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PROTECTION OF PATIENTS′ RIGHTS IN POLISH CRIMINAL LAW

1. Patient's rights are part of human rights. Yet, they have been isolated due to the specific position of a person in relation to a physician and health care system[1]. The recognition and protection of patient's rights coincides with the contemporary trend of departing from the paternalistic approach in medicine in favour of partnership between the patient and his or her doctor.[2] At the international level, these rights are collated in, for example, the World Health Organization Declaration on the Promotion of Patients' Rights in Europe of 1994[3] and in the 2002 European Charter of Patients' Rights drafted by the Active Citizenship Network. Patients' rights were also addressed in the European Convention on Human Rights and Biomedicine of 1997, even though its subject matter goes beyond the problems of medical deontology[4]. They are in the focal point of the European Union policies[5].

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[1] Cf. Annas, G. J. *The rights of patients.* Totowa 1992, pp. XIII, XV; Karkowska, D. *Prawa pacjenta.* Warszawa 2004, pp. 15, 37-41; Bujny, J. *Prawa pacjenta. Między autonomią a paternalizmem.* Warszawa 2007, pp. 4, 36; Nesterowicz, M. *Prawo medyczne*. Toruń 2007, p. 17; Boratyńska, M., Konieczniak, P. *Prawa pacjenta.* Warszawa 2001, pp. 14–15.

[2] Cf. Veatch, R. *The Patient as Partner. A Theory of Human-Experimentation Ethics.* Bloomington and Indianapolis 1987, p. 4; Annas, G. J. *The rights,* p. XIII.

[3] International Digest of Health Legislation 411 (1995).

[4] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No 164. See also Małecka, D. "Prawna ochrona pacjenta na tle europejskiej konwencji bioetycznej." *Prawo i Medycyna* (hereinafter "PiM") 3(1999), pp. 85-86; Nys, H.″Comparative health law and the harmonization of patients' rights in Europe." *European Journal of Health Law* (hereinafter "EJHL") 8(2001), pp. 317, 322-323.

[5] Cf. Charter of Fundamental Rights of the European Union, O. J. 2010, C 83, p. 389-403: Article 3(2)(a), Article 35; Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, O. J. 2011, L 88, pp. 45-65; Nys, H. ″Comparative." pp. 317-321; Roscam Abbing, H. D. C. "Rights of Patients in the European Context. Ten Years and After." *EJHL* 11(2004), p. 9.

2. For over 20 years, patient's rights in Poland have been addressed in a number of laws on health care, but, as in many other countries, it was found reasonable to bundle them in a legal instrument, which is the 6 November 2008 Act on Patient's Rights and the Ombudsman for Patients;[1] the law lists the following patient's rights: the right to health care, the right to information, the right to confidentiality of information about the patient, the right to self-determination in the matters of health care, the right to respect for intimacy and dignity, the right to medical records, the right to object to doctor's opinion or medical certificate, the right to respect for private and family life, the right to pastoral care, the right to seek redress for the violation of patients' rights. The responsibilities of medical personnel corresponding to the aforesaid patient's rights are also set out in the laws regulating specific medical professional groups, such as the Act of 5 December 1996 on Professions of Doctor and Dentist.[2] Certainly, any patient is generally protected under the rights vested with every human being, but to draw up a separate catalogue of patient's rights testifies to the person's specific situation as someone who seeks medical care services or benefits from such services provided by an entity performing health care activities or by a medical practitioner.[3] In such a relationship, the patient is considered a weaker party.[4] This is due to the professional knowledge and practice gap, which makes the patient vulnerable to abuse by a professional entity and dependent on persons with medical qualification.[5]

The Act on Patient's Rights and the Ombudsman for Patients introduced specific measures to protect these rights,[6] yet it fails to stipulate

[1] Act of 6 November 2008 on Patient's Rights and the Ombudsman for Patients, Journal of Laws of 2012, item 159 as amended, hereinafter "the act" or "the PRA".

[2] Consolidated text: Journal of Laws of 2011, No. 277, item 1634 as amended.

[3] This is how Article 3(1)(4) of the PRA defines patient.

[4] Cf. Śliwka, M. *Prawa pacjenta w prawie polskim na tle prawnoporównawczym*. Toruń 2008, p. 24.

[5] Cf. Karkowska, D. *Prawa*, pp. 15-16; Haberko, J. "Konsumencki charakter umowy o świadczenie zdrowotne." *PiM* 1(2007), pp. 83-84; Tobiasz-Adamczyk, B. *Relacje lekarz-pacjent w perspektywie socjologii medycyny.* Kraków 2002, p. 42; Rega, I. M. *Patienten- und Burgerbeteiligung im Gesundheitswesen Deutschlands Finnlands und Polens.* Gottingen 2007, pp. 51-52.

