best as possible.

In its structure, QLaw (Annex 1) was divided into two parts. The first part asked for legal norms concerning the relationship of the (clinical forensic) doctor to the victim of violence (or suspect) in the context of a clinical-forensic examination (questions 1-2), and for specific professional duties of the doctor (questions 3-6; i.e. the duty to secrecy or confidentiality, the duty of disclosure and the obligation to report). Question 7 concluded the first part with the search for legal consequences for the

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<sup>9</sup> The other being the „QCFN“ (questionnaire concerning national victim supporting low-threshold clinical forensic examination offers). – See Chapter 4.

breach of contractual or professional duties. The second part referred to legal standards for a physical or clinical forensic examination within criminal proceedings (questions 8-14). The focus rested on who is allowed by law to examine, which methods can be used and are coercive means against the suspect (and victim or third person) possible. The final question 15 gave room for comments or suggestions for improvement. Methodically, QLaw always first asked a substantive question that could be answered with "yes" or "no". A follow-up question gave space to mention the legal source(s).

After the compilation, QLaw was sent together with QCFN via email (Annex 3) between June-October 2017 to over 200 addresses. These included the project partners, members of the European Council of Legal Medicine (ECLM), different medical associations and ministries as well as others (for a detailed report c.f. Annex 2). The return of completed questionnaires was sparse. Thus, for most countries, only one completed questionnaire returned (exception Germany). Additionally, the evaluation was difficult due to the low quality of most answered questionnaires. The main reason for this seemed to be that QLaw was primarily addressed to legal practitioners across Europe and that these few persons who took the trouble answering it, apparently had ignored the explicit advice within the email of distribution to ask for legal guidance by answering QLaw. Hence, some of the answers were in contradiction to one another, often references to legal sources were missing, and sometimes the answers were wrong with regard to the legal source.

As far as QLaw was concerned with the clinical forensic examination within criminal proceedings (questions 8-14), most of the results could be corrected or missing ones could be supplemented, since a look into the relevant criminal procedure codes was sufficient. With regard to the first part on medical duties (questions 1-6), poor results often made it difficult to compile a comprehensive picture of the legal order. In particular, question 7 on the legal consequences the breach of medical duties has been largely skipped.

These findings lead to the conclusion that it seems all the more important to continue to support forensic practitioners in their medical duties from a legal point of view.

### **C. Private Law Level<sup>10</sup>**

The content-related starting point for the results of QLaw is the doctor-patient relationship. This usually takes place in a private law contract, which regulates rights and duties (essentially information, medical briefing and treatment *lege artis* for a fee) to each other. Although this was not queried explicitly within the context of the QLaw, it forms on the one hand the basis for the private law effectiveness of the physicians' professional duties (see chapter IV.); on the other hand, it could

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<sup>10</sup> Part of Questions 1, 2 and part of question 7 of QLaw.

also describe the legal relationship between the clinical-forensic doctor and the person to be examined before, during and after a clinical forensic examination.

*Germany:* The German BGB<sup>11</sup> contains a special contractual type, the so-called “Behandlungsvertrag”. Provisions of Section 630 et seq. of the BGB define the relationship as a contract between a (natural or legal) person providing treatment (typically a physician) and a patient. Under this contract the treating party is bound to perform the relevant medical treatment and the patient is bound to provide the agreed remuneration, unless no third party is obliged to effect the payment. Within the framework of such a relationship the physician as well as the patient are expected to co-operate and the physician is obliged to inform the patient of all important and substantial circumstances relating to the given treatment, including financial costs.

Under Section 630d of the BGB, prior to implementing the medical treatment the treating party is bound to acquire the consent of the patient or of another person (e.g. legal representative). In the case that the implementation of medical treatment cannot be delayed and it is impossible to acquire the patient’s consent in good time, the treatment may be implemented only if it is in accordance with the implicit will of the patient. A patient may revoke his or her consent with the performance of the treatment at any time without stating reasons. In order to obtain the patient's consent, the law requires the physician and other professional staff to provide the patient with all the relevant information related to the treatment (options, necessity, suitability, prognosis, risks etc.) in a comprehensive and timely manner. In connection with the implementation of the treatment, the physician is required to keep and store medical records in paper and/or electronic form and is obliged to allow the patient to inspect it, with the exception of a refusal for serious reasons.

Section 636h of the BGB also regulates the private law liability for malpractice or erroneous information provided to the patient.

*Austria:* The Austrian Civil Code (ABGB)<sup>12</sup> does not contain a special regulation of the doctor-patient relationship, which is hence characterised by the Austrian jurisprudence in most cases as a free-lance contract (“freier Dienstvertrag”); for this purpose only the relevant provisions related to a service contract (Dienstvertrag, Sections 1151 et seq.) are applied. The outcome is still very similar to the specially regulated “Behandlungsvertrag” of the German BGB.

The private law liability for malpractice, erroneous information or other contractual breaches, which lead to damages for the patient, is governed by the general law of compensation for damages (Sections 1295 et seq. ABGB)

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<sup>11</sup> Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 4d des Gesetzes vom 18. Dezember 2018 (BGBl. I S. 2651) geändert worden ist.

<sup>12</sup> Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811.

*The Czech Republic:* Similar to Germany, Czech law in the Czech Civil Code<sup>13</sup> (in following CCC) has ranked the doctor-patient relationship under special types of contracts. In accordance with the Contract for Health Care (Sections 2636-2651 of the Civil Code) the provider undertakes to take care of the patient's health within the scope of his profession or subject of activity. Subsequently, the rights and obligations of the parties (physician's instruction, duty to keep records, confidentiality, etc.) are regulated.

The CCC systematically assigns responsibility and its consequences to part four (relative property rights) of the third chapter, which bears the name of the obligation offenses, and part 1 (Compensation of property and non-material damage). The first piece is divided into 3 sections: 1.) Basic provisions are codified in §§ 2894 -2908, 2.) obligation to pay damages in §§ 2909-2950 and 3.) method and extent of compensation follows in §§ 2951-2971. According to the Civil Code, damage is generally compensated by a *restitutio in integrum* or, if this is not possible, in money (§ 2958 CCC<sup>14</sup>).

The CCC defines a number of types of responsibility applicable to professional misconduct in the health care sector: The most relevant one is in breach of a contractual obligation under Section 2913<sup>15</sup> of the CCC. <sup>16</sup> In the case that a healthcare facility (i.e. legal entity) provides health care as a party to the health care contract (§ 2914 icw §§ 1723, 1935 CCC), this facility will be responsible for the breach of duty by his or her physician or by another health care worker. Hence, the staff acts as vicarious agents for the health care provider.

In order for the doctor's liability for a breach of his secondary obligations (see Chapter IV. Professional Level) a legal contractual basis for the relationship between the healthcare provider in form of the "Health Care Contract" must exist. The legal regime of this contract is given by the law on health services<sup>17</sup> also applied as a *lex specialis* to the general regulations within the CCC. On this basis, the CCC has subsidiary effect to the specific regulation of the content of rights and obligations of healthcare. The Health Service Act, § 45, Article 2n also stipulates the obligation for the health service provider to conclude an insurance contract concerning its possible liability for the damage to be caused in connection with its health care services.

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<sup>13</sup> Act No. 89/2012 Coll., Civil Code, as amended.

<sup>14</sup> "In the case of bodily harm, the tortfeasor shall compensate the victim for such harm in money, fully compensating for the pain and other non-pecuniary harm suffered; if the bodily harm resulted in an impediment to a better future for the victim, the tortfeasor shall also compensate him for the deteriorated social position. Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency."

<sup>15</sup> "If a party infringes an obligation under the contract, it shall compensate for the damage incurred by the other party or even for a person whose interest is obviously to serve the fulfilment of the stipulated duty".

<sup>16</sup> Other types of non-contractual responsibility are tort liability under §2910 CCC, liability for damage caused by a matter under Section 2936 CCC, liability for damage caused by information or advice under Section 2950 of the CCC and ultimately, liability for damage caused by unlawful conduct in §§ 3006 et seq. CCC.

<sup>17</sup> Act No. 372/2011 Coll., on Health Services and the Conditions of Their Provision (Health Services Act), as amended.

*Slovakia:* Slovakia's system and the domain of private law are based on the same principles like the Czech system. Private law aspects, establishing the legal framework of the doctor-patient relationship are regulated by the Slovakian Civil Code<sup>18</sup> (in following SCC). Since the Civil Code is a Communist-Socialist standard, it is characterized by the reinforcement of supervision of the state over health services.<sup>19</sup> At present, the recodification of the SCC is under preparation, and a new concept of legal regulation of the doctor-patient relationship is being discussed in Slovakia. Legal analysis concentrates on the nature of the legal relationship itself and on the assessment of consumer issues or simple contractual relationships.

The right to complain for compensation of damages in Slovakia is prescribed in above mentioned laws. The patients have several options to file a complaint. Most of them are filed with the Healthcare Surveillance Authority. Concerning infringement of the patients' rights, Act No 576/2004<sup>20</sup> makes a reference in its § 11. Also the § 98/6 of the Act No. 576/2004 provides that the liability for damages, caused by providers in the provision of healthcare is governed by a separate regulation. The general responsibility within Private Law is regulated in §§ 420-450 SCC: Therefore, everyone is in general personally liable for the damage caused by a breach of legal obligation (§ 420/1) and according to § 420/2, a third person can become liable for the practice of his/her vicarious agent (their liability under labour law is not affected). Important is also § 420/3, determining that the liability is discarded by the person who proves that he has not caused the damage. Personal responsibility under SCC for the providing of health care is also important: Hence, everyone is also responsible for damage caused by circumstances that originate in the nature of the instrument or other matter used in the performance of the obligation (§ 421a/1). This responsibility cannot be discarded. §§ 444-449 SCC regulates the possible scope of compensation for an injured person.<sup>21</sup>

*Luxembourg:* In Luxembourg there is a specific act on the rights and obligations towards the patient<sup>22</sup>, which summarizes the rights and obligations of the patient and the physician, and thus contributes to a better understanding of the doctor-patient relationship: The relationship is based on mutual respect and loyalty. The act enhances the development of the healthcare system towards the

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<sup>18</sup> Act No. 40/1964 Coll. Občiansky zákonník.

<sup>19</sup> <http://www.projustice.sk/obchodne-pravo/rekodifikacia-sukromneho-prava-na-slovensku> (1.2.2019).

<sup>20</sup> National designation: „Zákon o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov“.

<sup>21</sup> § 444: compensation for the pain of the injured person and the burden of his social application are compensated once; § 445: compensation for the loss of earnings resulting from a personal injury; § 446: compensation for loss of earnings during the incapacity for work; § 447: compensation for loss of earnings after termination of incapacity for work or invalidity; § 447a: compensation for loss of retirement; § 447b: one-off settlement in accordance with the general rules on social security; § 448: survivor's accidental rent; § 449/1: compensation for the expense associated with the treatment; § 449/2: compensation for adequate costs associated with the funeral; § 449/3: reimbursement of the cost of healing and the cost of funeral.

<sup>22</sup> Gesetz vom 24. Juli 2014 über die Rechte und Pflichten der Patienten, das die Einrichtung einer nationalen Informations- und Vermittlungsstelle im Gesundheitswesen vorsieht (Memorial A, 2014, Nr. 140, Seite 2193 ff.)

partnership between the physician and the patient, now allowing the patient to take a more active role in it. Among other things, the basic features of the act of 24 July 2014 include the free choice of the health care provider, informing the patient, taking into account the patient's will, the option of choosing a confidant or an accompanying person, but also the right of well-organized and thorough medical records of the patient<sup>23</sup>, to which the patient has access<sup>24</sup>.

