

# FROM PATERNALISM TO AUTONOMY. THE EVOLUTION OF REGULATIONS REGARDING THE PATIENT'S CONSENT FOR TREATMENT IN POLISH LAW

Marcin Janosz

Uniwersytet Jagielloński, Wydział Prawa i Administracji, Katedra  
Powszechnej Historii Państwa i Prawa  
ORCID ID: 0000-0001-8260-0787

Marian Filar, in his reflections on the legal (criminal) responsibility of a physician, aptly highlighted several basic possibilities, stating that 'a physician exposes himself to such a responsibility in three typical situations:

- when he does not treat, although he should,
- when he treats not the way he should,
- when he treats, although he shouldn't.<sup>1</sup>

The starting point for the outline contained in this study is the third of the above-mentioned situations. The problem of the legality of treatment without authorisation of the patient has been for many years arousing numerous controversies of both axiological and legal nature.

The central issue of all the considerations carried out in this respect is determination of what is the value of the individual's right to self-determination in a given legal system, what are the limitations of this right, if any, and what is the relation of this right to values such as life or health.<sup>2</sup>

In medical practice, certain situations require making a difficult

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<sup>1</sup> M. Filar, *Lekarskie prawo karne*, Kraków 2000, p. 18. Unless otherwise stated, the English translations of the quotes contained in this study have been made by me (M.J).

<sup>2</sup> A. Zoll, *Teza 1 komentarza do art. 192 [in:] Kodeks karny. Część szczególna. Komentarz*, Vol. II. Part 1: *Komentarz do art. 117–211a k.k.*, eds. W. Wróbel, A. Zoll, Lex 2017.

choice between two significant principles often expressed in Latin maxims: ‘*salus aegroti suprema lex est*’ (‘the patient’s health shall be the supreme right’), originated from the medical ethics of Hippocrates, on the one hand, and ‘*voluntas aegroti suprema lex est*’ (‘the patient’s will shall be the supreme right’) on the other hand.<sup>3</sup> The sense of these two principles is similar: the welfare of the patient should always be the overriding goal for the physician while undertaking the treatment. Sometimes, however, in the event of a conflict between the patient’s position and the urgent need to save his or her health or even life, simultaneous observance of them both is excluded. Then, ethical and legal dilemmas inevitably arise – which of these principles shall take precedence.

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The traditional model of medicine practice was undoubtedly based on paternalistic relations, assuming the patient’s subordination to the physician. The key ethical principles taken into account in the treatment process were the already mentioned ‘*salus aegroti suprema lex est*’, prioritising the patient’s health and ‘*primum non nocere*’ (‘first, do no harm’).<sup>4</sup>

According to Thomas Percival – an English physician living at the turn of the eighteenth and nineteenth centuries, who is considered to be the creator of the first professional medical code of ethics – the above principles set the limits of the most important medical duties and, in the event of a serious conflict, they shall take precedence over patients’ preferences and their rights.<sup>5</sup> An even more radical view was formulated in 1935 by Lawrence Joseph Henderson in his article entitled *Physician and Patient as a Social System*. According to the author, too much respect for the rights of the patient, resulting from his autonomy, may turn out to be dangerous, because it may not take into account the medical prognosis and, as a consequence, it may endanger the health of the patient.<sup>6</sup> An illustration of this approach may be

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<sup>3</sup> The English translations of the Latin phrases quoted in this study have been made by me (M.J) on the basis of publicly available (e.g. on the Internet) Polish translations.

<sup>4</sup> J. Pacian, A. Pacian, T.B. Kulik, P. Flieger, K. Kowalczyk, *Regulacje prawne dotyczące zgody pacjenta na czynność medyczną*, „Przegląd Prawa Publicznego” 2012, No 7–8, p. 9.

<sup>5</sup> The first version of this document was published under the title *Medical Jurisprudence* in 1794. The extended version, entitled *Medical Ethics or Code of Institutes and Precepts Adapted to the Professional Conduct of Physicians and Surgeons*, was published in 1803.

<sup>6</sup> See [online:] <https://www.nejm.org/doi/full/10.1056/NEJM193505022121803> (access: 30/11/2020). The author was an American physiologist, chemist, biologist, phi-

complemented by an example taken from the Polish medical code of ethics of the late nineteenth century, adopted by Warszawskie Towarzystwo Lekarskie (the Warsaw Medical Society) under the name *Zasady Obowiązków i Praw Lekarzy* (*The Principles of Duties and Rights of Physicians*), whose Article 11 stated that the physician can rightly demand from the patients to fulfil everything that he believes is beneficial to their health.<sup>7</sup>

Of course, the phenomenon of paternalism in medicine should not be assessed in isolation from the context of a number of factors that justified the idea of the dominant position of the physician in relations with his patients. Undoubtedly, the basis of the described attitude was often a strong moral imperative, resulting from the content of the call of each physician, according to which health and human life should be protected in the first place. It is also significant that a physician is usually expected to provide an effective medical help as soon as possible. Therefore, it seemed natural to believe that the patient, entrusting himself to the professional care of the physician, should trust him fully and comply with all his recommendations.