[6] See especially Articles 41-67 of the PRA on the Ombudsman for Patients and collective patient rights.

any measures under criminal law.[1] It is therefore justified to consider whether and to what extent the patient is able to protect and assert his or her rights under criminal law. This issue goes beyond the volume of one article, but it is worth discussing, or at least outlining, due to the supranational relevance of patients' rights.

The protection of patient's rights under criminal law is primarily ensured in the Criminal Code of 1997.[2] Although the Code mentions the word "patient" only once (Article 192 of the CC), most of its provisions are synthetic enough to be employed in a variety of matters. Still, the question is to what extent these provisions overlap with the content of patient's rights and whether they are the adequate means of their protection. To this end, three areas have been identified among the rights: the life and health, privacy in a broad sense, and some control mechanisms intended for medical procedures.

3. The protection of patient's life and health is afforded in the laws on health care services, defined by the legislator as, "activities aimed to preserve, rescue, restore or improve health and other medical interventions resulting from the treatment process or separate regulations governing their performance."[3] This is a comparatively broad approach, going beyond medical interventions, although the range of non-treatment interventions that the patient is entitled to is still debatable.[4] The law is intended to ensure a medically justified health care service of the quality corresponding to the requirements of current medical knowledge (Article 6 of the PRA). A health care service should be provided with due diligence, by a person possessing appropriate skills and in the conditions complying with separate technical and sanitary requirements set out in the relevant regulations and respecting the rules of professional conduct (Article 8 of the PRA).

Criminal liability for violation of these standards of health care services depends on the effect caused by this violation. If it has led to patient's death, damage to their health or an increased health hazard, the perpetrator may be held liable for the offence of unintentional

[1] Articles 68-69 of the PRA are ranked among administrative legislation.

[2] Act of 6 June 1997 the Penal Code (Journal of Laws No. 88, item 553 as amended, hereinafter the CC.

[3] See Article 3(1)(4) of the PRA in connection with Article 2(1)(10) of the Act of 15 April 2011 on Health Care Activity, Journal of Laws No. 112, item 654 as amended.

[4] Therefore, this problem is omitted.

manslaughter,[1] causing grave, medium or light health damage[2] or exposing the person to imminent danger of death or serious injury.[3] In determining the compliance of treatment with the medical practice, it is mandatory to establish the optimal standard of procedure, making allowances for doctor's qualification and availability of medication.[4] Faulty treatment as such that has not caused any adverse effects does not result in criminal liability; still, it does not exclude the perpetrator's professional liability.[5]

The legislator envisaged the possibility of limited access to some adequate health services. In the traditional classification of human rights, the right to health care is ranked among social rights, or positive rights, the

[1] Article 155 of the CC: Any person who unintentionally commits manslaughter is liable to a penalty of deprivation of freedom, ranging from from 3 months to 5 years. There is also liability for intentional manslaughter but it is only theoretical in health care activity.

[2] Article 156 of the CC: § 1. Any person who causes a severe impairment of health in the form of: 1) depriving a person of sight, hearing, speech, fertility, 2) causing another severe disability, severe terminal or long-term sickness, an illness exposing him to the risk of death, a permanent mental illness, a total or significant permanent incapacity to perform a profession/vocation or a permanent significant bodily distortion or disfigurement is liable to a penalty of deprivation of freedom, ranging from 1 year to 10 years. § 2. If the perpetrator acts unintentionally, he is liable to a penalty of deprivation of freedom of up to 3 years. § 3. If the consequence of the act defined under § 1 is the death of a person, the perpetrator is liable to a penalty of deprivation of freedom, ranging from 2 to 12 years. Article 157 of the CC: § 1. Any person who causes an impairment of bodily functions or disturbance to health other than that defined under Article 156(1) is liable to a penalty of deprivation of freedom, ranging from 3 months to 5 years. § 2. Any person who causes an impairment of bodily functions or disturbance to health for a period of over 7 days is liable to a fine, a penalty of restriction of freedom or of deprivation of freedom of up to 2 years. § 3. If the perpetrator of the act defined under § 1 or 2 acts unintentionally, he is liable to a fine, a penalty of restriction of freedom or of deprivation of freedom of up to 1 year.

[3] Article 160 of the CC: § 1. Any person who exposes another person to a direct danger of loss of life or a severe impairment to his health is liable to a penalty of deprivation of freedom of up to 3 years. § 2. If the perpetrator has a duty of care over the person exposed to danger, he is liable to a penalty of deprivation of freedom, ranging from 3 months to 5 years. § 3. If the perpetrator of the act defined under § 1 or 2 acts unintentionally, he is liable to a fine, a penalty of restriction of freedom or of deprivation of freedom of up to 1 year.

[4] Cf. Zoll, A. "Zaniechanie leczenia – aspekty prawne." *PiM* 5(2000), p. 34.

