

PROTECTION OF PATIENT'S AUTONOMY WHEN UNDERGOING THERAPEUTIC PROCEDURES UNDER THE POLISH PENAL CODE

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MAREK MOZGAWA, KRZYSZTOF WALA

Maria Curie-Skłodowska University, Department of Penal Law and Criminology,
Lublin, Poland, marek.mozgawa@mail.umcs.pl, krzysztof.wala@mail.umcs.pl

CORRESPONDING AUTHOR

marek.mozgawa@mail.umcs.pl

Abstract This study addresses the issue of criminal liability for performing a therapeutic procedure without patient's consent under the Polish Penal Code of 1997 (Article 192 of the Penal Code). The authors analyse the statutory criteria of the prohibited act concerned. They emphasize the importance of the patient's consent to the legality of therapeutic procedures, and they highlight the situations in which such a procedure may be performed either without the consent or even contrary to the patient's will. The authors conclude that the existence of a separate provision protecting the autonomy of the patient's will deserves approval, although at the same time they advise the need for a certain correction to Article 192 § 1 PC, if only in terms of specifying the entity capable of committing that offence.

Keywords

therapeutic procedure,
criminal liability,
patient,
patient's consent,
autonomy of
patient's will

1 Introduction

The protection of human autonomy in deciding whether to undergo medical treatment is one of the essential elements affecting the proper functioning of society governed by democratic rule of law. It ensures a sense of security in the context of the arbitrariness of the State apparatus, but at the same time can sometimes be restricted if the general social interest so requires. Our study is a synthetic discussion of the scope of criminal liability applicable where the will of the patient is disrespected, together with an analysis of situations in which the public interest prevails over the autonomy of particular individuals (legalising, in these cases, the failure to respect their will). Hence, the next part will concern the analysis of Article 192 § 1 PC¹, under which the offender performing a treatment procedure without the consent of the patient is punishable by a fine, restriction of liberty or imprisonment of up to two years, and where the prosecution is initiated at the request of the victim (Article 192 § 2 PC). Due to the nature of the study, it omits such issues as, *inter alia*, the so-called living wills, interruption of persistent therapy and the doctor's liability for failing to provide assistance in a situation of threat to the patient's life or health. These issues would require a detailed and separate analysis.

At the outset, it should be indicated that medical interventions *a priori* involve the violation of various legal protections, including bodily integrity in the general sense, bodily integrity in terms of damage to health (for example, cutting the skin in the course of surgery), and broadly defined freedom. In Poland, the concept of the primary legality of medical procedures is commonly accepted in this respect. As rightly emphasised by Zoll, a doctor who undertakes a procedure *lege artis* does not violate the rules of dealing with a specific legal good, and consequently is not subject to liability under the criminal law regulations defining the values of human health and life (Zoll, 2017, p. 612). At the same time, some commentators argue that if a doctor violates one of the conditions justifying the primary legality of such behaviour (for example, carries out a procedure in violation of the principles of medical knowledge or without the patient's consent), the doctor's action becomes secondarily unlawful, thus exposing the doctor to criminal liability, whether for a crime against life or health or for carrying out a therapeutic procedure without the

¹ Act of 6 June 1997, Penal Code, consolidated text: Journal of Laws of 2021, item 2345, (hereinafter referred to as PC).

patient's consent (Mozgawa & Kanadys-Marko, 2004, p. 24). Thus, for example, in the case of a medical error, a doctor may be liable for an unintentional type of offence against life or health, depending on the result stemming from the error (Budyn-Kulik, 2017, pp. 161-168). The adoption of this concept explains why in the Polish legal system there is no equivalent of, for example, Article 125 of the Penal Code of Slovenia that excludes criminal liability in cases involving bodily injury with the consent of the injured person.