Despite the undoubtedly practical relevance of the above-mentioned factors, the paternalistic model of medicine practice was subjected to clear criticism over time. It was particularly evident on European and American grounds – both in the theoretical reflections on broadly understood medical law as well as in judicial decisions. As a good illustration of the emerging tendency to respect the patient's autonomy can serve the precedent-setting judgement of the New York Court of Appeals issued in the case of *Schloendorff v. Society of New York Hospital* of 1914, in which the Court stated clearly that 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.'<sup>8</sup>

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losopher, sociologist and longtime professor at Harvard University. See [online:] [https://en.wikipedia.org/wiki/Lawrence\\_Joseph\\_Henderson](https://en.wikipedia.org/wiki/Lawrence_Joseph_Henderson) (access: 30/11/2020).

<sup>7</sup> As quoted in: R. Kubiak, *Prawo medyczne*, Warszawa 2010, p. 335. Unless otherwise stated, the English translations of the Polish terms, proper names and titles quoted in this study have been made by me (M.J.).

<sup>8</sup> As quoted in: P. Sobolewski, *Zgoda na zabieg medyczny*, [in:] *System prawa medycznego*, vol.1: *Institucje prawa medycznego*, eds: M. Safjan, L. Bosek, Legis 2017.

Critics of paternalism pointed out that in the approach so far adopted the patient was often just the subject of medical procedures, often undertaken by a physician in an entirely or at least largely arbitrary manner. The acceptance of such a model not only excluded the possibility of a partnership cooperation between these individuals, but above all it meant that the patient's will had not much significance for the legality of the treatment carried out by the physician.

Andrzej Zoll even expressed the view that such a position was characteristic for countries with a totalitarian system, where individuals' rights were subordinated to the state's interest. To prove this thesis, the author cites the expressive statement of Kallfelz – one of the German lawyers from the Nazi Germany period – who claimed that 'Everyone who can be useful to the society shall be obliged to keep his life and maintain his capacity to serve the society. (...) This is the ideal, but also the practical duty of the people to maintain their lives and abilities, even by forcibly breaking their opposing will.'<sup>9</sup>

The view quoted above is obviously a flagrant example of justification for forced treatment. Usually, however, more sophisticated legal argumentations were used in this respect. One of them referred to the institution of the state of (higher) necessity understood as a circumstance that legitimises the sacrifice of a particular legal interest when it is necessary to save another, more valuable legal interest at the moment of an immediate danger.<sup>10</sup> It is commonly believed that health and human life occupy a very high position in the hierarchy of values, usually higher than freedom in the sense of the right to self-determination. Therefore, it was considered that in situations marked by the need to choose between these interests, the physician should be guided primarily by medical considerations and undertake the treatment even despite the patient's objection.<sup>11</sup>

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<sup>9</sup> A. Zoll, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu*, Warszawa 1988, p. 19.

<sup>10</sup> See Article 26 § 1 of the Polish Penal Code (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej [the Journal of Laws of the Republic of Poland]* of 1997, No. 88, item 553, as amended): 'Whoever acts with the purpose of averting an immediate danger threatening any interest protected by law, if the danger cannot otherwise be avoided but the interest sacrificed has a lower value than that of the interest rescued, he shall be deemed to have not committed an offence.' Unless otherwise stated, the English translations of the Polish legal regulations quoted in this study have been taken from Legislationline.org – the online legislative database operating within the structures of the Organization for Security and Co-operation in Europe.

<sup>11</sup> R. Kubiak, op. cit., p. 336.

However, the arguments described above were negatively assessed in scholarly commentaries. It was pointed out, among others, that the institution of the state of (higher) necessity can be applied only when the conflicting legal interests remain at the disposal of different persons. However, it does not apply when these interests remain at the disposal of one person. As Andrzej Zoll noticed, only the patient can decide which of the interests – health and life or the right to self-determination – is more valuable to him or her.<sup>12</sup> In addition, it was rightly pointed out that the adoption of the analysed concept could paradoxically lead to excessive responsibility of physicians, as they would be obliged to make the most serious decisions on matters related to patients' health, bypassing their will. On the other hand, the involvement of the patient, his or her acceptance of the risks associated with proposed therapy, would distribute the burden of this responsibility both on the patient and the physician.<sup>13</sup>

Above all, however, it was emphasised that the situation of the complete elimination of the patient from the decision-making process and placing him at the physician's unrestricted disposition is clearly contrary to the idea of a democratic state protecting the rights of the individuals. Referring the above view, for example, to the provisions of the Constitution of the Republic of Poland of 2<sup>nd</sup> April 1997, it can be stated that basing the whole system of individual rights on inherent and inviolable dignity of the person places the right to self-determination in a very high position in the hierarchy of values, also in respect of one's health or even life.<sup>14</sup> Therefore, in a situation where it is necessary to choose between the patient's will and the protection of his or her health or life, the right to self-determination should decide in a democratic state of law.<sup>15</sup>

In addition to purely legal arguments, the criticism of paternalism was also influenced by the progressive development of medicine itself – verifying the appropriateness of choosing given treatment methods – as well as growing health awareness of the society. With the devel-

<sup>12</sup> A. Zoll, *Odpowiedzialność...*, op. cit., p. 18.