[5] Cf. Boratyńska, M., Konieczniak, P. In *Prawo medyczne.* L. Kubicki, ed., Wrocław 2003, p. 162.

enforcement of which depends on the financial and organizational factor.[1] If, therefore, the possibility of providing adequate health care services is limited, the patient has the right to a procedure of determining the order of access, the procedure being transparent, objective and based on medical criteria (Article 6(2) of the PRA). On the other hand, any lowering of the standard of health care service due to its cost is unacceptable.[2] Such a lowering may form the basis for doctor's criminal liability, and if he or she had no influence on it, the liability rests with the person in charge of medical care unit.

Likewise, financial problems may not be the basis for refusing to provide a health care service which is directly intended to save patient's life or health from permanent damage.[3] Therefore, Article 7(1) of the Act on Doctor's Profession (hereinafter "the DPA") stipulates that the provision of health care services should be immediate in the event of danger to life or health. The lack of valid health insurance or the exhausted limit of medical services specified in the contract with the National Health Fund must not affect this regulation.[4] Similarly, Article 30 of the DPA requires the physician to provide medical assistance in any case if the delay could result in a risk of loss of life, serious injury or serious health disorder, and in other emergency cases.[5] In such a case, the doctor cannot refuse to assist by evoking the conscience clause or other serious reasons, which, in principle, suffice to refuse or discontinue a treatment.

Failure to perform this duty may form the basis for criminal liability for the offence of failure to come to an aid of another person who is in a direct danger of loss of life or serious impairment of health and is

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[1] Cf. Nys, H. *Comparative*, pp. 317-318; Den Exter, A., Hermans, B. "Constitutional Rights to Health Care: The Consequences of Placing limits on the Right to Health Care in several Western and Eastern European Countries." *EJHL* 5(1998), pp. 263-264.

[2] Judgement of the Constitutional Court of 7 January 2004, K 14/03, OTK 2004, no. 1, item 1; Dukiet-Nagórska T. ″Prawnokarne konsekwencje niepodjęcia interwencji lekarskiej lub udzielenia świadczenia zdrowotnego w sposób niewłaściwy na skutek niedostatku środków finansowych w publicznym zakładzie opieki zdrowotnej." *PiM* 6-7(2000), pp. 16-17.

[3] Cf. Bosek, L. ″Constitutional right to health protection. Commentary." In *Medical Law. Cases and Commentaries.* M. Safjan, ed., Warszawa 2012, pp. 59-60; Dukiet-Nagórska, T. *Prawnokarne*, pp. 14-16.

[4] Cf. Kulesza, J. ″Lekarski obowiązek pomocy na tle obowiązku ogólnoludzkiego (art. 162 k.k.)." *PiM* 1(2006), p. 114; Dukiet-Nagórska, T. *Prawnokarne*, p. 14.

[5] Cf. Konieczniak, P. In *Prawo medyczne.* L. Kubicki, ed., Wrocław 2003, p. 44.

punishable by imprisonment of up to 3 years (Article 162(1) of the CC). The ensuing obligation to rescue human life has a slightly narrower scope than the responsibilities of medical personnel under Article 7 of the PRA and Article 30 of the DPA.[1] For the liability under Article 162 of the CC to occur, any level of threat to the patient's life or health is not enough. This threat must take the form of immediate danger of loss of life or serious impairment of health, i.e. a situation in which there is a high probability of spontaneous occurrence of life or health threatening effects.[2] In addition, the criminal liability under Article 162(1) of the CC applies only to intentional conduct, which means that the doctor must at least envisage the possibility of risks and accept it (conceivable intent).

The offence under Article 162(1) of the CC is considered committed the moment the assistance is refused, regardless of whether there has been a real chance to save the patient, and whether his or her health condition has deteriorated.[3] However, if such deterioration occurs, the scope of liability of the involved medical personnel may be broader. In the performance of his or her professional duties (e.g. during working hours, while at a hospital), the doctor has the status of a guarantor as given in Article 2 of the CC.[4] This means that they may be held liable for an offence of result if, through their omission, they did not prevent the effect connected with the danger that the patient had been exposed to, which they would have otherwise been able to prevent if they had fulfilled their professional responsibilities.[5] If, therefore, the assistance that the doctor refused had prevented patient's death, impairment of health or increased danger, the doctor would be liable under Articles 155-157 or Article 160 of the CC.[6] Unlike Article 162(1) of the CC, the aforesaid regulations provide for other (more stringent) punishment and also criminalize both intentional and unintentional conduct.

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[1] Cf. Zoll, A. ″Prawo lekarza do odmowy udzielenia świadczeń zdrowotnych i jego granice." *PiM* 13(2003), p. 21.

[2] Cf. Filar, M. *Lekarskie prawo karne.* Kraków 2000, pp. 53, 71-72; Kubiak, R. *Prawo medyczne.* Warszawa 2010, p. 203; Wiak, K. *Kodeks karny. Komentarz*. A. Grześkowiak, K. Wiak, eds., Warszawa 2012 (hereinafter *Komentarz.* A. Grześkowiak, K. Wiak, eds.), p. 794. Severe impairment of health is defined in Article 156(1) of the Criminal Code - see note 17.