2 Protected interest

The title of the chapter which contains Article 192 § 1 PC states that the generic object of protection in case of that offence is liberty.² However, the complexity and multifaceted character of the concept of "liberty" entails the need to individualise the interest protected by that provision more closely. We share the view that "the protected matter is the patient's right to self-determination in the field of medical treatment, this right stemming from human dignity and being independent on the capacity to perform acts in law" (Mozgawa, 2017, p. 587). Scholars in the filed rightly claim that the patient's right to autonomy in deciding whether to undergo treatment results from the solutions adopted in the Constitution (Kubicki, 2000, p. 35; Zoll, 2017, p. 613). In this context, Articles 41 (1)³ and 47 of the Constitution of the Republic of Poland⁴ are of principal importance. Therefore, Article 192 § 1 PC complements the systemic protection of that aspect of liberty expressed in the Polish legal system. Moreover, T. Bojarski's view that Article 192 § 1 PC grants penal-law protection not only for the freedom to decide whether to undergo treatment, but also in terms of methods of this treatment (Bojarski, 2016, p. 548), may be considered reasonable. Reflecting upon the essence of this distinction, it firstly involves performing a medical treatment procedure either without the consent of the patient or against the patient's will. This situation would constitute a violation of freedom from coercive treatment. A second scenario is where the medical practitioner presents the patient with alternative methods of treatment, and then, after the patient (duly informed, of course) has chosen one of them, the procedure is eventually performed in a different variant than chosen by the patient. Here, the

² Chapter XXIII of the Penal Code – "Offences Against Liberty".

³ Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute.

⁴ Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

doctor's actions would constitute a violation of the patient's right to choose the form of treatment. As a rule, the place of the patient's right of self-determination in the hierarchy of values excludes the possibility for a medical practitioner to invoke a state of necessity (Article 26 PC) as a defence to circumvent the patient right to consent (Zoll, 2017, p. 611).⁵

3 Causative act

We begin our analysis of the subjective aspects of the crime in question under Article 192 § 1 PC by analysing the meaning of the concept of therapeutic treatment. As this term does not have a statutory definition in Polish law, scholars in the field have posited various views on its meaning and scope. According to Bojarski, a therapeutic procedure is any medical activity (medical service) performed at the stage of prevention, diagnosis, therapy or rehabilitation. The author reaches this conclusion by extrapolating from the Act on the Professions of Medical Practitioners and Dentists⁶, which uses the broad meaning of the term "medical service", including medical activities carried out by a medical practitioner (Bojarski, 2016, p. 549). Filar proposes a narrower interpretation of this term. Filar argues that in order for a given activity to constitute a therapeutic procedure, there must be a violation of the patient's physical integrity through either an interference with the patient's body tissue or physically invasion of the patient's body without violating that tissue (Filar, 2000, pp. 247-248). Under Filar's interpretation, the term would not cover various non-invasive treatments or even the prescriptions for specific pharmacological treatments, unless they involve the possibility of serious side effects (Filar, 2000, pp. 247-248). On the other hand, A. Fiutak defines therapeutic procedures as medical

⁵ It is right, therefore, that the view that negates this possibility is the prevailing scholarly opinion. A. Zoll rightly argues that acceptance of the possibility of invoking by the medical practitioner a state of necessity in such cases would lead to legal meaningfulness of the norm under Article 32(1) of the Act of 5 December 1996 on the professions of medical practitioner and dentist, while the institution of legal excuse can never lead to the deprivation of the meaning of a provision specifying a precept or prohibition of certain behaviour. (Zoll, 2005, p. 10). Also in the case law, a conviction has been expressed that it is inadmissible for a medical practitioner to invoke a state of necessity in the absence of the patient's consent (cf. judgement of the Supreme Court of 28 November 2007 (V KK 81/O7), OSNKW 2008/2/14: It is not acceptable to exempt a medical practitioner from responsibility for changing the scope of surgery without the patient's consent under Article 26 § 1 or § 5 PC in a situation of failure to meet the conditions set out in Article 35 (1) and (2) of the Act of 5 December 1996 on the professions of medical practitioner and dentist (Journal of Laws of 2005, No. 226, item 1943, as amended) as this would mean ignoring the limitations resulting from the latter provision, which are of a guarantee nature"). This is a reasonable approach, since a different conclusion would in principle lead to the annihilation of the individual's right to self-determination to undergo medical treatment.