<sup>13</sup> R. Kubiak, op. cit., p. 366.

<sup>14</sup> See Article 30 of the Constitution of the Republic of Poland (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej [the Journal of Laws of the Republic of Poland] of 1997, No. 78, item 483, as amended*): 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.'

<sup>15</sup> R. Kędziora, *Odpowiedzialność karna lekarza w związku z wykonywaniem czynności medycznych*, Warszawa 2009, p. 86.

opment of these tendencies, the idea of the infallibility of a physician and the need for unlimited trust of the patient lost its credibility. In practice, often there were cases when physicians made wrong decisions, as a result of which the patient suffered severe consequences, not being able to return to the level of health from the period preceding the medical intervention.<sup>16</sup>

The criticism of paternalism in medicine, undertaken in the name of defending the patient's autonomy, has contributed to the gradual reformation of legislation on medical issues and the principles of medical ethics. As a result, the model based on the patient's subordination to the physician was being more and more clearly replaced by a partnership model of relation, assuming that both of these entities are equal participants of the medical treatment process.<sup>17</sup>

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On the Polish ground, an approval of the approach respecting the patient's will in the treatment process was growing already in the interwar period.<sup>18</sup> By way of example, Article 37 of the Regulation of the President of the Republic of Poland of 22<sup>nd</sup> March 1928 on Health Care Institutes<sup>19</sup> stated that performing the surgery was only allowed upon the patient's consent. However, if the patient was under twenty-one years of age or 'because of his mental immaturity or his state of health he could not assess the need for surgery,' then the consent of his legal representative was required. An exception to these requirements was the situation of danger of the patient losing his life. In this case, the director of the hospital had the power to decide to carry out the medical procedure. There were administrative sanctions for non-compliance with these provisions. Almost identical provision was contained in Article 12 of the Regulation of the

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<sup>16</sup> A. Klich, *Paternalizm czy współodpowiedzialność? Stosunek lekarz-pacjent, a zgoda pacjenta na zabieg medyczny w polskim porządku prawnym* [online:] <http://www.prawoimedycyna.pl/index.php?str=artykul&cid=1031> (access: 05/03/2013).

<sup>17</sup> *Ibidem*.

<sup>18</sup> The historical outline presented herein is largely based on the findings of Renata Kędziora and Rafał Kubiak. See: R. Kędziora, *op. cit.*, pp. 17–39 and 73–78; R. Kubiak, *op. cit.* pp. 335–339.

<sup>19</sup> Rozporządzenie Prezydenta Rzeczypospolitej z dnia 22 marca 1928 r. o zakładach leczniczych (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1928, No. 38, item 382, repealed as of 15<sup>th</sup> January, 1992).

President of the Republic of Poland of 25<sup>th</sup> September 1932 on the Performance of Medical Practice.<sup>20</sup>

The Polish legislator developed this stance after the Second World War, which was reflected mostly in the relevant provisions of the Act of 28<sup>th</sup> October 1950 on the Physician Profession.<sup>21</sup> Article 17 thereof provided the requirement to obtain the patient's consent for surgery. If such a treatment was to be performed on a person who was a minor or the one suffering from mental illness or mental retardation, the position of the patient's statutory representative or actual guardian was decisive. The act in question also specified the cases in which surgery was allowed without the need of obtaining the consent of the authorised person. It was possible when the patient was unconscious or when his legal representative or actual guardian was impossible to communicate with. In such a situation, the physician was obliged to consult his decision with another physician. However, if there was no such an opportunity, he could carry out the treatment without anyone's approval. He only had to make an appropriate note in the patient's medical records.

The content of the referenced regulation was quite concise. It omitted several important issues, such as the form of the consent, the option of replacing the legal representative's objection with a court decision, or the admissibility of extending the scope of surgery previously approved by the patient. However, its introduction should be undoubtedly recognised as the right action of the Polish legislator, opening the way to more modern solutions.

The clear development of regulations regarding patient's consent dates back to the nineties of the twentieth century. This tendency undoubtedly reflected the change in political and social circumstances that took place in Poland at the turn of the eighties and nineties of the twentieth century when the need to protect the citizen rights began to be emphasised – including the individual's right to self-determination. The first legal act that expressly implemented this tendency was the Act of 30<sup>th</sup> August 1991 on Health Care Institutes, being in force un-

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<sup>20</sup> Rozporządzenie Prezydenta Rzeczypospolitej z dnia 25 września 1932 r. o wykonywaniu praktyki lekarskiej (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1932, No. 81, item 172, repealed as of 29<sup>th</sup> October, 1950).