Besides the rights of the patients, the act also provides for their obligations, e.g. clear and understandable description of symptoms, the duty to inform the physician of any previous treatment, its effects, etc. Further, the Act of 24 July 2014 on the Rights and Obligations of the Patient reckons on establishing a national mediation and information centre that should serve patients as well as health services providers and provide both sides with information, advice, or mediation.

At the private law level, non-compliance with the obligations may result in a person becoming liable under Sections 1383 and 1384 of the Civil Code (Lux-BGB).<sup>25</sup>

*Poland:* Following the development of the legal regulation of the Polish healthcare system after the change into the Democratic state, many changes have been realized. Most important for the researched problematic were the Institutional healthcare providers Act from August 30 1991, later derogated by the Act from Mai 15 2011<sup>26</sup> and the Universal health insurance Act from February 6, 1997; the latter introduces the national health insurance system, representing the principles reflected in article 68 Section 1 and 2 of the Polish Constitution from April 1997<sup>27</sup> (right to the protection of health and access to health care), later replaced by the Act from January 23 2003.<sup>28</sup>

The national health insurance system has been changed by the public founded healthcare service Act from August 28, 2004<sup>29</sup>. The Act of November 6, 2008<sup>30</sup> on Patients' Rights and the Commissioner for Patients' Rights collects and safeguards patients' basic rights as well as provides, for the first time in Poland, an original concept for patients' collective rights. In addition, the new Act stipulates the specific mechanism for protecting patients' rights by the newly established body called the Commissioner for Patients' Rights. However, the nature of codified rights is relatively abstract, and

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<sup>23</sup> Article 2(f) in connection with Article 15 of act of 24 July 2014 on the rights and obligations of the patient.

<sup>24</sup> Article 16 of the mentioned act; in Ireland a similar regulation is included in e.g. the Freedom of Information Act 2014, Section 11.

<sup>25</sup> For more details see at: <http://legilux.public.lu/eli/etat/leg/code/civil/20181101> (1.2.2019).

<sup>26</sup> National designation: „Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej (Dz.U. 2011 nr 112 poz. 654)“.

<sup>27</sup> National designation: „Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (Dz.U. z 1997 r. nr 78, poz. 483)“.

<sup>28</sup> National designation: „Ustawa z dnia 23 stycznia 2003 r. o powszechnym ubezpieczeniu w Narodowym Funduszu Zdrowia (Dz.U. 2003 nr 45 poz. 391)“

<sup>29</sup> National designation: „Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych“.

<sup>30</sup> National designation: „Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta“.

the Act cannot be read without reference to legislation related to physicians and health care institutions.<sup>31</sup>

In the field of civil liability and damages arising from medical malpractice, the articles of the Civil Code from June 17, 2004 (in following PCC) form the legal basis. The liability for medical malpractice is on the Polish law contractual or tortious. It depends on the status of the doctor and the nature of medical services, which have been rendered to a patient. Consequently, in the case of damage, provisions of *ex delicto* liability are applied exclusively.<sup>32</sup> A contract between parties (qualified as a contract of rendering services; cf. Article 750 PCC) is concluded only when a patient receives treatment outside the insurance scheme at a private clinic or a doctor's office. The breach of that contract may then give rise to the provider's *ex contractu* liability according to Article 471 or 474 PCC.<sup>33</sup>

However, in most malpractice cases, provisions of tortious liability are applied. According to case law and doctrine, a doctor who causes personal injury (a bodily impairment and/or health disturbance) does not only perform his contractual obligations improperly, but at the same time acts inconsistently with the general duty of care by which he is bound to, regardless of the legal relationship with a patient. *Ex contractu* liability is then in concurrence with tortious liability and, pursuant to Article 443 PCC, the injured is entitled to choose legal grounds for seeking indemnity. In practice, patients prefer the *ex delicto* regime because of the wider scope of damages, including compensation for a non-pecuniary loss and the statute of limitations, which is far more convenient for a claimant (especially after the latest amendment of Article 442 PCC).<sup>34</sup>

According to the article 363/1 PCC, the compensation for damage should follow the will of the victim in the way of restoring the previous state, or by paying the appropriate sum of money. The civil law doctrine is based on the view, that damage caused by treatment is to be repaired only in money.<sup>35</sup> The choice of the liability provisions is binding for the court. However, it is not possible to create a "combined" regime, which comprises certain (and most favourable for a claimant) elements of *ex contractu* and *ex delicto* liability.

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<sup>31</sup> The English translation of the act is available at [https://www.bpp.gov.pl/gfx/bpp/userfiles/\\_public/en\\_-\\_wersja\\_anglojezyczna/ustawa\\_o\\_prawach\\_pacjenta\\_i\\_rzpp\\_w\\_jezyku\\_angielskim.pdf](https://www.bpp.gov.pl/gfx/bpp/userfiles/_public/en_-_wersja_anglojezyczna/ustawa_o_prawach_pacjenta_i_rzpp_w_jezyku_angielskim.pdf) (1.2.2019).

<sup>32</sup> Article 415 PCC: liability for the tortfeasor's own acts and omissions; Article 430 PCC: vicarious liability.

<sup>33</sup> Kinga Baczyk-Rozwadowska, Medical Malpractice and Compensation in Poland, 86 Chi.-Kent L. Rev. 1217 (2011). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss3/9> (1.2.2019).

<sup>34</sup> Kinga Baczyk-Rozwadowska, Medical Malpractice and Compensation in Poland, 86 Chi.-Kent L. Rev. 1217 (2011). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss3/9> (1.2.2019).

<sup>35</sup> A. Rembielin´ski, *Kodeks cywilny z komentarzem*, red. J. Winiarz, Warszawa 1989, komentarz do art. 363 § 1, teza 4, s. 313;

A short digression should add to the private law doctor-patient relationship, the situation governed by civil procedure regulations; these typically focus on the area of evidence, in that they allow the physician to refuse testimony for personal reasons. A few examples are given in the following:

*Germany:* Under Section 383 par. 1(6) the German Code of Civil Procedure (ZPO)<sup>36</sup> provides for the refusal of giving testimony of those persons entrusted by virtue of their function, status or profession with certain information which, due to their nature or following the law, are regarded as confidential. However, physicians do not have the right to refuse giving testimony in the case that they were released from the duty of confidentiality (Section 385 par. 2 of the German ZPO).

*The Czech Republic:* The Czech Code of Civil Procedure<sup>37</sup> also takes into account a situation in which a physician as a witness should testify about the facts entrusted to him by the patient. The same as the German regulation, the Czech Code of Civil Procedure allows the production of evidence only in the case that the duty of confidentiality is not preserved. Thus, interrogation of the physician may be carried out only, if the interrogated person had previously been released from the duty to maintain confidentiality by the competent authority or by the person in whose interest the duty of confidentiality is maintained (Section 124 of the Code of Civil Procedure; *in casu* physician by patient).

*Slovakia:* The ground for regulating civil procedure in Slovakia is Act No. 160/2015 Coll. (the Code of Civil Procedure).<sup>38</sup> It is the new legal regulation replacing the old civil procedure law, adopted by Slovakia after the federation with the Czech Republic. Within the Slovak legal order an important legal regulation related to the issue concerned is the regulation of evidence and testimony, in particular the provisions of Section 196 till 210 of the Code of Civil Procedure. This law provides for the recognized ways of confidentiality and determines the situations in which confidential information is guaranteed or protected. For instance, questioning in the event of confidentiality is possible only if the person concerned was released from the duty of confidentiality for the purposes of the procedure in question and by the competent authority.

As seen above, countries regulate the doctor-patient relations, important also for forensic medical examinations, very differently, but systematically. The legal system of each country is working with the same rights and obligations and with the same legal consequences after unlawful damages. The different instruments are not an obstacle for a correspondent private law protection and

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<sup>36</sup> Zivilprozessordnung in the version of the announcement of 5 December 2005 (BGBl. I p. 3202; 2006 I p. 431; 2007 I p. 1781), which has been changed by Article 11 (15) of the Act of 18 July 2017 (BGBl. I p 2745) and by Article 11 of the Act of 18 December 2018 (BGBl. I S. 2639).

<sup>37</sup> Act No. 99/1963 Coll., as amended.

<sup>38</sup> <https://www.epravo.sk/top/clanky/rekodifikacia-procesneho-prava-vseliiek-na-neduh-y-sudnictva-223.html> (1.2.2019).

are covering the most important aspects of the researched procedures. It is clear that the European Union policy and also some initiatives and activities in the field of harmonization has stimulated the legal development in the corresponding member states, but still not all the countries have the corresponding patients' legislation, covering especially the patient's rights. Some countries have special laws or acts, where the rights and positions of the patients are well described, but in some of them, the topics of the research matter are regulated by pieces of legislation. The situation in former Eastern countries is better than it was at the end of the 20<sup>th</sup> century, but there are still differences in the approaches to patients' rights or in the obligations of the subjects involved in healthcare procedures. Still, as a common denominator for patient rights one can mention the right to informed consent and information about ones' health, the right to see and read ones' own medical record as well as the right to privacy and the right to complain for compensation.

#### **D. Professional Level<sup>39</sup>**

The topic of professional medical duties is far-reaching and has both a public and a private law impact. In private law, most professional duties, provided that they have been governed by special public law legislation, become secondary or ancillary obligations of the doctor-patient contract (see chapter III.). This usually results from an extended contract interpretation; the same applies even if there are no explicitly formulated professional duties in public law. Sometimes professional medical duties can arise only from criminal law or existing legal professional duties are further determined by criminal law (see chapter V.). Within the framework of QLaw, only two particularly relevant professional medical duties in relation to the clinical forensic examination were queried, the obligation to maintain secrecy or confidentiality and the duty to disclose information or to report to the security authorities in certain cases of physical and/or sexual violence.

*Germany:* The same regulation of the doctor-patient relationship as contained in statutes can be found in professional regulations, the binding effect of which is given by the affiliation to the given profession. In Germany, the applicable professional regulation for physicians was the "(Muster-) Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte – mbo-ä 1997 – in der Fassung des Beschlusses des 118. deutschen Ärztetages 2015 in Frankfurt am Main"<sup>40</sup>, which, in Part II, Section 7 et seq., provides for the obligations of a physician towards the patient. The obligations represent a sort of "reminder and detailed description" of duties laid down by the law. Thus, under Section 7

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<sup>39</sup> Answers to Questions 3-6 and a part of question 7 of QLaw.

<sup>40</sup> Last version is now the Model professional code for physicians working in Germany in the version of the resolutions of the 121st German Medical Conference 2018 in Erfurt.

physicians are bound to respect and preserve human dignity, rights of the patient and their will; they are obliged to inform the patient of relevant circumstances (Section 8); they are bound to maintain confidentiality with regard to what they have communicated to the patient (Section 9), with the exception stated under Section 9 par. 2 relating to the protection of higher legal interests. Yet another exception covers situations in which the patient is being examined, or provided treatment by several physicians at the same time, or the patient is in the after-care of different physicians and the consent can be, given that relevant information is provided, assumed (Section 9 par. 4). The professional regulation subsequently provides for the obligation to keep records (Section 10) or, for instance, the issue of fees for the performed acts (Section 12).