⁶ Act of 5 December 1996 on the professions of medical practitioner and dentist; consolidated text: Journal of Laws of 2021, item 790, (hereinafter referred to as APMPD).

activities undertaken in relation to a patient at each stage of intervention (prevention, diagnostics, therapy, rehabilitation), related to the violation of the patient's bodily integrity through violating the tissue continuity (for example, surgeries or injections), as well as the use of natural body orifices (for example, gastroscopy) (Fiutak, 2016, p. 74). The narrowest interpretation of this term seems to be that presented by Dukiet-Nagorska. The author considers as therapeutic procedures all therapeutic activities aimed at the prevention, diagnosis, therapy or rehabilitation, provided that they are related to the performance of surgery or application of another method of increased risk (Dukiet-Nagórska, 2008, p. 23). In our view, this interpretation is too narrow because, for example, it leads to the deprivation of the patient's criminal-law protection in case of other therapeutic procedures. In this regard, Article 32 (1) APMPD also requires the consent of the patient.

To sum up, it may be assumed that the definition of therapeutic procedure should include an element of the therapeutic purpose. This conclusion logically follows from the statutory definition of this element contained in Article 192 § 1 PC, which expressly uses the adjective "therapeutic" in defining this treatment. Therefore, it is reasonable to assume that for the treatment to meet this requirement, it must be undertaken for therapeutic purposes. As P. Daniluk aptly notes, the therapeutic purpose takes place "when a given medical activity is objectively directed against a disease in the biological-medical sense and aims at prevention, diagnosis, therapy or rehabilitation of the affected person" (Daniluk, 2005/2, p. 46). Such an approach elucidates that therapeutic procedures can be undertaken on both the ill (therapy, rehabilitation, diagnosis) and healthy people (prevention, but sometimes also a diagnosis resulting in finding that the person is healthy). At the same time, it seems reasonable to circumscribe therapeutic procedures to only those activities which entail a violation of the patient's bodily integrity or which consist of entering the patient's body without violating this integrity (for example, gastroscopy). Given the importance of this issue, and the current state of uncertainty given the ambiguities that exist in the current Act, introducing a statutory definition of this term would be a welcome improvement to Polish law. Adoption of a definition necessarily should take into account both the views of the prevailing scholarly opinion as well as those of the medical community (Wala, 2015/3, p. 42).

The essence of the offence in question consists of undertaking a therapeutic procedure, in the sense as defined above, without the consent of the patient. Accordingly, there is a need to examine the element of consent together with an analysis of the requirements that must be met for its legality, and to explore cases in which the patient's disagreement will not give rise to criminal liability. There are many provisions in medical law that make medical intervention conditional on the consent of the authorised person. First of all, attention must be paid to Article 32 (1) APMPD⁷ and Article 34 (1) APMPD.⁸ Relevant solutions in this regard are also provided for in the Act of 6 November 2008, on patients' rights and the Ombudsman for Patients' Rights, which are addressed in the whole chapter 5.⁹ Article 15 of the Code of Medical Ethics is essential in the context of medical deontology.¹⁰ The issue of patient's consent is also governed by international regulations.¹¹ Given the importance of the consent for the legality of medical activities, it is necessary to specify the conditions that must be met for such consent to be valid. The concept put forward by Filar seems reasonable in this context. Filar lists the following conditions (to be met cumulatively):

- a) "the person who states his/her will must be entitled to express it, which means that the person must be the legal holder of legal interests to interfere in which he/she agrees,
- b) the act covered by the consent is not contrary to the law or the principles of social coexistence,

⁷ The medical practitioner may carry out an examination or provide other medical services, subject to exceptions provided for by law, after obtaining the patient's consent.

⁸ The medical practitioner may carry out a surgery or apply a method of treatment or diagnosis that poses an increased risk to the patient, after obtaining his/her written consent.

⁹ Consolidated text, Journal of Laws of 2020, item 849, (hereinafter referred to as APR). This mainly concerns Article 16, according to which the patient has the right to consent to the provision of certain medical services or refuse such consent, having been informed as set out in Article 9, Article 17(1), according to which a patient, including a minor over 16 years of age, has the right to consent to an examination or provision of other medical services, and Article 18(1). For a surgery or the use of a method of treatment or diagnosis posing an increased risk to the patient, the consent referred to in Article 17(1) shall be given in writing.

¹⁰ Resolution of the Extraordinary 2nd Nationwide Congress of Medical Practitioners of 14 December 1991 on the Code of Medical Ethics (<https://sip.lex.pl/akty-prawne/akty-korporacyjne/kodeks-etyki-lekarskiej-286454095>). Pursuant to the provision of Article 15 of this resolution, diagnostic, therapeutic and preventive procedures require the patient's consent.