<sup>21</sup> Ustawa z dnia 28 października 1950 r. o zawodzie lekarza (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1950, No. 50, item 458, repealed as of 27<sup>th</sup> September, 1997).

til July 2011.<sup>22</sup> The crucial regulation for the protection of autonomy in the field of treatment was contained in its Article 19, according to which the patient's rights included the right to consent to or to refuse particular medical services. Importantly, this could only take place after the person authorised to give the consent had previously obtained adequate information about the planned medical intervention.

It is worth noting that the above regulation constituted a significant modification of previous regulations in the field of expressing the consent for surgery. First of all, the legislator clearly determined that the patient's consent should be expressed only after providing him with relevant information on the planned treatment. Secondly, the requirement to obtain the consent applied to all categories of medical services, not only the surgery. Thirdly, the consent given concerned only the particular treatment, which precluded the practice of obtaining a 'blanket' consent, 'for the future' and for all the treatments deemed advisable by the physician. Fourthly, and finally, as far as language is concerned, the legislator used a more personalised concept of 'the patient' (Pol. 'pacjent') instead of – as before – 'the sick person' (Pol. 'chory') in the analysed regulation.

The right to self-determination in the field of medical interference was also the subject of lively discourse in the scholarly commentaries on criminal law, which ultimately led to specific actions of Polish legislators. Yet in older literature, it was pointed out that carrying out a medical procedure without a consent of the authorised person should result in a criminal penalty. However, there was no agreement as to what type of crime should the perpetrator be convicted of. At the same time, a stance according to which a physician who performed a medical treatment against the patient's will did not attack such legal interests as health or life, and therefore such a physician could not bear criminal responsibility e.g. for a damage to the patient's body, was strengthened. Instead, the legal interest which is violated in such circumstances is freedom, understood as the one's right to decide about their treatment.<sup>23</sup>

In connection with the above, it was postulated to introduce into the Polish criminal law a separate type of crime sanctioning medical interventions carried out without obtaining legally effective consent.

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<sup>22</sup> Ustawa z dnia 30 sierpnia 1991 r. o zakładach opieki zdrowotnej (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1991, No. 91, item 408, repealed as of 1<sup>st</sup> July, 2011).

<sup>23</sup> R. Kubiak, op. cit., p. 337.

Such a provision was already provided for in the draft Penal Code of 1963. According to Article 266 thereof, criminal responsibility was to be imposed on those who ‘perform medical treatment on another person without their consent or without consent of another authorised person or against their objection.’<sup>24</sup> Ultimately, however, when adopting the Penal Code in 1969, the legislator unfortunately gave up this solution. The deeds in question were qualified either as an appropriate offence against health or as an offence against freedom.<sup>25</sup>

However, the postulate of adopting the appropriate regulation was still raised in penal literature. The need to introduce a separate type of crime was emphasised, among others, by Andrzej Zoll. He pointed out that regulations on violation of freedom, applied in those times, were definitely not an adequate tool to protect this kind of legal interest against such a specific attack as the performance of therapeutic activities without authorisation.<sup>26</sup> Similar notions were also expressed by Agnieszka Liszewska, who suggested introducing a provision analogous to the one in force in the Austrian Penal Code. According to its Article 110, the one who ‘treats another person without his consent, even according to the principles of medical knowledge, shall be subject to criminal responsibility.’<sup>27</sup>

A separate type of crime penalising the violation of patient’s autonomy was introduced into the currently applicable Polish Penal Code of 1997 as article 192, according to which:

‘Article 192.

§ 1. Whoever performs a therapeutic treatment without the consent of the patient shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 2. The prosecution shall occur on request from the injured person.’<sup>28</sup>

<sup>24</sup> As quoted in: R. Kubiak, op. cit., p. 337. The English translation of the quoted provision has been made by me (M.J.).

<sup>25</sup> A. Marcinkowska, *Uwagi co do zgody pacjenta na zabieg medyczny jako formy ochrony autonomii jednostki oraz warunków legalności zabiegu leczniczego w rozumieniu art. 192 k.k. przy zastosowaniu telemedycyny*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza” 2017, No 97, pp. 60–61.

<sup>26</sup> A. Zoll, *Odpowiedzialność...*, op. cit., p. 30.

<sup>27</sup> As quoted in: A. Liszewska, *Zgoda pacjenta na zabieg leczniczy*, ‘Państwo i Prawo’ 1997, vol. 1, p. 36. The English translation of the Austrian regulation has been made by me (M.J.) on the basis of the Polish translation quoted by A. Liszewska.