[3] Wiak, K. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 797.

[4] Article 2 of the CC: Criminal liability for an offence of result committed by omission charges only the individual who had a legal specific duty to prevent the result.

[5] Cf. Filar, M. *Lekarskie*, pp. 46-47; Zoll, A. *Prawo lekarza*, pp. 22-23.

[6] Cf. Filar, M. *Lekarskie*, p. 72; Wiak, K. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 794.

It is worth noting that in the provision of publicly funded health care services the doctor is considered a person exercising a public function within the meaning of Article 115(19) of the CC and can be responsible for passive bribery under Article 228 of the CC.[1] This offence is committed when a doctor accepts a material or personal benefit or the promise thereof in connection with the performance of a public function.

4. The first area of patient privacy is the right to self-determination as regards health care services. The crucial character of this right was reaffirmed in the European Convention on Human Rights and Biomedicine which incorporated this rights as part of its axiological foundation.[2] The essence of self-determination consists in the right to give consent to a health care service and the right to refuse such a consent (Article 16 of the PRA). In principle, the oral consent is sufficient, but in the case of surgery or a treatment or diagnostic testing of increased risk, the consent requires a written from in order to be valid.

Patient's right to self-determination is not fully dependent on their legal capacity.[3] This right can be exercised by both a patient over 16 and under 18 years of age as well as by an incapacitated person[4]; on the other hand, this right is denied to persons who are not practically able to give consent, even if they enjoy full legal capacity[5]. If the patient's self-determination is excluded or limited, any decisions concerning medical care are taken for them him or together with them by a legal representative, guardian or a guardianship court[6].

A mandatory prerequisite for the effective consent is the awareness of the subject matter. This is where the patient's right to information about their health condition obtained in a medical consultation comes into play

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[1] Cf. Zielińska, E. In *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*. E. Zielińska, ed., Warszawa 2008, pp. 43-44; Hałas, R. In *Komentarz*. A. Grześkowiak, K. Wiak, eds., pp. 693, 1033.

[2] Cf. Article 5 of the European Convention on Human Rights and Biomedicine (hereinafter the "ECB"); Safjan, M. ″Prawo polskie a Europejska Konwencja Bioetyczna." *PiM* 5(2000), p. 12.

[3] Cf. Bosek, L., Pawliczak, J. ″Codification of Patients' Rights in Poland – The Patient's Rights Act 2008." *EJHL* 17(2010), p. 371.

[4] Cf. Article 17(1-3) of the PRA; Bosek, L., Pawliczak, J. *Codification*, pp. 371-375.

[5] Cf. Article 17(2-3) of the PRA. For example, due to a mental illness or if the person has not been incapacitated.

[6] Cf. Article 17(2) of the PRA; Bosek, L., Pawliczak, J. *Codification*, pp. 371-375.

(Article 9(1) of the PRA). The scope of the required information covers, "diagnosis, suggested and possible diagnostic and therapeutic methods, foreseeable consequences of their application or omission, the outcome of treatment and prognosis" (Article 9(3) of the PRA). The information should be communicated in a manner understandable to the patient.[1] Only exceptionally, the doctor can take advantage of the so-called therapeutic privilege (or exception), i.e. decide to reveal only part of the information of patient's health condition and prognosis if the prognosis is unfavourable and the doctor believes that withholding part of the information may be detrimental to the patient's condition (Article 31(4) of the DPA). Information may also be withheld if the patient wishes so (Article 9(4) of the PRA). Also, the patient has the right to information on matters unrelated to the consent to specific medical service.[2] This is true of the rights granted to them under statute (Article 11 of the PRA) and of the doctor's intention to withdraw from treatment and indicating other means of obtaining medical assistance (Article 10 of the PRA).

Patient's right to self-determination is directly protected under Article 192(1) of the CC which reads as follows: "Any person who performs a therapeutic intervention without the patient's consent is liable to a fine, a penalty of restriction of freedom or a penalty of deprivation of freedom of up to 2 years. In order for this offence to occur, the effect of the intervention is irrelevant because it is the patient's autonomy and not their health that is subject to protection.[3] The term "consent" use in Article 192(1) of the CC is interpreted as an agreement given under the terms provided in the act.[4] It seems, however, that the mere failure to grant consent in writing may not underlie criminal liability, although it may be a crucial evidence.[5] Impairment of consent may result from the consent being given in the conditions excluding free decision[6] or in the absence of the legally required information, its incomplete scope or incomprehensible communication. This criminal provision also protects the patient's right to information to the extent necessary to give consent to the provision of a health care service.

[1] Cf. Bosek, L., Pawliczak, J. *Codification*, p. 369.

[2] See ibidem, p. 370.

[3] Cf. Hypś, S. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 867.