¹¹ Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (signed on 4 June 1997 in Oviedo (hereinafter referred to as the Bioethics Convention) provides for that "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time." It should be noted that Poland is not a party to this Convention (although it signed it in 1999 but has not yet ratified).

- c) the consent must be informed, which means that it is an expression of the free will of the individual; it cannot be expressed under coercion, be it physical or mental, nor as a result of an error or in a mental state preventing its expression,
- d) the consent must be given in an appropriate form” (Filar, 2000, p. 249).

As a rule, in the context of therapeutic procedures, the holder of the legal interest will be the patient to whom the given procedure is to be performed. The person must have the ability to consent. This ability depends on the maturity (not necessarily majority) and the mental state of the patient (Mozgawa, 2016, pp. 547-548). It should also be accepted that for the existence of this right, it is not required for the person to have capacity to perform acts in law (Zoll, 2017, p. 615).

The APMPD also defines situations in which the patient does not have the full ability to consent to a therapeutic procedure. Depending on the specific situation, it is necessary for there to be the so-called substitute consent or the so-called cumulative consent. The APMPD refers to the alternative consent, which must be considered consent given instead of the patient's consent, or even against his will or against the will of the legal representative of the patient. Article 32 (2)¹², Article 32 (3)¹³, Article 32 (4) first sentence¹⁴, Article 32(6)¹⁵, Article 32(8)¹⁶ are the provisions relating to the alternate forms of consent to the examination or the performance of another medical service. Article 34(3)¹⁷ and Article 34(6)¹⁸ are the regulations relating to the

¹² If the patient is a minor or incapable of giving informed consent, the consent of his/her legal representative is required, and if the patient does not have a legal representative or it is impossible to communicate with the patient, a permission from the guardianship court is required.

¹³ If there is a need to carry out the examination of a person referred to in paragraph 2, the actual guardian may also agree to carry out the examination.

¹⁴ Where the person is fully incapacitated, the consent shall be given by the statutory representative of that person.

¹⁵ However, if a minor over 16 years of age, an incapacitated patient or a mentally ill or mentally handicapped patient, but having sufficient discernment, objects to medical treatment, permission from the guardianship court is required apart from the consent of his or her legal representative or factual guardian, or if their consent is not given.

¹⁶ If a patient referred to in paragraph 2 has no legal representative or actual guardian or it is impossible to communicate with those persons, the medical practitioner, after the examination, may proceed to provide further medical services only after obtaining the consent of the guardianship court, unless the provisions of the Act provide otherwise.

¹⁷ The medical practitioner may perform the procedure (surgical procedure – *an author's remark*) or apply the method referred to in paragraph 1 (method of treatment or diagnosis posing an increased risk to the patient – *an author's remark*) to a minor patient, incapacitated patient or a patient incapable to provide an informed written consent, after obtaining the consent of his/her statutory representative, and if the patient has no statutory representative or if communication with him/ her is impossible - after obtaining the consent of the guardianship court.

¹⁸ If the statutory representative of a minor patient, incapacitated patient or a patient incapable to provide an informed written consent does not agree for the performance by the medical practitioner of the activities listed in paragraph 1, which are necessary to remove the risk of loss of life or serious bodily injury or serious health

performance of a surgical procedure or the use of a method of treatment or diagnosis posing an increased risk to the patient. The cumulative consent, understood as consent given simultaneously by the patient himself and additionally by the patient's representative, takes place in the following cases referred to in the APMPD: Article 32(4) second sentence¹⁹, Article 32(5)²⁰ as regards the consent to carry out the examination or another medical service, and in Article 34 (4) ²¹ - as regards the consent to surgery or the use of a method of treatment or diagnosis posing an increased risk to the patient. However, the cumulative consent is largely restricted. This stems from the fact that where a minor who is at least 16 years of age, an incapacitated or a mentally ill patient, but able of sufficient discernment, opposes medical activities, surgery or the use of a treatment or diagnosis method presenting an increased risk to him/her, the possibility for the lawful performance of such medical procedures still exists, provided, however, that the authorisation for such a procedure is obtained from the guardianship court (Article 32(6) in conjunction with Article 34(5) APMPD). The guardianship court with jurisdiction to grant consent to perform medical activities is the court in whose district the activities are to be carried out (Article 32(10) APMPD).