<sup>28</sup> The English translation of the quoted provision has been taken from the legislative database referred to in footnote 10 and includes modifications made by me (M.J.).

The introduction of a separate type of crime into the Polish legal system was, to a large extent, a response to the voices of specialists expressed in professional literature, who had been signalling the need for such a regulation much earlier. On the other hand, it was an expression of a broader tendency manifested in the development of regulations regarding the patient's autonomy in the nineties of the twentieth century.

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Under the current Polish legal system, it is indicated that the general source of the right of self-determination is the human dignity, protected by Article 30 of the Constitution of the Republic of Poland.<sup>29</sup> The requirement to obtain a consent for treatment is also rooted in Article 41 section 1 of the Constitution, which guarantees everyone a personal inviolability and personal freedom. In addition, it is derived from Article 47 of the Constitution, according to which everyone has the right to the legal protection of their private and family life, honour and good name, and to decide on their personal life. It should be emphasised that the constitutional concepts of personal freedom and the right to decide about one's personal life are widely interpreted – also as the right to self-determination in the field of health protection.<sup>30</sup>

The regulations contained in the Polish Constitution are coherent with numerous provisions of international law.<sup>31</sup> Among those which formally constitute the part of the Polish legal system should be mentioned Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4<sup>th</sup> November 1950.<sup>32</sup> It provides that everyone has the right to respect for their private life. This law was correlated with a fundamental prohibition on interference of public authorities in this sphere, allowing it in

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<sup>29</sup> See for example: W. Lis, *Zgoda pacjenta na czynność medyczną w polskim porządku prawnym*, „Zeszyty Naukowe KUL” 2018, No 3, pp. 39–41, A. Marcinkowska, op. cit., pp. 61–62, J. Pacian, A. Pacian, T.B. Kulik, P. Flieger, K. Kowalczyk, op. cit., p. 12.

<sup>30</sup> R. Kubiak, op. cit., p. 338.

<sup>31</sup> See the detailed considerations on the issues related to the protection of the patient's autonomy on the grounds of international law: A. Wnukiewicz-Kozłowska, *Autonomia jednostki w międzynarodowym prawie biomedycznym*, Wrocław 2019, pp. 299–327.

<sup>32</sup> Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności sporządzona w Rzymie dnia 4 listopada 1950 r., zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2 (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1993, No. 61, item 284, as amended).

only a few situations, among others, when it is necessary for reasons of public safety, protection of health or the rights and freedoms of others. A similar regulation is contained in Article 17 of the International Covenant on Civil and Political Rights of 16<sup>th</sup> December 1966.<sup>33</sup> Under this provision, no one may be exposed to arbitrary or unlawful interference in their private life. Appropriate legal mechanisms should guarantee protection against such violations.

It is worth pointing out that regulations directly related to patients' rights are contained in the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4<sup>th</sup> April 1997, often referred to as the European Bioethics Convention. The provisions of this document constitute an attempt to regulate difficult issues on the border of medicine, ethics and law. The issue of the patient's consent has been regulated in Article 5 of the Convention, which states that no medical intervention can be carried out without the free and informed consent of the person subjected to it. In addition, prior to such intervention, the person concerned should receive adequate information about its purpose and nature, as well as the anticipated consequences and risks. Further provisions regulate in detail the issue of protection of the rights of persons unable to express the consent, e.g. minors. At this point, however, it should be noted that Poland is not yet a party to this convention. Although it was signed by Poland in 1999, it has not yet been ratified, despite numerous voices from the medical and legal circles prompting the Polish legislator to adopt this significant act.<sup>34</sup> Despite the lack of ratification, the provisions of the convention are, however, taken into account in case-law as important interpretative guidelines.<sup>35</sup>

Within the frames of domestic laws, the basic regulation of the matter in question constitutes the provisions of the Act of 5<sup>th</sup> December 1996 on the Professions of Physician and Dentist,<sup>36</sup> where the issue of effective consent is regulated by Articles 31–35. On the basis of these provisions, one can identify some general conditions, the fulfillment of

<sup>33</sup> Międzynarodowy Pakt Praw Obywatelskich i Politycznych otwarty do podpisu w Nowym Jorku dnia 19 grudnia 1966 r. (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1977, No. 38, item 167).

<sup>34</sup> A. Wnukiewicz-Kozłowska, op. cit., p. 76–79.

<sup>35</sup> N. Karczewska-Kamińska, Europejska *Konwencja Bioetyczna* [in:] eadem, *Przymus leczenia i inne interwencje medyczne bez zgody pacjenta*, Lex 2018.