Whilst the obligation to maintain confidentiality on the patients' secrets is governed in Section 9 "(Muster-)Berufsordnung" and is further secured by Section 203 of the German Criminal Code (see chapter V.), German law does not know a general duty or obligation to report criminal acts to the authorities; nevertheless, the doctor could justify a breach of the duty to confidentiality by reporting a possible criminal action by Section 34 of the German Criminal Code ("rechtfertigender Notstand" – "justified emergency").

In this context it is necessary to mention the special regulation related to the protection of children, the protection of the well-being of a child. Section 4 of the German Child Protection Cooperation and Information Act (Gesetz zur Kooperation und Information im Kinderschutz – KGG)<sup>41</sup> stipulates that if a physician in the exercise of his profession learns about facts likely to endanger the well-being of a child or a minor, such a situation should be discussed with the child or youth and the person exercising care of the child. In order to assess the threat to the well-being of a child, physicians can contact a competent authority and provide it with relevant data related to the situation, or they can inform the competent authority of the threat to the well-being of the subject directly (Section 4 par. 3).

*The Czech Republic:* In Czech law these issues are stipulated by the Professional Regulation No. 10 of the Czech Medical Chamber - Code of Ethics of the Czech Medical Chamber. This regulation reminds and specifies, in more detail, rights and obligations already laid down by other legal instruments. Section 2 provides for the rights and obligations of the physician related to the performance of their profession (the obligation to respect to as great an extent as possible the will of the patient; in the interest of the patient, to maintain thorough medical confidentiality, to keep and store thorough records in a written or other form etc.). Section 3, called "The Physician and the Patient" provides for the physician's duty to inform the patient in a comprehensible manner of the character of his illness, the intended procedures, risks and other important circumstances.

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<sup>41</sup> Gesetz zur Kooperation und Information im Kinderschutz vom 22. Dezember 2011 (BGBl. I S. 2975), das zuletzt durch Artikel 20 Absatz 1 des Gesetzes vom 23. Dezember 2016 (BGBl. I S. 3234) geändert worden ist.

Besides the above mentioned provisions (and besides the below mentioned professional and criminal law regulations) the issue of confidentiality has been regulated in Czech law under the Act on Health Services and Conditions of Their Provision<sup>42</sup>, which regulates the conditions of the provision of health services and the related execution of state administration. Section 51 provides for the duty of the health care provider to maintain confidentiality in relation to all facts learned in connection with the provision of health services. This provision gives a more detailed specification of what is not considered as a breach of the obligation of confidentiality (transmission of information necessary for ensuring the continuity of the provided health services; communication of data and other facts, if the provider is released from the duty of confidentiality by the patient; communication of data or other facts for the purposes of criminal proceedings in the manner stipulated by the provisions that regulate criminal proceedings; the disclosure of data or other facts in the course of performing the legal duty to prevent or report the commission of an offence is also not viewed as a breach of the obligation of confidentiality, etc.). A specific obligation to report criminal acts does this Act not include, but can in some way be found by Sections 367 et seq. of the Czech Criminal Code (see chapter V.)

In Czech law a similar special regulation than the German “KGG” for the protection of children can be found within the Act on Social and Legal Protection of Children<sup>43</sup>, under which everyone is entitled to draw the attention of parents to the offensive behaviour of their children, or the Authority for Social and Legal Protection to the breach of duty or abuse of rights ensuing from parental responsibility, or, for instance, call attention to the fact that the child is a victim of an offense endangering life, health, freedom, human dignity, moral development or property, or there is the suspicion of such an offence (Section 7 in conjunction with Section 6).

Regarding victim protection, it is also necessary to mention the Czech Act No. 45/2013 Coll. on Victims of Crime and on amendments to some acts (Crime Victims' Rights Act) which obliges the healthcare providers who, after the commission of a crime, provide the victim with health care, to give information related to bodies providing professional assistance to victims of crime (Section 10, par. 2 in conjunction with Section 8 par. 1[b]).

*Luxembourg:* In Luxembourg, the Ministerial Order of 1 March 2013 approving the Code of Conduct of Doctors and Dentists (in following LCCDD)<sup>44</sup> issued by the Medical Council includes all relevant medical duties for doctors<sup>45</sup>, including a strict duty to secrecy (Articles 4-6).

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<sup>42</sup> Act No. 372/2011 Coll., on Health Services and the Conditions of Their Provision (Health Services Act), as amended.

<sup>43</sup> Act No. 359/1999 Coll., on Social and Legal Protection of Children, as amended.

<sup>44</sup> National designation: Arrêté ministériel du 1er mars 2013 approuvant le Code de déontologie des professions de médecin et de médecin-dentiste édicté par le Collège médical.

<sup>45</sup> Further regulations are the Grand-Ducal Regulation of 7 October 2010 establishing the professional code of certain health professions and the Ministerial Order of 11 July 2011 approving the Pharmacists' Code of Conduct issued by the Medical Association.

*Ireland:* In Ireland such regulation is the Guide to Professional Conduct and Ethics for Registered Medical Practitioners<sup>46</sup>. Good professional practice has been divided into eight domains of good professional practice as devised by the Medical Council of Ireland. These domains describe a framework of competencies applicable to all doctors across the continuum of professional development from formal medical education and training through to maintenance of professional competence. They describe the outcomes which doctors should strive to achieve and doctors should refer to these domains throughout the process of maintaining competence. For professional, ethical and practical aspects the Medical practitioners act from the year 2007 is important. This law is handling the questions of registered and not registered medical practitioners and also the practice of medicine. Next to this law the health and social care professionals act from 2005 and the nurse act from 1985 have to be named.

In Ireland, focus should be placed in this respect on the protection of children. The Children First Act 2015 places a legal obligation on certain people, many of whom are professionals, to report child protection concerns at or above a defined threshold to Tusla - Child and Family Agency. Mandated persons are people who have contact with children and/or families and who, because of their qualifications, training and/or employment role, are in a key position to help protect children from harm. Mandated persons include professionals working with children in the education, health, justice, youth and childcare sectors. Certain professionals who may not work directly with children, such as those in adult counselling or psychiatry, are also mandated persons. Mandated persons have two main legal obligations under the Children First Act 2015<sup>47</sup>. These are:

1. To report the harm of children above a defined threshold to Tusla<sup>48</sup>;
2. To assist Tusla, if requested, in assessing a concern, which has been the subject of a mandated report.

*Austria:* Although not at the level of a professional regulation, in Austria rights and duties of physicians are regulated by the Physicians Act (Ärztegesetz 1998)<sup>49</sup>. The duty to keep medical records thoroughly and the duty to provide relevant information is stipulated in Section 51; the obligation of confidentiality, or the obligation to report is provided for under Section 54. The duty to maintain confidentiality about sensitive personal data and the legal breach of said duty, is regulated in Section 54 paragraph 1-3 (breached are justified if the law required a report about the health condition of a patient; for the obligations of the social security and health care institutions; if the patient has released

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<sup>46</sup> Compare to that <https://www.medicalcouncil.ie/News-and-Publications/Reports/Guide-to-Professional-Conduct-Ethics-8th-Edition.html> (20.01.2019).

<sup>47</sup> Section 14 of the Children First Act 2015.

<sup>48</sup> The statutory bodies with primary responsibility for child welfare and protection are Tusla – Child and Family Agency, and An Garda Síochána.

<sup>49</sup> National designation: „Bundesgesetz über die Ausübung des ärztlichen Berufes und die Standesvertretung der Ärzte (Ärztegesetz 1998 – ÄrzteG 1998), BGBl. I Nr. 169/1998“.

the doctor from his duty to secrecy; and to protect higher interests, especially health care or the administration of justice). Moreover, this regulation extends significantly to the area of criminal law in that under paragraph 4 the physician is obliged to inform competent authorities of the suspicion that an adults' death (Sections 75 et seq. StGB) or grave physical injury (Section 84 leg cit) was due to a criminal act under the Austrian Criminal Code (StGB)<sup>50</sup>. Under the suspicion, than a minor or a (natural) person who is represented, because she cannot take care of her own interests, was subject to certain serious crimes (maltreatment [Section 83 (2) StGB], neglect [Section 92 StGB], sexual abuse [Sections 205, 205a, 206, 207, 207b StGB], torture [Section 83 or 92 StGB]) have been committed, the doctor is also obliged to report to the security authorities; but if the victim is a minor and the suspicion arises against a next of kin (Section 166 StGB), the doctor can suspend his reporting duty under the condition, that this is for the good of the child and the youth welfare authorities are informed (Section 54 (5) Ärztegesetz 1998).

Within the "Ärztegesetz 1998" an unjustified breach of confidentiality or failure to report as stated in Section 54 (4) to (5) can constitute a disciplinary offence punishable by a written reprimand, a fine of up to € 36.340.-, a temporary ban on professional practice or even deletion from the medical list (Sections 136, 139 Ärztegesetz 1998). A breach of confidentiality can further lead to claims for damages under private tort law (see chapter III.), and be punished by criminal law (Section 121 StGB; see chapter V.); subsidiary to the latter, an administrative penalty up to € 2.180.- may also be imposed (Section 199 (2) Ärztegesetz 1998).

*Slovakia:* In Slovakia, important rules are contained in Act No. 576/2004 Coll., on Health Care and the Services Related to Health Care Services and on amendments and supplements to some acts, which regulates health care.<sup>51</sup> Legal regulation of health care issues has been further extended by Act No. 578/2004 Coll., on Healthcare Providers, Health Workers and Professional Organizations in the Health Service, i.e. entities eligible to provide health care within the framework of the health care system.<sup>52</sup>

Under the Section 80 (1) (a) and (b) of the Act No. 578/2004 Coll. on Health care providers as amended, each provider of health care (hospital, ambulance as the case may be) has the legal obligation to report without undue delay to police, prosecutor's office and the pertinent Office of Labor, Social Affairs and Family suspicion of sexual abuse, other misuse, rape, sexual violence, sexual exploitation,

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<sup>50</sup> Criminal code Nr. 60/1974, National designation: „Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), BGBl. Nr. 60/1974“.

<sup>51</sup> National designation: „Zákon o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov“.

<sup>52</sup> National designation: „Zákon o poskytovateľoch zdravotnej starostlivosti, zdravotníckych pracovníkoch, stavovských organizáciách v zdravotníctve a o zmene a doplnení niektorých zákonov“.

Intercourse between Relatives, Maltreatment or neglect. In the case of minors or person or persons with limited or no legal capacity.

Under the Section 79 (2) (b) of the Act No. 578/2004 Coll. On Health care providers as amended each provider of health care (hospital, ambulance as the case may be) has the legal obligation to report without undue delay to police, prosecutor's office admission of person to hospital if such person has been injured by firearm or another type of weapon. Regulation of failure to report cases under Section 79 (2) (b) of the Act No. 578/2004 Coll. (admission of person to hospital if such person has been injured by firearm or another type of weapon) is under the Section 82 (1) (b) of the Act No. 578/2004 Coll.

Members of the professional chambers (in Slovakia membership is voluntary) may face disciplinary measures for not reporting as this constitutes the violation of Code of Ethics.