The second requirement for the validity of the consent is that its content does not contravene the law or the principles of social coexistence. Thus, this condition will not be met by, for example, a consent to the carrying out of a procedure resulting in bodily injury motivated by the intention to evade military draft by a person subject to such an activity. In this case, the medical practitioner may be held liable pursuant to Article 143 § 2 PC.²² At the same time, it may be concluded that under Article 192 § 1 PC a medical practitioner will not be subjected to liability under such circumstances. The absence of that liability does not result because of the existence of consent, which, after all, would then be defective, but rather from the failure of the perpetrator of the crime element in the form of performing a therapeutic

derangement, the medical practitioner may perform such activities after obtaining the consent of the guardianship court.

¹⁹ Where the person is fully incapacitated, the consent shall be given by the statutory representative of that person. If such a person is able to give an informed opinion on the examination, it is also necessary to obtain that person's consent.

²⁰ If the patient is over 16 years old, the patient's consent is also required.

²¹ If the patient is over 16 years old, the patient's written consent is also required.

²² The same penalty (custodial sentence of up to 3 years – *an authors' remark*) shall be imposed on anyone who, in order to facilitate another person's exemption from military service or deferral of such service, with his consent, causes the effects specified in Article 156(1) or Article 157(1), or uses deception to this end to mislead the competent authority.

procedure. In other words, in this example, the procedure carried out for draft evasion does not meet the criterion of therapeutic procedure, which by its very nature, requires a therapeutic purpose.

The consent, to be valid, must be given in an informed manner. In accordance with Article 31(1) APMPD, "the medical practitioner is required to provide the patient or his legal representative with accessible information on the patient's health condition, the diagnosis, proposed and possible diagnostic methods, therapeutic methods, foreseeable consequences of their use or non-use, the results of treatment and the prognosis". The medical practitioner must also answer any questions the patient asks relating to the therapeutic procedure. Paragraph 4 provides for a restriction, according to which the medical practitioner may, in exceptional cases where the prognosis is unfavourable to the patient, limit the information provided to the patient. However, the medical practitioner is then obliged to provide this information to the patient's legal representative or the person authorised by the patient. However, at the patient's request, the medical practitioner is obliged to provide the patient with the requested information. The necessity to inform the patient in an accessible manner about the issues regarding the procedure was also pointed out by the Supreme Court in the judgment of 16 May 2012, in which the Court stated that "the patient's very approval of the procedure, obtained in the absence of prior provision of accessible information, cannot be treated as consent within the meaning of Articles 32 and 34 of the Act of 1996 on the professions of medical practitioner and dentist".²³ Fiutak's view that the consent given by a patient without first being provided with information about the risk or consequences of the procedure is invalid is therefore reasonable (Fiutak, 2016, p. 113). A situation sometimes arises in which it is necessary to change the content of the original consent during the procedure. In the APMPD, this issue is regulated by Article 35.²⁴The literature on the subject rightly claims that the originally given consent

²³ Judgment of the Supreme Court of 16 May 2012, (III CSK 227/11), Biul. SN 2012/7/13.

²⁴ Pursuant to paragraph 1, "if in the course of performing a surgical procedure or the use of a therapeutic or diagnostic method, circumstances arise, which, if not taken into account, expose the patient to the danger of loss of life, severe injury or severe health derangement, and it is not possible to promptly obtain the consent of the patient or his/her legal representative, the medical practitioner shall have the right, without such consent, to change the scope of the procedure or treatment or diagnostics in such a way as to take account of those circumstances. In this case, the medical practitioner is obliged, if possible, to consult another medical practitioner specialised in the same area if possible." Paragraph 2 also requires the medical practitioner to make an appropriate note in the medical records and to inform the patient, legal representative or actual guardian or the guardianship court of such change.

legalises the extension of the content of the therapeutic procedure as early as during its performance if:

- a) “the extension of the procedure does not pose a substantial risk to the patient and at the same time does not refer to particularly important organs,
- b) the procedure concerns particularly important organs or involves an increased risk to the patient, the scope of the procedure may be extended once the conditions under Article 35(1) APMPD are met” (Mozgawa, 2016, p. 553).