<sup>36</sup> Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentystry (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1997, No. 28, item 152, as amended).

which determines the validity of the consent for treatment, including the following:

- the consent needs to be expressed by a person authorised to grant the consent,
- the person authorised to grant the consent needs to have previously obtained adequate information about the planned medical intervention,
- lack of contradiction between the subject of the consent and the provisions of law or ‘the rules of social conduct’ (Pol. ‘zasady współżycia społecznego’),
- integral and free expression of a declaration of will, which can take place only after proper recognition of circumstances related to the planned medical intervention,
- expression of the consent in a proper form prescribed by law.<sup>37</sup>

In addition, consent for treatment was included in the patient’s rights catalogue in the Act of 6<sup>th</sup> November 2008 on Patient Rights and the Patient Ombudsman.<sup>38</sup> For regulation of this wide issue, the Polish legislator allocated as many as two chapters of the Act: the third, relating to the information obligation (Articles 9–12), and the fifth, covering provisions directly regarding the consent to medical services (Articles 15–19).<sup>39</sup>

Already at first glance it can be seen that the regulations contained in both of the above-mentioned legal acts are analogous. However, while the provisions of the Act on the Professions of Physician and Dentist regulate the issue of the patient’s consent from the point of view of the physician’s obligations, in the latter act the legislator adopted the perspective of the patient’s interests. According to the legislator’s intention, both cited legal acts were to be consistent: the patient’s right to express the consent for treatment is to be met by the physician’s obligation to effectively obtain it prior to implementation of the treatment procedure.<sup>40</sup>

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<sup>37</sup> A. Marcinkowska, op. cit., p. 62. See more on this issue: M. Malczewska, *Komentarz do art. 31–35* [in:] *Ustawa o zawodach lekarza i lekarza dentystry. Komentarz*, ed. E. Zielińska, Lex 2014.

<sup>38</sup> Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 2009, No. 52, item 417, as amended).

<sup>39</sup> See more on this issue: D. Karkowska, *Komentarz do art. 9–12, 15–19* [in:] eadem, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz*, Lex 2016.

<sup>40</sup> R. Tymiński, *Obowiązek informacyjny lekarza wobec pacjenta – refleksje na tle wybranego dorobku orzeczniczego Izby Cywilnej Sądu Najwyższego*, „Przegląd Sądowy” 2017, No 5, p. 51.

Much attention to the discussed matter was also provided in the Act of 19<sup>th</sup> August 1994 on the Protection of Mental Health.<sup>41</sup> It indicates voluntary treatment as a rule, and at the same time it specifies in detail the conditions to be fulfilled and appropriate procedure to be implemented in the event of compulsory diagnostic tests and hospitalization (Article 21 et seq.).

As previously indicated, the right to self-determination in the field of medical interference in the current Polish legal system is finally secured by the provision of Article 192 of the Polish Penal Code.

Finally, it can be pointed out, that the requirement to obtain the patient's consent for treatment is also emphasized on the grounds of deontological principles – in the currently applicable Code of Medical Ethics,<sup>42</sup> where this issue is regulated by the provisions of Article 15. It's worth noting that on the basis of Article 53 of the Act of 2<sup>nd</sup> December 2009 on Medical Chambers,<sup>43</sup> for actions contrary to the provisions of the Code of Medical Ethics – including those related to the requirement to obtain the patient's consent for medical interference – physicians are subject to disciplinary liability, as judged by medical courts.<sup>44</sup>

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In an attempt to make an overall assessment of the current legal regulations devoted to the patient's consent, it should be signalled that they are unfortunately not free of imperfections. The main problems pointed out in the professional literature in this respect include in particular: the lack of terminological precision and mutual contradiction

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<sup>41</sup> Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 1994, No. 111, item 535, as amended).

<sup>42</sup> Uchwała Nadzwyczajnego II Krajowego Zjazdu Lekarzy z dnia 14 grudnia 1991 r. w sprawie Kodeksu Etyki Lekarskiej [Resolution of 14<sup>th</sup> December 1991 of the Second Extraordinary National Medical Congress on the Code of Medical Ethics] as published in *Biuletyn Naczelnej Rady Lekarskiej* [Bulletin of the Supreme Medical Council] of 1994, No 1 (24), as amended.

<sup>43</sup> Ustawa z dnia 2 grudnia 2009 r. o izbach lekarskich (as published in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*The Journal of Laws of the Republic of Poland*] of 2009, No. 219, item 1708, as amended).

<sup>44</sup> See more on this issue: J. Haberko, *Zasady postępowania lekarza w stosunku do pacjenta. Uwagi de lege lata i de lege ferenda na tle przepisów Kodeksu etyki lekarskiej*, *Medyczna Wokanda* 2016, No 8.

in terms, which leads to considerable interpretation difficulties,<sup>45</sup> dysfunctionality of some provisions due to unclear regulation of certain legal institutions,<sup>46</sup> or finally the lack of full consistency between provisions contained in particular medical laws.<sup>47</sup>

The indicated problem is particularly evident in the context of application of the cited Article 192 of the Penal Code, which in the scholarly commentaries rises to the rank of one of the most controversial regulations in the entire system of Polish medical law. In the rightful intentions of the legislator, the adoption of this regulation was to end long-standing disputes surrounding the problem of effective protection of the patient's autonomy under the criminal law. Unfortunately, the wording of the adopted regulation turned out to be so unclear that it gives rise to a number of new interpretive controversies.<sup>48</sup>

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<sup>45</sup> See for example: R. Tymiński, op. cit., p. 51–54.