This law was followed by Act No. 577/2004 Coll. providing for the scope of health care covered by public health insurance.<sup>53</sup> The legal regulation guarantees the basic aspects such as the principle and duty of confidentiality. The extent of confidentiality is determined as absolute and every provider of health care is bound by the duty of confidentiality with respect to all information learned in connection with the provision of health care services.

Act No. 305/2005 Coll. on the Social and Legal Protection of Children<sup>54</sup> is designed in a manner similar to the legal regulation of the same matter in the Czech Republic. The basic benefit of this rule is the right of a child to ask authorities and persons providing health care services related to the life and other rights of a child for assistance and protection. The antipode of this right is the duty of bodies and persons concerned to provide the child with adequate assistance. An important aspect is, in particular, domestic violence and the right of the child to ask for assistance without the parents' or other accountable persons' knowledge or notification.

In Slovakia, a draft law on the protection and the support of victims of crime has currently been under discussion and preparation. The Slovak Parliament has been dealing with it as well.<sup>55</sup> The present proposal has a similar concept to the legislation implemented in the Czech Republic and is, to a great extent, influenced by the European Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 introducing minimum rules on the rights, support and protection of victims of crimes and replacing the framework Council Decision 2001/220/JHA, which, the same as in the Czech Republic and in Slovakia, establishes the grounds for future regulation. Here, a victim of a crime is specified as the subject of special care performed by the state. The social character of the proposed

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<sup>53</sup> National designation: „Zákon o rozsahu zdravotnej starostlivosti uhrádzanej na základe verejného zdravotného poistenia a o úhradách za služby súvisiace s poskytovaním zdravotnej starostlivosti“.

<sup>54</sup> National designation: „Zákon o sociálnoprávnej ochrane detí a o sociálnej kuratele a o zmene a doplnení niektorých zákonov“.

<sup>55</sup> <http://zastolom.sk/postavenie-obete-posilnuje-dlho-ocakavany-zakon/> (1.2.2019).

system is implemented by the state through financial aid to victims of crimes. The proposed standard also establishes the rules and legal grounds for cooperation with organizations and institutions providing assistance to victims of crimes. At the same time, the legal regulation addresses the issue of compensation, which is stipulated by a valid and effective law No. 215/2006 Coll., on Compensating Victims of Violent Crimes.

*Italy:* Italy, like Germany (c.f. "[Muster-] Berufsordnung"), has a binding professional code for physicians issued by the Medical Association (Codex Deontologicus 2014<sup>56</sup>). This obliges physicians and dentists to be completely confidential about secrets that have become known to him/her in the course of his/her professional activity; a disclosure of these secrets is only admissible on the basis of a patient's release of said duty, a legitimate reason provided for by the law, or the fulfilment of a duty prescribed by law (Art 10). Art 11 and 12 provide additional rules for the confidential handling of personal and sensitive data. A violation of professional secrets by a relevant secret carrier, such as a doctor, may also be criminally relevant according to Art 622 of the Italian Criminal Code<sup>57</sup>. With regard to an obligation to report in the event of a suspected criminal act, the general right of notification under the Italian Code of Criminal Procedure<sup>58</sup> applies doctors (Sections 331, 334). However, for the protection of minors, the physician is required to report to the competent authorities any situation of discrimination, physical or mental abuse, violence or sexual abuse, provided that the legal representative has rejected appropriate and proportionate action.

Finally, it should be mentioned, that the Italian Code on Medical Ethics as soft law could in some cases become additionally relevant concerning professional duties and patient rights (e.g. right to information, or duty to confidentiality).

*Sweden:* In Sweden there is in the relationship between doctor and victim of violence no specific regulation for the situation when a doctor is dealing with such a victim of violence in general. In chapter 8 of the National board of Health and Welfare's Regulations and General Advice (SOSFS 2014:4) on Domestic Violence, there are rules and general advice on the health care provider's responsibility in regards to domestic violence specifically. SOSFS 2014:4 shall be applied when health care professionals deal with children and adults who have been exposed to violence or other abuse by a related person (victims of domestic violence), and children, who have witnessed violence or other abuse of or against related persons (children victim of witnessing domestic violence). The rules are

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<https://webcache.googleusercontent.com/search?q=cache:D7KXTJeoWC8J:https://www.ordinemedici.bz.it/de/berufsordnung/%3Fdownload%3D649+&cd=1&hl=de&ct=clnk&gl=at&client=firefox-b-ab> (1.2.2019).

<sup>57</sup> National designation: "Codice Penale (Regio Decreto 19 ottobre 1930, n. 1398; con le modifiche apportate, da ultimo, dalla L. 3 luglio 2017, n. 105, dalla L. 14 luglio 2017, n. 110 e dalla L. 23 giugno 2017, n. 103.)".

<sup>58</sup> National designation: "Codice di Procedura Penale (D.P.R. 22 settembre 1988, n. 447; con le modifiche apportate, da ultimo, dal D. Lgs. 3 ottobre 2017, n. 149, dalla L. 3 luglio 2017, n. 105, dalla L. 14 luglio 2017, n. 110 e dalla L. 23 giugno 2017, n. 103.)".

directed at the health care provider mainly, but some rules prescribe what the staff shall do (doctors and other healthcare professionals). According to SOSFS 2014:4<sup>59</sup>, every health care provider is obliged to establish the routines needed to develop and secure the quality in their work with regards to victims of domestic violence.<sup>60</sup> These routines may therefore differ on a regional level. Duty to secrecy when examining patients within the health care is regulated in Chapter 25, Section 1, Public Access to Information and Secrecy Act (2009:400).<sup>61</sup> This regulation does not include private healthcare providers. For private healthcare providers the secrecy is regulated in Chapter 6, Section 12 of the Patient Safety Act of the year 2010 (2010: 659). If the patient agrees or if it is clear that the patient or any related person does not suffer from the data being disclosed, the health care providers may break the duty of secrecy. Aside from this, data of that type may only be disclosed if, by law or regulation, there is an obligation to disclose information, for example, at the request of a court and certain supervisory authorities, and in some cases where the staff is obliged to report to another authority, for example to notify social authorities to the situation of a child (see answers to questions 1 a and 5 a).<sup>62</sup>

Healthcare professionals may, in some cases, provide information to police or prosecutor according to Chapter 10, Section 21 and Section 23, of the Public Access to Information and Secrecy Act. Rules concerning the obligation to report to the social authorities that a child may need the protection of them are found in Chapter 14, Section 1 of the Social Services Act (2001: 453). This obligation concerns all healthcare and health care professionals, public as well as private.<sup>63</sup>

Regarding children, is for the regulation Sweden the chapter 5, Section 6 of the Health Care Act (2017: 30) important, which stipulates that when healthcare is given to children, the best interests of the child shall be taken into account. According to Chapter 5, Section 7 of the Health Care Act the health care has a special responsibility to collaborate with social services and other authorities with regard to children in vulnerable situations. As mentioned earlier, there is also a special obligation to report to the social authorities if the healthcare professionals are concerned about a child.<sup>64</sup>

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<sup>59</sup> National designation: „Socialstyrelsens föreskrifter och allmänna råd om våld i nära relationer“.

<sup>60</sup> For the legal sources and exact numbers of correspondent laws in Sweden please see: Stephanie Holt, Carolina Overlien, John Devaney, Responding to Domestic Violence: Emerging Challenges for Policy, Practice and Research in Europe, Jessica Kingsley Publishers 2017, p. 113-114

<sup>61</sup> for details available at: <https://www.government.se/49b75b/contentassets/2ca7601373824c8395fc1f38516e6e03/public-access-to-information-and-secrecy-act> (1.2.2019).

<sup>62</sup> Compare with the correspondent scientific articles at: [https://www.scirp.org/\(S\(i43dyn45teexjx455qlt3d2q\)\)/reference/ReferencesPapers.aspx?ReferenceID=1051638](https://www.scirp.org/(S(i43dyn45teexjx455qlt3d2q))/reference/ReferencesPapers.aspx?ReferenceID=1051638) (1.2.2018)

<sup>63</sup> The text of the law and respondent commentary are available at: [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/social\\_services\\_act\\_sweden\\_en\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/social_services_act_sweden_en_1.pdf) (1.2.2018).

<sup>64</sup> For information about this Swedish law see: [https://ec.europa.eu/health/sites/health/files/state/docs/chp\\_sv\\_english.pdf](https://ec.europa.eu/health/sites/health/files/state/docs/chp_sv_english.pdf) (1.2.2019).

According to Chapter 10, Section 21 of the Public Access to Information and Secrecy Act the health care professionals have the possibility to disclose more information to the police/prosecutor with regards to suspicion of crimes committed against children.

As mentioned before the National Board of Health and Welfare have Regulations and General Advice (SOSFS 2014:4) on Domestic Violence. Part of the regulations within SOSFS 2014:4 concern the care for adults only, others only the care for children and some rules both children and adults alike. There are no direct consequences of violating the rules set out in the answers above, specifically. There may be several different possible consequences if a doctor or other healthcare professional violates rules or patient security, depending on, for example, the severity of the violation of rules.

A healthcare provider and its staff may be subject to supervision by The Health and Social Care Inspectorate (IVO), as regulated in Chapter 7, Patient Safety Act. In Chapter 8 of the Patient Safety Act specific consequences for health care professionals with a license are regulated (for example loss of license).<sup>65</sup>

Anyone who does not report concerns about a child, despite being obliged to do so according to Chapter 14, Section 1 the Social Services Act, risks being held responsible for Misuse of Office under Chapter 20, Section 1 of The Swedish Penal Code. A prerequisite for this is that the omission relates to the exercise of public authority.<sup>66</sup>

*Croatia:* Similar to Austria, the Doctors' Code of Croatia<sup>67</sup> puts Art 21 about the duty of medical secrecy (further determination by Art 145 Criminal Code of Croatia<sup>68</sup> "Violation of professional secrets"; see chapter V.) and Art 22 leg cit about general obligation to notify the police or public prosecutor in the event of death or suspected bodily injury to the patient systematically together; with regard to minors, the doctor is additionally obliged to report in cases of suspected maltreatment or neglect. As for the duty to secrecy, it can be breached by consent of the patient or if orders by a special law.

*Poland:* The issue of medical confidentiality is related to in hard law within the provisions of the Act on the Profession of Physician and Dentist, the Act of 5 December 1996 (Journal of Laws of 1997 No. 28, item 152) on physician and dentist<sup>69</sup> (in following PDA), as well as in soft law within the provisions of the Code of Medical Ethics (in following CME). It was adopted in 1991, during the II. Extraordinary National Congress of Chambers of Physicians and reviewed in 1993 and in 2003. In accordance with Art. 23 CME a physician has a duty to maintain secrets concerning a patient. These

<sup>65</sup> <https://www.ivo.se/om-ivo/other-languages/english/> (1.2.2019).

<sup>66</sup> See also NJA 2014, p. 910, where the Swedish Supreme Court ruled that the obligation to report concerns about a child according to Chapter 14, Section 1 the Social Services Act may be seen as such an omission which may constitute the crime Misuse of Office.

<sup>67</sup> National designation: „Zakon o liječništvu (pročišćeni tekst zakona NN 121/03, 117/08)”.

<sup>68</sup> Criminal Code of Croatia, National designation: “Kazneni zakon (NN 110/97, 27/98, 129/2000, 51/2001, 111/203)”.