The relevant case law is in accord and also seems to be based on similar reasoning.²⁵ The fourth condition for the validity of the consent is its appropriate form, the content of which depends on the type of procedure the patient is subject to. In the case of an examination which does not pose a higher risk to the patient, and in the case of other health services (Article 32 (1) APMPD), the consent may be expressed orally or even through a behaviour of the authorised person which clearly indicates the will to undergo the medical activities proposed by the medical practitioner (Article 32 (7) APMPD). However, pursuant to Article 34 (1) APMPD, in the case of surgery, or the use of methods posing a higher risk for the patient, it is necessary to obtain written consent. Failure to keep the written form in the latter case, however, does not invalidate such consent. As the Supreme Court stated, the failure to document in writing the patient's consent to perform a therapeutic procedure, which the patient actually gave in a form other than required, does not meet the criterion "without consent" making up the type of crime specified in Article 192 § 1 PC.²⁶

²⁵ Judgment of the Supreme Court of 29 December 1969, (II CR 551/69, OSPiKA 1970, vol. 11, item 224): “If the medical practitioner performing the surgical procedure has found, after the opening of the abdominal cavity, a state of affairs that differs from the clinical examination, the medical practitioner may in some cases exceed the patient's consent to the procedure. However, this may only happen in special cases where failure to carry out the necessary surgery would endanger the patient's life, or where there is a slight and necessary correction to the planned surgery”. See also the judgment of the Appellate Court in Katowice of 19 February 2008 (I Aca 34/08, PS 2011, no. 4, p.144) which states that: “An unlawful extension of Caesarean section surgery by performing tubal ligation constitutes bodily injury. The ability to procreate is everyone's physiology, and deprivation of this ability is a kind of contraception that may not be accepted by a particular person. It is irrelevant to the unlawfulness of action that another pregnancy would pose a threat to the woman's life.”

²⁶ Decision of the Supreme Court – Penal Chamber of 10 April 2015 (III KK 14/15), OSNKW 2015 no. 9, item 77; the Appellate Court of Lublin also ruled similarly, holding that ‘the absence of a document containing the patient's consent to the surgery is irrelevant to the medical practitioner's liability, since the consent was undoubtedly there. This is so since consent is a patient's act of awareness, which can only find its confirmation in writing.’ – Judgment of the Appellate Court of Lublin of 27 February 1991 (I ACa 16/91), OSA 1991, no. 2, item 5.

Importantly, performing a therapeutic procedure without the consent of the authorised person will not always result in criminal liability of the person who performs such medical intervention. Multiple regulations allow for medical procedures to be carried out without consent, and sometimes even against the will of the person undergoing such treatment. For example, pursuant to Article 33 (1) APMPD, an examination or providing a patient with another medical service without his/her consent is permissible if the patient requires immediate medical attention, and due to his/her condition or age the patient cannot express the patient's consent and it is not possible to communicate with his/her legal representative or actual guardian. In such a situation, if there is such a possibility, the medical practitioner performing the procedure should consult with another medical practitioner who practices in the same field, and also record these circumstances in the patient's medical files (Article 33 (2) and (3) APMPD). For surgical procedures and methods posing a higher risk for the patient, Article 34 (7) applies, according to which the medical practitioner may take the indicated actions without the consent of the patient's statutory representative or the consent of the competent guardianship court, if the delay caused by the proceeding for obtaining consent would put the patient at the risk of loss of life, serious bodily injury or serious health derangement. In this case, the medical practitioner is obliged, if possible, to consult another medical practitioner specialised in the same area if possible. The medical practitioner shall immediately notify the statutory representative, the actual guardian or the guardianship court of the steps taken. In addition to the provisions in the APMPD discussed above, other legal regulations in this field include the following:

- a) Act of 19 August 1994, on the protection of mental health²⁷ (in the field of medical activities, in particular, Article 21(1)²⁸, and Articles 23, 24 and 29 specify the cases in which the patient may be placed in a psychiatric hospital or monitored without his/her consent);

²⁷ Consolidated text, Journal of Laws of 2020, item 685, (as amended).