<sup>46</sup> See for example: W. Lis, op. cit, p. 45–46.

<sup>47</sup> See for example: R. Tymiński, *Anatomia niedoskonałości – jak złe prawo wpływa na wykonywanie zawodu lekarza*, „Medyczna Wokanda” 2016, No 8, p. 172.

<sup>48</sup> The framework of this study does not allow to conduct comprehensive considerations on the interpretation disputes arising around the wording of Article 192 of the Penal Code. In order to illustrate the essence of the problem, however, it is worth indicating the two most vivid examples confirming the conclusion presented in the study. Therefore, it should be indicated that interpretative doubts concern the very question of who may be the perpetrator of the type of crime regulated by Article 192 of the Penal Code. Some authors, including Marian Filar and Jerzy Lachowski, expressed the view that the perpetrator of this crime can be any person. The argument in favor of this position is the use by the legislator of the pronoun ‘who’ in the structure of the discussed provision, without further individualisation, which in the light of the established principles of interpretation of criminal norms is a suggestion that anyone can be the perpetrator of the forbidden act (M. Filar, *Teza 3 komentarza do art. 192*, [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Lex 2016, J. Lachowski, *Teza 3 komentarza do art. 192*, [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzošek, Lex 2020). The authors who do not agree with this point of view include Agnieszka Fiutak and Andrzej Zoll, in whose opinion the perpetrator of this crime can only be a physician, possibly other persons who have the appropriate authorization to perform medical treatments. In support of their thesis, the authors point out that since Article 192 of the Penal Code includes such terms as ‘therapeutic treatment’ and ‘patient’, it may only refer to behaviour related to certain professionals who are authorized to perform medical treatments (A. Fiutak, *Odpowiedzialność karna za wykonanie zabiegu leczniczego bez zgody pacjenta*, Lex 2016, A. Zoll, *Teza 7 komentarza do art. 192*, [in:] *Kodeks karny*..., op. cit.). The most controversial, however, is the use of the word ‘therapeutic’ in the discussed provision and the question, which arises is how broadly this term should be interpreted. Marian Filar believed that in the light of the principles of systemic and teleological interpretation, it should be considered that a ‘therapeutic treatment’ within the meaning of Article 192 of the Penal Code includes both strictly therapeutic procedures and other medical procedures devoid of therapeutic

A detailed analysis of particular issues regulated by the above-mentioned legal acts goes beyond the scope of this study. The signalled legislative imperfections, however, lead to the conclusion that the process of reforming the Polish medical law towards developing solid guarantees for the protection of patient's autonomy has not yet been fully completed. They have become the main cause of criticism of the current shape of the regulations constituting the Polish medical law system as well as the postulates for amendments aimed at increasing the precision and functionality of particular solutions. Certainly, this is a necessary challenge which the Polish legislator will still have to face. Radosław Tymiński rightly noticed that these regulations are, after all, addressed to entities who do not hold a higher education diploma in law. Therefore, they are not able to reconstruct a proper legal norm. It may also lead to conflicts in a relation between the physician and the patient. Consequently, insufficient quality of Polish medical law may adversely affect not only the legal situation of physicians, but also the health safety of all citizens.<sup>49</sup>

On the other hand, it must be admitted that, despite the indicated legislative imperfections, over the years Polish legislators managed to establish certain legal framework for the comprehensive regulation of the requirement to obtain the patient's consent for medical intervention, thus reflecting the constantly increasing approval for the position of the need to respect the patient's will in the treatment process. This is undoubtedly an important step towards an unequivocal departure from the approval of paternalism in the relationship between the physician and the patient in favour of respecting the autonomy of the latter.

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purpose (M. Filar, *Lekarskie...*, op. cit., p. 90.) Quite different opinion was expressed for example by Paweł Daniluk, who considers that, due to the literal wording of the provision in question, including a non-therapeutic procedures within its scope would constitute an unacceptable extensive interpretation to the detriment of the perpetrator, contradicting the fundamental principle of modern criminal law *nullum crimen sine lege stricta* ('there is no crime without exact law') and ignoring of the guarantee function of criminal law (P. Daniluk, *O pojęciach „zabieg leczniczy” i „pacjent” w rozumieniu art. 192 § 1 k.k.*, „Prawo i Medycyna” 2011, No 4, pp. 66–69). The disputes over the interpretation of Article 192 of the Penal Code have been broadly discussed e.g. by A. Fiutak, *Strona przedmiotowa*, [in:] *Odpowiedzialność karna...*, op. cit., Lex 2016, M. Marcinkowska, op. cit., pp. 69–74, M. Mozgawa, *Komentarz do art. 192*, [in:] M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa, *Kodeks karny. Komentarz aktualizowany*, Lex 2020, R. Rejmanskiak, *Problemy interpretacyjne wybranych pojęć zawartych w art. 192 k.k.*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2012, No 4.