[4] Cf. Dukiet-Nagórska, T. *Autonomia pacjenta a prawo karne.* Warszawa 2008, p. 156; Filar, M. *Lekarskie*, pp. 302-303.

[5] Cf. Dukiet-Nagórska, T. *Autonomia*, p. 156; Kubiak, R. *Prawo*, p. 446.

[6] Cf. Mozgawa, M., Kanadys-Marko, M. "Zabieg leczniczy bez zgody pacjenta (art. 192 k.k.)." *Prokuratura i Prawo* 3(2004), p. 36.

The use in Article 192(1) of the CC of the term "therapeutic intervention" excludes from the scope of this provision any non-therapeutic activities, such as research experiments or taking organs for transplantation;[1] in such cases, the violation of the right to self-determination can be persecuted under Article 189(1) of the CC, criminalizing the deprivation of another person of freedom and, if bodily harm is inflicted at the same time, under the the provision pertaining to the offence against health.[2]

Patient's right to self-determination is protected under criminal law only against intentional conduct. For the liability under Article 192(1) and Article 189(1) of the CC to occur, conceivable intent is required at a minimum. Conceivable intent is when the doctor is not sure whether they have obtained a legally effective consent; still, they begin the medical intervention, accepting the possibility that it may be against the patient's will.[3] Of course, this condition is fully met when the doctor performs the procedure knowing that the patient has not given any consent.

5. Another area of patient privacy concerns access to patient and information about them.

The protection of access to patient is ensured on account of their right to respect for intimacy and dignity (Article 20(1) of the PRA). The literature on the subject defines intimacy as "a set of facts about the individual and their experiences which it is not disclosed even to the relatives and whose "exposing" before anyone results in a feeling of shame, embarrassment and distress."[4] It is referred to the strictly personal sphere of life, particularly related to human emotionality[5] which, in particular,

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[1] Cf. Dukiet-Nagórska, T. *Autonomia*, p. 146; Duda, J. *Transplantacja w prawie polskim. Aspekty karnoprawne.* Kraków 2004, pp. 162-163. Differently in Kubicki, L. ″Nowy rodzaj odpowiedzialności karnej lekarza (Przestępstwo z art. 192 k.k.)." *PiM* 8(2000), p. 36.

[2] Cf. Duda, J. *Transplantacja*, p. 163. Article 189(1) of the CC: Any person who deprives another person of freedom is liable to a penalty of deprivation of freedom, ranging from from 3 months to 5 years.

[3] Cf. Kubiak, R. *Prawo*, pp. 446-447.

[4] Kopff, A. ″Koncepcja praw do intymności i prywatności życia osobistego (zagadnienia konstrukcyjne)." *Studia Cywilistyczne* 20(1972), pp. 32-33. See also Karkowska, D. *Prawa*, p. 366; Drozdowska, U. *Cywilnoprawna ochrona praw pacjenta.* Warszawa 2007, p. 177.

[5] Cf. Wild, M. ″Ochrona prywatności w prawie cywilnym (koncepcja sfer a prawo podmiotowe)." *PiP* 4(2001), p. 61; Sut, P. ″Czy sfera intymności jest dobrem osobistym chronionym w prawie polskim?" *Palestra* 7-8(1995), p. 54.

manifests itself in reluctance to disclose the facts of sexual life and expose oneself to another person.[1]

Many medical interventions invade intimacy; therefore, the legislator emphasizes the obligation to respect intimacy, especially when providing health care services (Article 20(1) of the PRA). In a sense, the patient opens up some strictly personal areas of their life by giving consent to a particular medical intervention, which, of course, does not mean they renounce the right to intimacy.[2] This right requires the medical personnel to reduce the feelings of pain, shame and discomfort, which the patient experiences,[3] to a minimum, especially reducing the need for exposure to the absolutely necessary degree.[4] Another condition to be met in order to respect intimacy is to ensure that when providing health care services only the necessary medical personnel is present in the room.[5] Other people's participation and presence requires patient's consent (Article 22(2) of the PRA).[6] However, at the patient's request, their relative or another person identified by the patient may accompany them during a medical procedure (Article 21(1) of the PRA), unless there is a threat of an epidemic or the patient's health may be at risk (Article 21(2) of the PRA).

Patient's intimacy protection under criminal law only applies to particularly severe violations. The lack of respect for patient's nudity may provide grounds for liability under Article 191a of the CC.[7] This provision criminalizes the recording and distribution of the image of a naked person without their consent. The state of nudity is defined as both whole-body exposure, as well as the exposure of its parts causing a feeling of shame.[8]

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[1] Cf. Boratyńska, M., Konieczniak, P. *Prawa*, p. 383.

[2] Cf. Bosek, L., Pawliczak, J. *Codification*, p. 376.

[3] Cf. ibidem; Drozdowska, U. *Cywilnoprawna*, p. 177.

[4] Cf. Boratyńska, M., Konieczniak, P. *Prawa*, p. 383.