<sup>69</sup> National designation: “Ustawa o zawodach lekarza i lekarza dentystry (z dnia 5 grudnia 1996 r)”.

are, respectively, the subjective and objective scope of the duty. The personal scope is limited to the entities that can practice the medical profession. Therefore, these are persons described in Art. 5 and those according to the PDA. The further content of the provision of the CME clearly shows that all information about patient and his surroundings obtained by a physician in relation to the performance of professional activities are covered by professional secrecy. The physician's confidentiality will therefore refer to the information relating to the facts concerning not only the patient and his health, understood as a person using medical assistance, but also to the patient's life environment, as well as general personal and material conditions about which the physician learned in contact with the patient. The professional secrecy of a physician is primarily defined in Art. 40 PDA provisions, which obliges a physician to "maintain the confidentiality of information related to the patient, and obtained in connection with the exercise of the profession". On the basis of the art. 40 PDA the medical secrecy has no absolute character. Art. 40 paragraph 2 point 1 states that medical secrecy may be harmed by the provisions of the bills. For example, on the grounds of procedural laws it would be the situations to which Art. 180 § 2 of the Code of Criminal Procedure, Art. 261 § 2 of the Code of Civil Procedure and Art. 83 § 2 of the Code of Administrative Procedure refer. There are also other factual states to which the act refers. Both of the above-mentioned provisions include the term "patient" as an entity - the source of information - in relation to which one is obliged to preserve medical secrecy. The term patient is not legally defined in the acts commented in this article. Although an obligation of confidentiality to the patient's environment is not mentioned in art. 40 PDA, it is a duty explicitly expressed in art. 23 CME.<sup>70</sup> The duty to secrecy is protected by Criminal Law according to Art 266 of the Polish Penal Code<sup>71</sup>.

A specific obligation to notify or report suspected criminal acts to the authorities could not be found for Poland within the research.

*Romania:* The Romanian College of Physicians has issued on the one hand the Code of Medical Ethics (active since January 6, 2017)<sup>72</sup> which defines general ethical standards within the doctor patient relationship; and on the other hand the Rumanian Code of Medical Deontology<sup>73</sup> (in following RCMD). Latter's Chapter II Section B deals with the medical duty of confidentiality: As a general rule, confidentiality has to be preserved concerning secrets about the "intimate life of the patient, of his family and relatives, as well as the matters of diagnosis, prognosis, treatment, and other problems

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<sup>70</sup> More information to Poland situation available in Michalak K, The essence medical secrecy according Polish law, Prog Health Sci. 2014, Vol 4, No1 239

<sup>71</sup> National designation: „Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny. Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 5 lipca 2016 r. w sprawie ogłoszenia jednolitego tekstu ustawy - Kodeks karny“.

<sup>72</sup> Available at <https://www.cmr.ro/new/wp-content/uploads/2017/03/Code-of-Medical-Ethics.pdf> (1.2.2019)

<sup>73</sup> For the english version see: [http://www.ceom-ecmo.eu/sites/default/files/documents/romanian\\_code\\_of\\_medical\\_deontologypdf.pdf](http://www.ceom-ecmo.eu/sites/default/files/documents/romanian_code_of_medical_deontologypdf.pdf) (1.2.2019).

related to the disease” (Art 15 RCMD), as long as the law does not stipulate otherwise (Art 14 RCMD). This duty has to be preserved towards relatives, other doctors and medical staff not involved in the treatment process, the scientific public and the media, unless the patient consents to a release of the duty to confidentiality (Art 16-19 RCMD). Accordingly, “the medical records” qualify as “secret professional documents” (Art 20 RCMD).

As for a duty to report to competent authorities, the doctor is obliged to be a defender of a minor in need of medical treatment (Art 64 RCMD), which includes a duty to report to the authorities in cases of violence against the minor (Art 65 RCMD). A comparable rule for adults cannot be found within the RCMD; however, within the doctors’ duties to the public (Chapter IV RCMD), he has “the moral obligation to announce to the competent authorities about any situation that he is aware of and might be a possible danger for the public health (Art 70).

A breach of duties according to the RCMD can lead to disciplinary measures by Romanian College of Physicians.

*Slovenia:* The privacy of personal health information is in Slovenia governed by the Personal Data Protection Act<sup>74</sup> (in following PDPA), the Patients’ Rights Act (in following PRA)<sup>75</sup> and by the Health Services Act (in following HAS)<sup>76</sup>. Considering that the provisions of the PDPA apply with respect to the processing of health related personal data, the penal provisions of the respective act apply as well. The PRA also contains penal provisions. According to Article 44 of the PRA a patient has the right to the confidentiality of his/her personal data, including the information on visits to the doctor and medical treatment. Health care and allied professionals have to treat personal data of patients in accordance with the principle of confidentiality and provisions of the PDPA. In general, consent of the patient is required to process his/her (health related) personal data. However, the PRA determines the exemptions, when the consent of the patient is not required: e.g. for the purpose of epidemiological and other surveys, education, medical publications or other purposes the identity of a person is not identifiable; for the purpose of monitoring the quality and safety of medical care, if the identity of a person is not identifiable; or if the law requires that a medical condition is reported; or if – in case of need for medical treatment – the personal data are transferred to other health care service provider. According to the HAS, health care and allied professionals have to treat the information on medical condition of a patient, including the information on cause and other circumstances for such condition, as a professional secret. The respective information should not be disclosed to any third party, the public or published in way that would enable the identification of the individual to whom the data

<sup>74</sup> National designation: „Zakon o varstvu osebnih podatkov (uradno prečiščeno besedilo) (ZVOP-1-UPB1), Stran 12707”.

<sup>75</sup> National designation: „Zakon o pacientovih pravicah (ZPacP) (Uradni list RS, št. [15/08](#) in [55/17](#))”.

<sup>76</sup> National designation: „Zakon o zdravniški službi (ZZdrS-G) (Uradni list RS, št. [72/06](#) – uradno prečiščeno besedilo, [15/08](#) – ZPacP, [58/08](#), [107/10](#) – ZPPKZ, [40/12](#) – ZUJF, [88/16](#) – ZdZPZD, [40/17](#), [64/17](#) – ZZDej-K in [49/18](#))”.

relates to. Provision with similar content is also contained in the PRA. Pursuant to Article 6 of the PDPA personal health information are considered sensitive personal data. The secrecy about personal data is safeguarded by Art 143 of the Slovenian Criminal Code<sup>77</sup>. The duty to secrecy is further determined by Art 17-21 of the Slovenian Code of Medical Ethics<sup>78</sup> (in following SCME), issued by the Medical Association of Slovenia.

Concerning a duty to notify the authorities in cases of violence, the SCME does not provide for an explicit duty. Nevertheless, such a duty could arise concerning the health and safety of minors (Art 13 SCME), if serious harm to a third person is to be predictable (Art 20 SCME) or if a person is endangered by a misconduct of a colleague (Art 49 SCME).

A breach of duties according to the SCME – irrespective of other possible legal consequences – can lead to disciplinary measures by Slovenian Medical Chamber of the Medical Association (Art 67 SCME).

## E. Criminal Law Level

At the level of criminal law, following the structure of the chapter about private law (III.), a distinction is made between material and procedural criminal law. Thus, this chapter begins with the presentation of possible individual criminal offenses in connection with a clinical forensic examination (A.)<sup>79</sup>, then initiates the criminal procedural law with a small digression for refusal to testify (B.) and ends with the treatment of the clinical forensic examination within criminal proceedings (C.)<sup>80</sup>.

### *1. Material Criminal Law icw a clinical forensic examination*

#### *(i) failure to report*

*Germany:* At the criminal law level the doctor-patient relationship concerns mainly the issues of reporting or failure to report certain crimes, and the obligation to maintain confidentiality, already mentioned several times. The German Criminal Code (Strafgesetzbuch - StGB<sup>81</sup>) thus lays down in Section 138 and Section 139 the crime of Failure to Report Planned Crimes (Section 138), or the Exemption from Punishment for Failure to Report Planned Crimes (Section 139). The latter relates to the physician or e.g. advocates given that they had learned the facts during the exercise of their

<sup>77</sup> Official Gazette of Republic of Slovenia, No. 55/2008, Kazenski zakonik as amended.

<sup>78</sup> For the english version see: [https://www.zdravniskazbornica.si/docs/default-source/zbornicni-akti/code\\_of\\_medical\\_ethics.pdf?sfvrsn=879c2836\\_2](https://www.zdravniskazbornica.si/docs/default-source/zbornicni-akti/code_of_medical_ethics.pdf?sfvrsn=879c2836_2) (1.2.2019).

<sup>79</sup> Part of the answer to question 7.

<sup>80</sup> Answers to questions 8-14 Qlaw.

<sup>81</sup> Criminal code, National designation: „Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 1 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist“.

profession, and they had made an attempt to deter the person from the commission of a crime or to prevent its successful performance (Section 139 par. 3). Nevertheless, they have the obligation to report in a felonious case such as murder, genocide, terrorism, crimes against human dignity etc. The list of the crimes, which always relate to a duty to report, is enumerative (Section 139 par. 3 (1-3) of the German StGB).

*The Czech Republic:* A similar regulation can be found in the Czech Criminal Code (TZ)<sup>82</sup>, which, in Section 367, provides for the failure to prevent an offence, or in Section 368, the failure to report on an offence. Therefore, if any person, including a physician, learns in a credible manner, about the planning or commission of some of the enumerative specified crimes and does not attempt to prevent the commission or completion of such an offence (e.g. by reporting it), under Czech legislation such a person can be sentenced to imprisonment for up to three years. Provisions of Section 368 of the Czech Criminal Code then follows on from the time an enumerated crime was committed, but the person who had learned about the fact failed to report on the commission of an offence without delay. Such duty does not apply only if, for example, the given person or a related person would be put in danger of death or e.g. criminal prosecution. Unlike the German regulation the Czech Criminal Code does not apply the immunity from prosecution for the failure to report to physicians but only to lawyers and ministers of a registered church and religious societies (Section 368 par. 3 of the Czech Criminal Code).

*Slovakia:* In Slovakia and in the relation to criminal law aspects, the principal legal rule is Act No. 301/2005 Coll. the Criminal Code. In its Part 2, Chapter 1 it provides for Crimes against the Life and Health, the delimitation of which has also a significant importance for the issue in question. Starting with provisions of Section 144 which regulates the aspects of a murder as a crime and ending with the provisions of Section 178 focusing on the issue of the crime of failure to provide assistance, the mentioned part of the Criminal Code of the Slovak Republic is one of the important components in the fight and suppression of aspects connected with the situation of victims of crimes. Further, provisions of Section 340 which address situations related to thwarted crimes and Section 341 dealing with unreported crime and the eventual aspects of the obligation to report criminal offences are of high importance.

Furthermore, the Act No. 578/2004 Coll. On Health care providers contains in its annex 4 Code of Ethics of the healthcare worker which inter alia impose obligation to notify the pertinent authorities of the suspicion of gross or cruel treatment and abuse of the patient, especially minors and persons deprived of their legal capacity. Under the Section 80 (1) (e) of the Act No. 578/2004 Coll. On Health

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<sup>82</sup> Act No. 40/2009 Coll., Criminal Code, as amended.

care providers everyone is to perform his/her medical profession professionally, in accordance with generally binding legislation and the Code of ethics. Therefore, the general reporting duty is imposed.