<sup>49</sup> R. Tymiński, *Anatomia...*, op. cit., pp. 178–179.

In reference to the above, as a summary, it can be indicated that nowadays there is no doubt that informed consent shall be a necessary condition for the legality of medical interventions undertaken in relation to the patient. As it has been shown, the obligation to obtain the consent was stipulated *expressis verbis* in many currently binding legal acts regulating the principles of conduct towards the patient. This requirement is also unquestioned both in the modern scholarly literature<sup>50</sup> and in judicial practice.<sup>51</sup> In numerous attempts made to define the essence of the patient's consent, it is aptly emphasised that by accepting the proposed medical treatment, the patient allows another person to violate their bodily integrity within a pre-determined range. At the same time, he or she assumes the risk of the treatment to the extent that they have been informed of it. However, failure to obtain the consent from the patient deprives him or her of the opportunity to decide about themselves, including the opportunity to consider the risks associated with a particular medical activity. Therefore, performing such an act without obtaining legally effective consent, even if it takes place *lege artis* and does not cause any side effects, shall be considered, in principle, as an illegal behaviour.<sup>52</sup>

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<sup>50</sup> See recent studies referred to in the previous footnotes, devoted to particular issues related to the legal protection of the patient's autonomy.

<sup>51</sup> See for example: Postanowienie Sądu Najwyższego z dnia 27 października 2005 r. [The decision of the Supreme Court of 27<sup>th</sup> October 2005], III CK 155/05, Lex No 172101, Wyrok Sądu Najwyższego z dnia 16 maja 2012 r. [The judgement of the Supreme Court of 16<sup>th</sup> May 2012], III CSK 227/11, Lex No 1211885, Postanowienie Sądu Najwyższego z dnia 10 kwietnia 2015 r. [The decision of the Supreme Court of 15<sup>th</sup> April 2015], III KK 14/15, Lex No 1712821, Wyrok Sądu Apelacyjnego w Warszawie z dnia 21 stycznia 2016 r. [The judgement of the Court of Appeals in Warsaw of 21<sup>st</sup> January 2016], VI ACa 322/15, Lex No 2004480, Wyrok Sądu Apelacyjnego w Warszawie z dnia 19 lutego 2019 r. [The judgement of the Court of Appeals in Warsaw of 19<sup>th</sup> February 2019], VI ACa 119/18, Lex No 2631472.

<sup>52</sup> M. Serwach, *Oświadczenie pacjenta o wyrażeniu zgody albo sprzeciwu – kiedy jest prawnie skuteczne*, 'Medycyna Praktyczna' 2012, No. 7–8, pp. 119–120.

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## Od paternalizmu do autonomii. Ewolucja regulacji dotyczących zgody pacjenta w prawie polskim

### Abstrakt

Przedmiotem artykułu jest ukazanie zarysu przemian, jakie zachodziły na gruncie prawa polskiego w zakresie regulacji poświęconych autonomii pacjenta. Punktem wyjścia dla zawartych w nim rozważań jest rozróżnienie tradycyjnego modelu uprawiania medycyny, opartego na relacjach paternalistycznych, od modelu partnerskiego, zakładającego, że lekarz i pacjent są równouprawnionymi uczestnikami procesu leczniczego. W dalszej części ukazano proces reformowania polskiego prawodawstwa medycznego w kierunku stopniowego zwiększania autonomii pacjenta. W ostatniej części pracy dokonano ogólnej oceny aktualnie obowiązujących rozwiązań – z jednej strony sygnalizując ist-

nienie niedoskonałości legislacyjnych wymagających korekty, z drugiej zaś wyrażając aprobatę wobec stworzenia ram prawnych dla kompleksowego uregulowania kwestii zgody pacjenta na interwencję medyczną.

Słowa kluczowe: autonomia, pacjent, zgoda, prawo medyczne, historia prawa, odpowiedzialność karna

Keywords: autonomy, patient, consent, medical law, history of law, criminal responsibility

### Nota o autorze

Marcin Janosz, magister prawa. Radca prawny zawodowo zajmujący się obsługą prawną przedsiębiorców. Doktorant w Katedrze Powszechnej Historii Państwa i Prawa Wydziału Prawa i Administracji Uniwersytetu Jagiellońskiego w Krakowie. W zakres jego zainteresowań badawczych wchodzi zagadnienia z obszarów powszechnej historii prawa, prawa medycznego oraz prawa karnego. Przygotowuje rozprawę doktorską poświęconą rozwojowi regulacji z zakresu prawa medycznego w Galicji. Adres e-mail: marcin.janosz@doctoral.uj.edu.pl