[5] Cf. Karkowska, D. *Prawa*, p. 366; Drozdowska, U. *Cywilnoprawna*, p. 175.

[6] Article 22(2) of the PRA does not apply to university clinics and hospitals, medical research and development units and other establishments offering training to medical students, doctors and other medical personnel to the extent necessary for instruction purposes (Article 36(4) of the DPA).

[7] Article 191a of the CC: Any person who records the image of a naked person or a person in the course of sexual activity, using violence, unlawful threat or deception against this person, or distributes the image of a naked person or a person in the course of sexual activity without their consent is liable to a penalty of deprivation of freedom, ranging from 3 months to 5 years.

[8] Cf. Królikowski, M. In *Kodeks karny. Część szczególna.* Vol. I, A. Wąsek, R. Zawłocki, eds., Warszawa 2010, p. 865; Hypś, S. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 866.

The recording of such an image, however, is an offence only if it is done using violence, unlawful threat or deception against this person;[1] hence, for the sake of our discussion, more relevant seems to be the prohibition of distributing images, which is punishable in any case if done without the consent of the person concerned. In the provision of health care services, the punishability of such conduct is not limited if the perpetrator claims to do so for scientific or educational reasons. Yet, the offence under Article 191a(1) of the CC is not deemed committed when the recorded image does not permit the identification of the person (neither the face not distinguishing features are shown).[2]

The sole presence in the situation which is awkward to the patient (e.g. crying, naked) in violation of Article 22(2) of the PRA or watching the patient in a similar condition without providing medical service is not subject to criminalization, unless the patient is forced to endure such a situation as a result of violence or illegal threat (Article 191 of the CC).[3] Touching the patient, if not connected with the provision of health care services and without their consent, could result in criminal liability only if it caused physical pain comparable to hitting,[4] or if it took the form of sexual activity.[5] Forcing the patient to engage in a sexual activity without their consent, and in the case of a minor under 15 years

[1] Cf. Krajewski, R. "Przestępstwo utrwalania i rozpowszechniania wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej." *Prokuratura i Prawo* 5(2012), pp. 24, 29; Hypś, S. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., pp. 865-866.

[2] Cf. Krajewski, R. *Przestępstwo*, p. 26; Królikowski, M. In *Kodeks karny. Część szczególna.* Vol. I. A. Wąsek, R. Zawłocki, eds., Warszawa 2010, p. 865.

[3] Criminal liability would then occur for the offence of using force as in Article 191(1) of the Penal Code: Any person who uses violence towards another person or an illegal threat to force this person into either a defined conduct, or inaction or tolerance of another person's conduct is liable to a penalty of deprivation of freedom of up to 3 years.

[4] Article 217(1) of the CC: Any person who hits another person or in any other way violates his bodily inviolability is liable to a fine, a restriction of freedom or a deprivation of freedom of up to 1 year.

[5] The notion of sexual activity is interpreted as conduct related to sexual life in a broad sense, involving bodily contact between the victim and the perpetrator or the victim's involvement of sexual or bodily nature. Cf. the ruling of the Supreme Court on 19 May 1999, I KZP 17/99, OSNKW 1999/7-8/37.

of age even with their consent, provides grounds for liability for a sexual offence.[1]

Patient's right to respect dignity secures them against being treated as an "object" of treatment or a "medical case." The patient must be perceived as a human being, equal in their humanity to those offering them treatment. This implies the need to take the patient's concerns and suffering seriously, to respect them[2] and reduce pain and discomfort associated with medical intervention.

The protection of the patient against despicable treatment under criminal law is ensured in Article 216 of the CC.[3] This provision protects the dignity of every person against conduct referred to as "insult". Insult can be oral, written or can take the form of gestures. Still, it does not cover just any form of disrespect towards another person, but only those that exceed a certain level of severity, showing contempt for another person, or aiming to make the person feel humiliated and offended.[4] These criteria are of course subject to careful assessment, yet certainly, it is not enough for criminal liability to occur if a person is rude (e.g. not responding to greetings, handshakes), tactless (e.g. describing the autopsy procedure while patients waiting for a surgery listen), or prone to ridicule (e.g. making fun of

[1] Cf. Article 197 of the CC: § 1. Any person who by force, illegal duress or deceit causes another person to engage in sexual intercourse is liable to a penalty of deprivation of freedom, ranging from 2 to 12 years. § 2. If the perpetrator causes another person to submit to another sexual act or to perform such an act in the manner under § 1, he is liable to a penalty of deprivation of freedom, ranging from 6 months to 8 years; Article 199 of the CC: § 1. Any person who, by abuse of dependency or of a critical situation, causes another person to engage in sexual intercourse, or to submit to another sexual act, or to perform such an act is liable to a penalty of deprivation of freedom of up to 3 years; Article 200(1) of the CC: Any person who has sexual intercourse with a minor below the age of 15, or commits another sexual act against this person or makes him submit to such acts or to perform them is liable to a penalty of deprivation of freedom, ranging from 2 to 12 years.