*Austria:* The failure to prevent an offence is also stipulated by Austrian law (Section 286 of the Austrian StGB<sup>83</sup>), where, similarly, the Austrian regulation provides for the immunity from prosecution in the case that through prevention of the crime or by reporting it, the person concerned would breach the duty of confidentiality (Section 286 par. 2(3) of the Austrian StGB). Nevertheless, immunity from prosecution applies only in the consequences when the duty is more serious than the negative effect of the failure to prevent or failure to report the act.

*Italy:* In Italy, general law with regard to professional secrecy and disclosure may be used to report cases of criminal Acts. According to Article 361 of the Italian Penal Code<sup>84</sup>, any public officer has the duty to report any criminal offences they have been informed about, while performing their duties or because of their profession. Failing to do so, one may be fined between € 30-516. According to article 362 of the Italian Penal Code, the person in charge of delivering a public service in public bodies/institutions can also be punished via a fine up to € 103 for a failure to report. Article 365 of the Penal Code specifies that health professionals shall be prosecuted, where they fail to report information about a crime, obtained in the context of their occupational activities. This rule does not apply where reporting this activity would expose the patient to criminal prosecution. The fine is again up to € 516.

(ii) Breach of confidentiality

*Germany:* In relation to the patient, physicians may as well commit a crime by breaching their duty of confidentiality, as Section 203 of the German StGB provides for the duty to maintain personal secrecy. Therefore, if a physician publishes another person's secret (a secret related to the personal sphere of the patient concerned), which was entrusted to him during the exercise of his profession, or which the physician had learned in some other way, he or she would commit the breach of personal secrets and could be sentenced to imprisonment of up to one year or a pecuniary penalty. However, such a crime is not committed in the case that the fact was available to persons who work with the physician or co-operate with him or her in the course of vocational preparation (Section 203 par. 3 of the German StGB). Nevertheless, such persons are bound by the same duty of confidentiality, or these persons could be prosecuted for the breach of personal secrets too (Section 203 par. 4 of the German StGB).

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<sup>83</sup> Criminal code Nr. 60/1974, National designation: „Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), BGBl. Nr. 60/1974“.

<sup>84</sup> National designation: „Codice Penale (Regio Decreto 19 ottobre 1930, n. 1398; con le modifiche apportate, da ultimo, dalla L. 3 luglio 2017, n. 105, dalla L. 14 luglio 2017, n. 110 e dalla L. 23 giugno 2017, n. 103.)”.

*Austria* The Austrian StGB explicitly recognizes the duty of confidentiality and directly regulates the breach of personal secrets related to the health of a person. Under Section 121 of the Austrian StGB a physician commits a crime by publishing or using information that has been entrusted or made available to him in respect of his profession and the publication or use may violate the legitimate interest of the person concerned. Persons assisting the physician may also commit such an offence or those involved in his/her professional activities as a part of their vocational training (Section 121 par. 4 of the Austrian StGB).

*Luxembourg:* Provisions imposing the duty of confidentiality are also contained in the Criminal Code of Luxembourg in Article 358 that prohibits, except for cases stipulated by law<sup>85</sup>, to provide any information acquired by the physician in the course of the performance of their work. With regard to Article 18 of the Act of 24 July 2014 on the Rights and Obligations of the Patient, the same duty applies to the listed confidants of the patient of persons accompanying the patient. Section 23 par. 2 of the Code of Criminal Procedure of Luxembourg (code de procédure pénale (StPO) provides for the reporting obligation only for civil servant doctors or doctors in the public service. As regards to child patients, attention should be given to the regulation for the protection of minors (loi du 10 août 1992 relative à la protection de la jeunesse).

*Croatia:* The criminal punishment of an unauthorised disclosure of a professional secret is regulated in the Article 145 of the Croatian Penal Code<sup>86</sup>. Under this Article an attorney-at-law, notary, public healthcare worker, psychologist, employee of a welfare institution, religious confessor or another person who discloses without authorisation a piece of information about the personal or family life confided to him or her in the performance of his other profession, shall be punished by imprisonment up to one year. There shall be no criminal offence referred to in paragraph 1 *leg cit*, if the secret was disclosed in the public interest or the interest of a third party, which prevail over the private interest. The criminal offence referred to in paragraph 1 shall only be prosecuted upon request.

*Poland:* Article 266 of Polish Penal Code<sup>87</sup> stipulates that whoever, in violation of the law or obligation he has undertaken, discloses or uses information with which he has become acquainted with in connection with the function or work performed, or public, community, economic or scientific activity pursued shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. A public official who discloses to an unauthorised person information, which is an official secret or information with which he has become acquainted during the performance of his official duties and whose disclosure can endanger a legally protected interest,

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<sup>85</sup> E.g. in the case of a subsequent medical examination.

<sup>86</sup> "Penal Code" (NN 110/97, 27/98, 129/2000, 51/2001, 111/203).

<sup>87</sup> National designation: „Ustawa o Kodeks karny (z dnia 5 lipca 2016 r.)”.

shall be subject to the penalty of deprivation of liberty for up to 3 years. The prosecution of the offence shall occur only on a motion of the injured person.

*Italy:* According to the Italian Penal Code<sup>88</sup>, the breaching of the confidentiality is allowed only for a right reason. Art. 622 par.1 criminalizes whoever discloses confidential information or secrets, that he has gained knowledge of through his/her job, office or profession, without a right reason, or uses it for one's own or another's' profit. The perpetrator is punished, if the illegal act causes damage, with imprisonment up to 1 year or a fine between € 30-516. Art. 200 par. 1 of the Criminal Procedure Law guarantees the professional confidentiality for some subjects, e.g. lawyers, priest or doctors. Nevertheless, the Italian law can allow exceptional breaches of the professional confidentiality (compare for example art. 365 of Italian Penal Code, requiring to the medical personnel to inform the law enforcement authorities if they discover during his work that a crime has been committed).

*Slovenia:* The Slovenian Criminal Code<sup>89</sup> determines that whoever uses personal data, processed in accordance with the law, for the purpose other than for which they were obtained, or without obtaining a personal consent of the individual to whom the personal data relate, shall be punished by a fine or sentenced to imprisonment for up to one year. The same sanctions are envisaged with respect to a criminal offence of breaking into a computer filing system with a purpose to obtain personal data. Moreover, the Criminal Code determines that publishing personal data of a victim of a criminal offence, a victim of breach of rights and liberties or a protected witness is also a criminal offence for which a perpetrator shall be sentenced to imprisonment up to three years (Article 143 of the Criminal Code).

## 2. Procedural Criminal Law – Refusal of testimony

Parallel to the Criminal Code, the issue of criminal-law relationship between a patient and a physician is regulated by the Code of Criminal Procedure. The same as in civil proceedings, within the criminal proceedings doctors also have the right to refuse to testify.

*Germany:* As persons who, in the context of the pursuit of their profession, have learned information considered being a secret, they are provided with this right under Section 53 par. 1(1) of the German Code of Criminal Procedure (Strafprozeßordnung, StPO<sup>90</sup>). However, they do not have the right to refuse testimony in the case that their duty of confidentiality was removed from them

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<sup>88</sup> National designation: „Codice Penale (Regio Decreto 19 ottobre 1930, n. 1398; con le modifiche apportate, da ultimo, dalla L. 3 luglio 2017, n. 105, dalla L. 14 luglio 2017, n. 110 e dalla L. 23 giugno 2017, n. 103.)”.

<sup>89</sup> Official Gazette of Republic of Slovenia, No. 55/2008 as amended.

<sup>90</sup> Criminal procedure code from 7. April 1987 - changed by the law from 30. October 2017, National designation: „Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist“.

(Section 53 par. 2 of the German StPO). The right to refuse testimony applies also to persons assisting the physician or those involved in his/her professional activities as a part of their vocational training (Section 53a of the German StPO). In view of the physician's duty to maintain confidentiality and the duty to maintain documentation related to relevant data, it is logical that the prohibition of seizure applies to the documentation as well. Under provisions of Section 97 par. 1 of the German StPO written documents and other medical documentation cannot be seized. This restriction does not apply e.g. in a situation in which the physician is suspected of having participated in the commission of a crime (Section 97 par. 2 of the German StPO).

*The Czech Republic:* Also, the Czech Code of Criminal Procedure<sup>91</sup> governs the issue of interrogating a witness. The same as the German regulation, it prohibits an interrogation if such interrogation would be in breach of the duty of confidentiality imposed or recognized by the State (Section 99 of the Czech Code of Criminal Procedure). However, the Czech regulation also stipulates the prohibition of interrogation, if the person concerned was exempted from this duty by a competent authority or by the person in whose interest the duty is exercised (Section 99 par. 2. of the Czech Code of Criminal Procedure). In that respect, Section 78 of the Czech Code of Criminal Procedure, which provides for the obligation to submit or surrender an item, this obligation not applying to documents or other tangible mediums containing a video, audio, or data recording with content that relates to the circumstance prohibiting interrogation (78 par. 2 of the Czech Code of Criminal Procedure). Nevertheless, even there may be a waiver of the obligation to maintain the thing in secrecy or the waiver of the obligation of confidentiality. A document (medical records) can be surrendered by the physician only in the case that the patient would remove the obligation of confidentiality from the physician.

*Austria:* The Austrian legal regulation also respects the obligation of confidentiality regarding the facts entrusted to the person with regard to his or her profession and therefore it guarantees the right to refuse testimony. In Section 157 par.1 (3) of the Austrian Code of Criminal Procedure (Strafprozeßordnung, StPO<sup>92</sup>) the right to refuse testimony is granted only to physicians specializing in psychiatry and psychotherapists (and other non-medical professions). With regard to the circumstances that they had learned in the course of exercising their profession, it is not possible to circumvent the right to refuse testimony (under the sanction of invalidity) e.g. by confiscating medical records or interrogating persons working with the physician (Section 157 par. 2 of the Austrian StPO). Other persons who would have to disclose highly sensitive information about another person during

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<sup>91</sup> Act No. 141/1961 Coll., on Criminal Judicial Procedure (Code of Criminal Procedure), as amended.

<sup>92</sup> Criminal procedure law, National designation: „Strafprozeßordnung 1975 (StPO), BGBl. Nr. 631/1975“.

the interrogation cannot refuse testimony as such, however, in accordance with the provisions of Section 158 par.1(3) of the Austrian StPO, they can refuse to answer specific questions.

### *3. Procedural Criminal Law – Physical examination, expert witness*

*Germany:* The German Code of Criminal Procedure (StPO<sup>93</sup>) regulates the "physical examination" (Sections 81a-81d) and the "expert witness" (Sections 72 et seq.) in separate regulations. In this context, a doctor (Sections 81a [1], 81c [2]) – not necessarily a forensic doctor – may be ordered by the prosecution authorities to carry out a clinical forensic examination. For the purpose of securing evidence and on the basis of a court order, blood samples and other physical examinations may be conducted on an accused person without his consent, provided that no health risk is to be feared (Section 81a [1]). Another person (e.g. the victim) may also be examined or their blood samples and other withdrawals may be obtained without their consent, as far as traces to investigate the crime on their bodies are sure to be secured and no health-related disadvantage is to be feared (Section 81c paragraphs 1 and 2 StPO). Although these other persons have – unlike the accused – a right of refusal, a physical examination can also be indirectly enforced based on a judicial approval by fines and even coercive means (Section 81c [5]-[6]). In relation to clinical-forensic methods for imaging, the German StPO does not differ between the use of ionizing (CT, X-Rays) or non-ionizing radiation (MRI).

*Slovakia:* There are no generally binding legal regulations for a physical examination. The Ministry of Health issued in 2012 professional guidance No. 43/2012 on the symptoms and diagnosis of neglect, maltreatment or abuse of minors and on the approach of healthcare providers to reporting suspected negligence, abuse or abuse of minors.

The aspects of the compulsory examination and legal regulation by the Slovak Criminal Procedure<sup>94</sup> are combined with the opinion of the police to obtain the necessary data from the health care providers directly under the Section 3 of the Code of Criminal Procedure. Additionally, under Section 141, it may obtain a written confirmation of facts and the forensic expert as expert witness may be obtained by the police or prosecutor's office under Sections 142-156.

*Austria:* Moreover, the Austrian Code of Criminal Procedure (StPO<sup>95</sup>) expressly mentions the profession of a physician in the context of carrying out a personal search (Section 117 No. 3 lit b in conjunction with Section 121 par. 3) or a body search (Section 117 No. 4 in conjunction with Section 123 par. 5 of the StPO). A doctor – usually a forensic doctor – is ordered by the public prosecutor

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<sup>93</sup> National designation: „Strafprozeßordnung (StPO) v. 7.4.1987, BGBl I 1074, 1319, zuletzt geändert durch Art. 11 Abs. 17 G v. 18.7.2017, BGBl I 2745“.

<sup>94</sup> Act No. 301/2005.

<sup>95</sup> National designation: „Strafprozeßordnung 1975 (StPO) BGBl 1975/631 idgF BGBl I 2016/121“.

based on of a court approval (Section 123 par. 3) to conduct a clinical-forensic examination in form of a “body search”, if the requirements of Section 123 par. 1<sup>96</sup> are met. In practice, this order is combined with the doctors’ appointment as an expert witness (Sections 125 No. 1, 126 et seq.). Concerning imaging methods, the StPO does not mention those *expressis verbis*, but they could be subsumed under the legal definition of a “body search” in Section 117 No. 4.<sup>97</sup> Nevertheless, methods based on ionizing radiation are not applied, because of legal concerns arising from the general prohibition of Section 4 par. 3 of the Austrian Radiation Act<sup>98</sup>, which forbids the use of ionizing radiation outside medical indication. A forensic examination forced by coercive means is legally just possible on a suspect under certain further conditions described in Section 123 par. 4 sentence 3 StPO. A victim of a crime can never be forced to endure a coercive examination or an examination without his/her informed consent (Sentence 2 leg cit)

*The Czech Republic:* In the Czech Republic “body examination and other measures” (Section 114 of the Czech Criminal Procedure Code<sup>99</sup>) is included within law for experts (Section 111). Its purpose is to clarify, “if there are matters of fact substantial for criminal proceedings” (Section 113). Therefore, everyone is required to be subjected to a body examination, “if it is necessary to find any traces or effects of the criminal offence on their body”; a body examination can only be performed by a person of the same sex, unless it is carried out by a physician (Section 114/1). A blood test or other similar action has to be tolerated, “if it is not associated with any risk to their health”; other measures like the collection of biological material, which do not interfere with the physical integrity of a person, can be performed by said person, with her consent by the competent law enforcement authority or on the accused at request of the law enforcement authority by a physician or healthcare professional even without their consent (114/2). “If the evidence requires the determination of the identity of the person who remained at the crime scene, the person in question is obliged to submit to the necessary actions for such findings” (114/3). Coercive measures can be applied in a proportionate manner on the accused to gather evidential findings within Section 114, on a prior approval of the public prosecutor to overcome the resistance of the accused (114/4); the person must be instructed on their obligations under the preceding sections with the notification of the consequences of non-compliance (114/5).

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<sup>96</sup> „A physical examination is allowed if (1.) it is to be assumed on the basis of certain facts that a person has left traces whose securing and investigation are essential for the investigation of a criminal offense, (2.) it is to be assumed on the basis of certain facts that a person conceals objects in the body which have to be secured, or (3.) facts which are of decisive importance for the investigation of a criminal offense or the assessment of the mental ability can not otherwise be ascertained.“

<sup>97</sup> „the examination of body orifices, the drawing of a blood sample and **any other interference with the physical integrity of individuals**“.

<sup>98</sup> National designation: „Bundesgesetz über Maßnahmen zum Schutz des Lebens oder der Gesundheit von Menschen einschließlich ihrer Nachkommenschaft vor Schäden durch ionisierende Strahlen (Strahlenschutzgesetz – StrSchG) BGBl 1969/227 idgF BGBl I 2015/133“.

<sup>99</sup> Act No 141/1961.

The examination transcript must provide a full and fair picture of the examination subject; therefore, photographs, drawings and other aids are to be attached to it (Section 113/2).

*Croatia:* The regulations for a “physical examination” Croatian Criminal Procedure<sup>100</sup> (Articles 324, 326) are included within the law for an “expert witness” (Art 308-328). Therefore, the expert witness testimony on bodily injuries should in principle be based on a physical examination of the injured person or an evaluation of medical documentation or other data stated in the files (Article 324/1). “After accurately describing the injuries, the expert witness shall give his expert opinion particularly on the type and severity of each injury and their overall effect regarding the nature or particular circumstances of the case, as well as on what effect these injuries usually have and what effect they had in this specific case, and by what instrument they were inflicted and in which way” (Article 324/2). An expert in conducting a physical examination and/or evaluating injuries is ought to be – even though not explicitly stated – a medical professional.

According to the Article 326/1 a physical examination of the accused can be carried out without or against his will, “if it is necessary to determine facts relevant to the criminal proceedings. The scope of applicable measures is described as the taking of blood samples and “other medical procedures performed according to the rules of medical science in order to analyse and determine other relevant facts for the proceedings provided no detrimental health consequences (Article 326/3). Other persons have to tolerate a “physical review” without their consent only, “if it is necessary to determine whether there is a certain trace or consequence of an offence on his body” (Article 326/1). The measures described in Article 326/3 can only be conducted on other persons after their informed consent (Article 326/4). Again it seems a question of interpretation of national law, if imaging methods based on ionizing (CT, X-rays) and non-ionizing radiation (MRI) or only the latter are applicable.

*Poland:* The Polish Criminal Procedure Act<sup>101</sup> regulates the expert witness law (Articles 193-206) and the “physical examination” (Articles 207-208) formally separate. The material conditions for a physical examination, an inspection of a place or an object are described very vaguely with the wording “if necessary” (Article 207 Section 1). Further Article 208 only states, that a physical inspection or examination should be conducted by a person of the same sex – unless this involves some special difficulties –, because it could evoke feelings of shame; a person of the opposite sex may be present during the examination only in exigent circumstances.

Rules about the scope of measures for a physical examination are not included in the Polish Criminal Procedure; hence, fundamental rights – in light of their interpretation – have to serve as limit for a justified intervention. Further, Article 208 does not differ between accused or other persons.

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<sup>100</sup> National designation: „Zakon o kaznenom postupku (NN 152/08, 76/09)”.

<sup>101</sup> National designation: „Ustawa o Kodeks postępowania karnego (z dnia 6 czerwca 1997 r.)”.

*Sweden:* Under Chapter 28 Section 12 of the Swedish Criminal Procedure Code<sup>102</sup>, a person reasonably suspected of an offence for which imprisonment may be imposed may be subjected to a body examination for the purposes stated in Section 11 against or without his consent. Body examination means the examination exterior or interior of the human body and also the taking of samples from the human body and examination of such samples. A body examination may not be conducted in such a way as the examinee is at risk as regards future health or injury. One could argue the usage of clinical imaging methods, either ionizing (CT, X-rays) and non-ionizing (MRI) or only the latter. The person who shall be subject of body examination may be held for the purpose for up to six hours or, if there are extraordinary reasons, a further six hours.

Further, according to the Section 13, the applicable provisions in Sections 3a, 4, 8, and 9 of Chapter 28, governing search of premises, shall apply to body searches and body examinations. A body search or body examination may be decided by a police officer, if delay entails risk. A more extensive search or examination shall be performed indoors and in private. If it is performed by anyone other than a physician, a reliable witness commissioned by the officer conducting it, shall be present whenever possible. Only a physician or an accredited nurse may draw a blood sample. Only a physician may perform a more extensive examination. Only a female, a physician, or an accredited nurse may perform or witness a body search or a body examination performed on a female. However, a body search only involving the examination of something a woman has with her and body examination which only involves taking blood samples alcohol breath test may be executed and witnessed by a man. A person arrested or detained may be photographed, and fingerprinted; he may also be subjected to any similar measure (Section 14). Another person may be subject to such measures, if it is necessary to obtain information about an offence punishable by imprisonment.

*Luxembourg:* There is a general regulation in § 87 of the Criminal Procedure Code of Luxembourg<sup>103</sup> about the appointment of experts due to a court approval, but there is no special legal regulation about a “physical examination”. Hence, the law does not differ between a victim or an accused; for a physical or clinical forensic examination, the person to be examined has to give his/her informed consent. An examination against his/her will is not allowed (except for DNA-specimens: § 48 (3) Criminal Procedure Code of Luxembourg). Imaging techniques have to be applied according to the courts approval.

*Slovenia:* In Slovenia, “physical examination” is regulated within the chapter for an “expert opinion” (Articles 248-267 of the Slovenian Code of Criminal Procedure<sup>104</sup>. On the accused it can

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<sup>102</sup> Swedish Code of Judicial Procedure (1942:740).

<sup>103</sup> National designation: „Code de procédure pénale, version consolidée au 5 septembre 2017 ».

<sup>104</sup> National designation: „Zakon o kazenskem postopku (Uradni list RS, št. [32/12](#) – uradno prečiščeno besedilo, [47/13](#), [87/14](#), [8/16](#) – odl. US, [64/16](#) – odl. US, [65/16](#) – odl. US, [66/17](#) – ORZKP153,154 in [1/19](#) – skl. US)”.

even be performed without his/her consent, “when it is necessary to establish evidential material for criminal proceedings.”; the same applies to “other persons” as a last resort, “if a particular trace consequential for a criminal offence has been left on their body” (Article 266 Section 1). The “taking of blood samples and other medical procedures normally undertaken for the analysis and determination of other facts may be performed without the consent of the person being examined, except where such procedures would be harmful to his health” (Section 2 leg cit). With the persons’ health as limit of possible medical interventions, imaging methods based on non-ionizing radiation (MRI) can be applied; if ionizing methods are applicable, is up for discussion. “The application of medical interventions, which could influence their will, when giving testimony, on the accused or a witness shall be prohibited” (Section 3 leg cit). As for the clinical forensic examination of victims, Article 264 explicitly states, that an injured person is ought to be examined, if possible, for evidential reasons.

No mention is made within the Slovenian Code of Criminal Procedure, if a physical examination is to be conducted by a (special trained) doctor, the terminology simply calls for an “expert”.

*Italy:* A clinical forensic doctor conducts a clinical forensic examination in Italy within criminal proceedings under the title of „physical examination“ (Articles 244-245, 247, 249 of the Italian Code of Criminal Procedure<sup>105</sup>) or as an “expert“ (Art. 218 ff.). Imaging methods can be subsumed under measures for a „physical examination“. A distinction between measures on the victim or on the accused person is not made; the limit for permissible measures is simplyly the „human dignity“ (Article 245 Section 2, Article 249 Section 2).