[2] Cf. Karkowska, D. *Prawa*, p. 368; Bosek, L., Pawliczak, J. *Codification*, p. 375.

[3] Article 216(1) of the CC: Any person who insults another person in his presence, or even without his being present but publicly and with the intention for the insult to reach the wronged person is liable to a fine or a penalty of restriction of freedom.

[4] Cf. Hypś, S. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 999; Kulesza, W. *Zniesławienie i zniewaga. Ochrona czci i godności osobistej człowieka w polskim prawie karnym – zagadnienia podstawowe.* Warszawa 1984, pp. 173-174; Drozdowska, U. *Cywilnoprawna*, p. 179.

patient's misunderstanding of medical issues).[1] The condition for criminal liability is when an insult occurs in the presence of another person or in his or her absence but publicly or with the intent for the insult to reach the person. The suffering party may be any person, regardless of whether their mental state allows them to recognize the offending conduct, including children and mentally ill persons. For the legislator acknowledges the feeling of being wronged is not a necessary precondition for the insult to occur and take effect.[2] Recurring and severe violations of patient's personal dignity should be considered an offence of abuse[3] if the victim is helpless (because of age or health condition, which makes them not capable of determining their own status) or remaining in a state of dependence on the perpetrator (he or she is not able to counter the ill-treatment and endures it for fear of the situation getting worse).

The act also highlights the obligation of respecting the patient's right to pass away in peace and dignity. Therefore, it explicitly guarantees the right to health services aimed to reduce pain and other suffering of the patient in terminal condition (Article 20(2) of the PRA). A persistent therapy which does not offer any medical benefit but prolongs the advancing process of dying[4] is in conflict with the act and may be discontinued lawfully.[5] It does not alter the interpretation of conduct intended to accelerate death, which leads to criminal liability for manslaughter. If such an act is committed at the patient's request and out of sympathy, it may be regarded as euthanasia under Article 150 of the CC. In individual cases, to distinguish between the interruption of persistent therapy and accelerating death may entail assessment issues. Similar difficulties arise when attempting to draw a line between an offence against life and permissible alleviation of pain by means of medication posing death risk.[6]

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[1] Cf. Boratyńska, M., Konieczniak, P. *Prawa*, p. 386.

[2] Cf. Kulesza, W. *Zniesławienie i zniewaga*, pp. 167-170.

[3] Article 207(1) of CCC: Any person who abuses their next of kin physically or mentally or abuses another person who is permanently or temporarily dependent upon the perpetrator or a minor or a person rendered helpless because of his mental or physical condition is liable to a penalty of deprivation of freedom, ranging from 3 months to 5 years.

[4] Cf. Bosek, L., Pawliczak, J. *Codification*, pp. 375-376.

[5] Cf. ibidem, p. 376; Zoll, A. *Zaniechanie*, p. 33; Kubiak, R. *Prawo*, pp. 212-213.

[6] Cf. Bosek, L., Pawliczak, J. *Codification*, p. 375; Kubiak, R. *Prawo*, pp. 211–212; Góralski, P. "Oceny prawnokarne przedawkowania przez lekarza analgetyków (art. 150 k.k.)." *PIM* 13(2003), pp. 67-76.

Patient's right to confidentiality of information covers all the information related to the patient that has been acquired by the person of medical qualification when performing their duties related to this profession (Articles 13-14 of the PRA). The scope of confidentiality is thus marked out the manner of obtaining the information and not by its content; therefore, it is not confined to the patient's health or even personal affairs.[1] It covers both the information provided by the patient and inferred by the doctor from their findings.[2]

The breach of confidentiality in medical profession may be regarded as criminalized under Article 266(1) of the CC.[3] This provision provides protection only against intentional conduct; consequently, a physician who discloses information about a patient is not held liable if, at the moment of disclosing, he was convinced that the information did not need to be kept secret or if he kept medical records in a place readily available to third parties.[4] Besides, there are several instances in which the law releases the medical personnel from the obligation of confidentiality, for example, the lack of patient's interest (e.g. patient's consent to disclosure), important public interest (e.g. the result of examination ordered in criminal proceedings) or third parties' interest (if maintaining confidentiality is likely to threaten the life or health of other people).[5]

6. Patient's privacy also involves certain activities related to private life, family and religion. The act addresses those aspects of privacy only in relation to patients treated in medical establishments providing medical services on a stationary and 24/7 basis (Article 36 and Article 33(1) of the PRA), because then patients are limited in their freedom of choice of the place of stay and have reduced contact with the external world. Of course, it does not repeal the right to private and family life and religious freedom afforded to every human being in general.

The in-patient's right to have their private and family life respected, as laid down in the act, includes: personal contact, telephone contact or

[1] Cf. Safjan, M. "Problemy prawne tajemnicy lekarskiej." *Kwartalnik Prawa Prywatnego* 1(1995), pp. 11-12, 15-16.

[2] See ibidem, p. 11.

[3] Article 266(1) of the CC: Any person who, against the law or accepted duty, divulges or uses information with which he became familiar in connection with the function fulfilled, exercised job, or public, social, business or scientific activities is liable to a fine, a penalty of restriction of freedom or deprivation of freedom of up to 2 years.

[4] Cf. Kubiak, R. *Prawo*, p. 281.

[5] See Article 14(2) of the PRA; Safjan, M. *Problemy*, p. 29.

correspondence with other persons or a refusal of maintain such a contact (Article 33(1) of the PRA). It also grants the right to additional nursing care, other than the health care services provided (Article 34 of the PRA).[1] The confidentiality of patient's communication with other persons (by the aforesaid means) is protected under Article 267 of the CC which criminalizes: accessing information not intended for the perpetrator by opening a sealed letter, connecting to a cable serving to transfer information or breaking an electronic, magnetic or any other particular security (§1) and the installation of a bugging, visual or any other special devise to obtain information to which the perpetrator is not entitled (§2). The prohibition of Article 267(2) of the CC does not apply to the equipment necessary to monitor the patient's health condition.

As regards religious freedom, the in-patient has the right to pastoral care (Article 36 of the PRA). Its substance is only barely defined but it certainly involves contacting a priest of patient's religion, and – if the health condition so allows – taking part in religious services or ceremonies taking place on the hospital premises.[2] The entity providing health care services is also obliged to enable the patient to contact their priest in the event of a major decline in health condition or a life-threatening situation (Article 37 of the PRA). Violation of the right to pastoral care should be assessed against Article 194 of the CC, which names an offence of restricting the person's rights due to their religious affiliation or lack of thereof. This provision does not specify the means of discrimination, hence the offence can involve any act or omission which prevent or hinder another person from exercising their rights.[3]

7. One of the means to control medical procedures and serving as evidence in proceedings concerning a possible violation of patient's rights is medical records. Medical records cover, but are not limited to: personal data, a description of the patient's health condition and medical services provided (Article 25 of the PRA). The patient's right to medical records requires the entity providing health care services to keep and maintain such records (Article 29(1) of the PRA), to protect the data contained therein (Article 23(1) and Article 24(1) of the PRA) and make this data available to the patient (Article 23(1) of the PRA).

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[1] If the exercise of these rights means incurring costs, the patient is to be charged (Article 35 of the PRA).

[2] Cf. Karkowska, D. *Prawa*, p. 377.

[3] Cf. Hypś, S. In *Komentarz.* A. Grześkowiak, K. Wiak, eds., p. 875. These rights need not even relate to religious freedom, only the restriction should be of a religious nature.

Patient's medical records fall under criminal law protection pursuant to the provisions handling offences against authenticity of records and documents. This protection includes a prohibition of forging, altering and use of forged or altered documents (Article 270 of the CC), the prohibition of certifying a false statement by a person authorized to issue a document (Article 271 of the CC)[1] and use of the document which contains such a certified untruth (Article 273 of the CC), and the prohibition of destruction, damaging, making useless, hiding away or removing a document of which the perpetrator has no right to dispose (Article 276 of the CC). Medical records are also protected by the penal provisions of the 29 August 1997 Personal Data Protection Act[2] and under Article 266 of the Criminal Code pertaining to the confidentiality of patient information.

The two remaining patient's rights to control medical activities[3] do not protect the patient under criminal law because, compared with other rights, they serve as protective measures themselves.

8. To conclude, the patient's right to health care services and to self-determination enjoy broad protection under criminal law. The reminder of patient's privacy is protected by criminal law provisions only partially and in the instances of the most serious violations, and the institutions of civil law seem to be given priority in this regard. Although criminal law should not act as a regulator of the patient-doctor relations, the scope of protection under criminal law should be broadened to include patient's right to dignity and intimacy. This recommendation certainly require careful examination against the principle of *ultima ratio* of criminal law, which should take account of the fact that the patient is more vulnerable and weaker in their interaction with medical personnel and is particularly exposed to abuse by individuals disregarding the standards and ethics of medical profession.

Стаття надійшла 17 січня 2013 р.

[1] The perpetrator of this crime can be a physician making an entry in the patient's medical records. See the ruling of the Supreme Court of 24 May 2007, I KZP 11/07, OSNKW 2007/6/48, Zielinska, E. In *Ustawa o zawodach*, p. 40.

[2] Journal of Laws of 2002, No. 101, item 926 as amended.

[3] These are: patient's right to redress for damage resulting from a violation of patients' rights (Article 4 of the PRA), the right to object to the medical opinion or medical certification that affect the patient's rights or obligations (Article 31(1) of the PRA), the right to demand that the doctor consult another doctor or hold a case examination meeting (Article 6(3-5) of the PRA).