*Rumania:* The Rumanian Code of Criminal Procedure<sup>106</sup> describes in detail the forensic examination of a person (Article 189) either on the basis of a physical examination (Article 189/3 icw Article 190) or on the basis of medical data (Article 189/3) as part of the law for an „expert witness“ (Articles 172-191). The physical examination serves the puropos of detecting evidential traces and consequences of a criminal act (Artilce 189/1) and includes an external as well as internal physical examination and biological sampling (Article 190/1). Formal requirement is the prior (informed) consent of the person to be examined on request of the law enforcement agencies. Without or against the persons’ will or consent, a judge can order a physical examination, if it is „necessary to establish facts or circumstances that ensure the proper conduct of criminal prosecution or to determine whether a particular offense or consequence of the offense can be found on or within the body“ (Article 190/2).

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<sup>105</sup> National designation: „Codice di Procedura Penale (D.P.R. 22 settembre 1988, n. 447; con le modifiche apportate, da ultimo, dal D. Lgs. 3 ottobre 2017, n. 149, dalla L. 3 luglio 2017, n. 105, dalla L. 14 luglio 2017, n. 110 e dalla L. 23 giugno 2017, n. 103.)”.

<sup>106</sup> National designation: „Codul de procedură penală din 2010, în vigoare de la 1 februarie 2014”.

At this point, the law does not differ between a forced physical examination of an accused or another person.

A physical examination – except for a non-invasive collection of biological samples for the purpose of genetic assessments – may only be carried out by a (forensic) doctor, a nurse or a person with specialist training (Articles 189/2 icw 190/7). With regard to examination methods (e.g. imaging), no explicit indication can be found within the Rumanian Code of Criminal Procedure. By ministerial order<sup>107</sup>, it is the task of each hospital with forensic expertise to adhere to the principles of forensic science and to issue their own codes of conduct.

Despite the difficulties in the collection of data for clinical-forensic examinations (see Chapter II), the legal situation in eleven EU Member States has been ascertained at the level of criminal proceedings. It was noticeable that most countries know the legal institution of a “physical examination” within their respective criminal procedure codes (exception: Slovakia, Luxembourg). For the most part, this institution is closely connected to the law of an “expert witness”, so that it usually forms a sub-chapter of it (The Czech Republic, Croatia, Slovenia, Romania). Nevertheless, there are legal systems which formally govern “expert witness”-law alongside the institution of a “physical examination” (Austria, Germany, Poland, Sweden, Italy).

Striking is above all the different design of the legal institution of the "physical examination": While some states enumerate in long and detailed norms material and formal conditions (e.g. Austria, Germany, The Czech Republic, Romania), some are limited to short and sometimes extremely indeterminate (and thus in need of interpretation) legislation (eg Italy, Poland).

Furthermore, there are differences in the possible target group for a “physical examination“. The basic rule is that a physical examination can always be carried out (in compliance with the formal regulations of the respective Code of Criminal Procedure) after an informed consent of the person concerned. Differences exist above all in an examination without or against the will of the person concerned. Here, some legal systems differentiate between an accused and other persons, while others do not (Romania, Italy, Luxembourg, Poland, The Czech Republic, Slovakia). In the case of the former, the differentiation means that a compulsory investigation against other persons may not be carried out at all (Austria, Sweden) or under conditions other than on the accused (Slovenia, Germany, Croatia); in the case of the latter, coercive means are possible against everyone.

Finally, with regard to the methods, it can be concluded that they are not defined at all or only indirectly in the law; imaging methods are never mentioned by law. Thus, it is left to the practice of

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<sup>107</sup> National designation: „ORDIN nr. 1.134/C din 25 mai 2000 pentru aprobarea Normelor procedurale privind efectuarea expertizelor, a constatărilor și a altor lucrări medico-legale”.

forensic medicine and the interpretation of national law, which (imaging) methods and measures may be used for a physical examination.

#### **F. Outcome from the research - standards platforms**

From the research and information sent by partners of the project it is possible to formulate following outstanding basic aspects of the legal reflection for the protection of victims and also for forensic medicine. It is clear, that the medical scientific staff has a lot of knowledge concerning the procedures of medical and forensic treatments. But it is also evident, that there is a lack of sufficient knowledge and reflection of the legal regulations concerning victim treatment for forensic purposes. Not only from the questionnaire of the project JUST<sub>e</sub>U!, but also from the research concerning findings in written scientific or materials, it is obvious, that there is a good knowledge of the methodology and medical aspects of legal and forensic methods in the field of protecting victims, but the reflection of legal system and also important legal regulations seems to be only informative and taken as something what is existing, but not as a part of obligatory knowledge.

Standards of the research field – legal knowledge combined with forensic and legal medicine, should be organized and prepared in three platforms.

*The first one* is presented by the state responsibility for the content of legal order and sufficient legal regulations for all correspondent and important procedures and activities concerning protection of victims and legal and forensic medicine. The research shows, that on this platform the basic institutes of the relationship between patient and physician are involved in most of the modern European legal systems. The aspects of the confidentiality, human rights, that the protection, preparing reports and the obligations concerning the information's duties are present. The relationship between the patient and the physician is in most of the legal systems regulated by civil law as a common or specific type of contract. Some countries have prepared special laws for the regulation of the relationship between the physicians and the patient like Luxembourg. Important and not realized in all European countries is also a special regulation for the protection of children and victims of criminal acts. Some countries have not only special laws for protection of victims or protection of children, but also a combination of such a field of protection interests, special law for children and comprehensive teams for criminal acts such as Ireland. The legal system and most of the analysed legal orders seems to be sufficient. The question of the future development is combined with the relevant intensity of the victims' protection.

*The second* platform of minimum standards in the European Union countries is presented by the sum of knowledge and the educational system for practitioners in the sphere of forensic and legal medicine. The importance of the current situation in the legal systems of the European Union member states is given. But without sufficient knowledge of the existing ethical and jurisprudence aspects governing medical law questions, it will be non-functional. The second platform has to be reflected as responsibility of the state, education system and also public and private institutions. The granted field of knowledge should include the legal framework of practice, patient rights, responsibility by application of therapeutics, rights of authorization to prescribe, duties of treatment, consensual aspects of treatment involved the informed consent and also the limitations of the diagnostic procedures governed civil or criminal law. The necessary knowledge of collecting evidence, medical malpractice responsibility, duties and legal demands in hospitals and emergencies combined with the knowledge of necessary confidentiality, data protection in the sphere of civil and also criminal law system should be established.

Also aspects of competent and precise reports to state authorities, bodies of criminal procedures, relevant private bodies and institutions shall be provided. Often forgotten are aspects of the legal sphere of procedures with subjects examined in detention, aspects of the legal status of the medical expert himself and the legal regulation of the consequences of medical actions. Most important are also pre-prepared and legally correct reports in the form of pre-consulted forms for specific public authority or institution. Those prepared forms show and describe results and findings corresponding with the needs of the reflected public interest.

*The third platform* seems to be completely forgotten: It is a platform of the corresponding knowledge and information of the patient as victim or victim as patient. Private activities and also public institutions are presenting the rights of victims and the fight for protection of special kind of interest in the sphere of human rights, but the basic patient knowledge platform is not reflected as a part of educational and maybe also lifelong learning system. This platform could be presented as a sum of active reached information - the state has to enable the integration of its citizens in the field of the medical and also legal medicine aspects and combine those aspects with necessary steps on the field of children protection.

Not only in criminal proceedings, where those aspects are mentioned really often, but also in civil proceedings it is necessary to establish a correspondent system of child friendly procedures in cases, where children are involved as victims, witnesses or parties. Not only for medical professionals but also for the professional staff in the field of justice and security it is necessary to ensure the correspondent system and equipment for the engagement with children. The right of children to protection and privacy has to be combined in a useful way with non-discrimination in medical

treatment touched by criminal aspects and civil proceedings. In such a system, it would be possible to follow the best interest of the child as victims of crime. Corresponding to the children needs, it is necessary to reduce the length of proceedings in the criminal and also civil matters. It is also necessary to ensure the protection of all rights of children, especially the right to information, where children have to be appropriately formed with the help of information materials, prepared reflecting the childrens' age and needs. On the other hand the passive field of information shall be realized and guaranteed before the relationship between patient and physicians has been established.<sup>108</sup>

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<sup>108</sup> For some related aspects of the child friendly justice see for details at: <http://fra.europa.eu/en/publication/2017/child-friendly-justice-childrens-view> (1.2.2019).

**G. Annexes***1. JusteU! – QLaw***1.) Are there any legal regulations for doctors, when dealing with a victim of violence?**

No

Yes, in the Doctors code

Yes, in Criminal Procedure Law

Yes, in other (federal) legal sources

**1.a.) Please provide the legal source**

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**1.b.) Are there different legal regulations for doctors, when dealing with a victim of violence, on a regional level?**

No

Yes, in regional regulations for doctors

Yes, in regional regulations for Criminal Procedure Law

Yes, in other regional legal sources

**1.c.) Please provide the legal source**

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**2.) Are there any legal regulations for health-care professionals (eg nurses, excluding doctors), when dealing with a victim of violence?**

No

Yes

**2.a.) Please provide the legal source**

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**3.) Is there a duty to secrecy when examining a victim of violence?**

No

Yes

**3.a.) Please provide the legal source**

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**4.) Do the above mentioned legal regulations include a duty of disclosure or an obligation to report to the security authorities in certain cases of physical and/or sexual violence for the doctor?**

No

Yes

**4.a.) Please provide the legal source**

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**5.) Is there an obligation to notify a youth welfare authority when dealing with a case of physical or sexual violence against a child?**

No

Yes

**5.a.) Please provide the legal source**

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**6.) Are there different regulations for adults and minors in terms when dealing with a victim of violence?**

No

Yes

**6.a.) Please provide the legal source**

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**7.) Are there any legal consequences for physicians, when above mentioned duties/obligations are neglected?**

No

Yes, disciplinary consequences

Yes, consequences under private law

Yes, criminal consequences

Yes, administrative consequences

**7.a.) Please provide the legal source**

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**8.) Are there legal regulations concerning how to perform a physical examination in criminal proceedings?**

No

Yes

**8.a.) Please provide the legal source**

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**9.) In criminal proceedings, is it compulsory that a forensic expert conducts the physical examination?**

No

Yes

**9.a.) Please provide the legal source**

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**10.) In terms of conducting a physical examination, does the law of criminal procedure differentiate between victim and suspect?**

No

Yes

**10.a.) Please provide the legal source**

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**11.) Is it in some cases allowed to conduct a physical examination of the suspect without informed consent?**

No

Yes

**11.a.) Please provide the legal source**

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**12.) Are imaging techniques used for the clinical-forensic examination?**

No

Yes

**12.a.) Which imaging techniques are used?**

\_\_\_\_\_

**12.b.) Is there a separate regulation for the application of imaging techniques for a physical examination within the context of criminal proceedings?**

No

Yes

**12.c.) Please provide the legal source**

\_\_\_\_\_

**13.) Is there a difference between the application of ionizing and non-ionizing radiation?**

No

Yes

**13.a.) In case, there is a difference, please name it \_\_\_\_\_**

**14.) Can the application of imaging techniques be subsumed under the term “physical examination” in a legal sense?**

No

Yes

**15.) What are your recommendations for a clarification of the legal regulations for doctors when dealing with cases of violence?**

\_\_\_\_\_