²⁸ A person whose behaviour indicates that due to a mental disorder the person may directly put at risk his or her own life or the life or health of others, or is incapable of satisfying basic life needs, may undergo a psychiatric examination also without his or her consent, and a minor or incapacitated person may undergo a psychiatric examination also without the consent of his or her legal representative. In this case, Article 18 applies. Article 18 of this Act lists the prerequisites for applying direct coercion to such a person.

- b) Act of 5 December 2008, on the prevention and control of infections and infectious diseases in humans²⁹ (mainly Article 35(1)³⁰, as well as Article 5³¹ and Article 40(1) points (1) to (3)³². Pursuant to Article 46a of that law the Council of Ministers was granted the opportunity to issue regulations in the event of an epidemic or a state of threat of epidemic of the nature and degree exceeding the capacity of the competent governmental administrations and bodies of local authorities, under which various obligations or restrictions may be temporarily established, including the obligation of sick persons and those suspected of being infected to undergo medical examinations and subject to other preventive measures and treatment.
- c) Act of 21 November 1967, on the general duty of defence of the Republic of Poland³³(Article 26(1a)³⁴);
- d) Act of 26 October 1982, on education in sobriety and prevention of alcoholism³⁵ (Article 26(1)³⁶);

²⁹ Consolidated text, Journal of Laws of 2021, item 2069.

³⁰ In the case of suspected or diagnosed infection by a particularly dangerous and highly contagious disease, the medical practitioner admitting a person to the hospital, referring the person to hospital isolation, or isolation at home, shall, on the basis of his or her own assessment of the degree of risk to public health, subject the person suspected of being sick or diagnosed as infected by particularly dangerous and highly contagious disease or exposed to infection, to hospitalisation, isolation, quarantine, examination or shall refer the person to isolation at home, even where the decision referred to in Article 33 (1) (a decision to impose on such a person the obligations set out in Article 5 (1) of the Act) is not taken, and the person suspected of being sick, diagnosed as infected, or exposed to infection does not consent to hospitalisation, isolation, quarantine, examination or isolation at home.

³¹ This provision imposes various obligations on people staying in the territory of the Republic of Poland in terms of preventing and combating infectious diseases, and these include, in the context of Article 192 PC, the obligation to undergo: sanitary procedures, protective vaccinations, sanitary and epidemiological examinations, including proceedings aimed at collecting or providing the material for these examinations, treatment, hospitalization or isolation, including those at home.

³² According to this provision, persons with lung tuberculosis, syphilis and gonorrhoea are subject to compulsory treatment.

³³ Consolidated text, Journal of Laws of 2021, item 372.

³⁴ As part of the activities referred to in paragraph 1 (determination of capacity for active military service – *Author's remark*), persons appearing for military entrance processing, undergo mandatory medical examinations and, as necessary and at the decision of the chairman of the medical committee, specialized examinations, including psychological, and hospital observation.

³⁵ Consolidated text, Journal of Laws of 2021, item 1119.

³⁶ The persons referred to in Article 24 (persons who, due to alcohol abuse, cause the breakdown of family life, demoralise minors, evade the obligation to meet the needs of the family or systematically disturb peace or public order – *author's remark*), they are alcohol addicted, can be required to undergo treatment in a stationary or part-time rehab treatment facility. The obligation to undergo treatment in a rehab treatment facility is imposed by the district court having jurisdiction over the place of residence or stay of the person concerned, in non-litigious proceedings (paragraph 2).

- e) Act of 29 July 2005, on the prevention of drug addiction³⁷ (Article 30(1)³⁸);
- d) Act of 6 June 1997, Code of Criminal Procedure³⁹ (Article 74 § 2 points 1⁴⁰ and 2⁴¹);
- e) Act of 6 June 1997, Penal Enforcement Code⁴² (Article 118⁴³).

The object of the Act in the context of the discussed crime is the patient. Pursuant to Article 3 (1) point 4 of the Act of 6 November 2008, on patients' rights and the Ombudsman for Patients' Rights, the patient is a person who seeks health services or uses health services provided by an entity providing health services or a person performing a medical profession.⁴⁴ The term "patient" is not limited to sick people but is broadly defined by the World Health Organization to include "any person who uses health care services regardless of whether the person is sick or healthy" (Kozłowska, 2011, p. 109). This also indeed is the prevailing view among scholars in the field and should be considered reasonable (Możliwa & Kanadys-Marko, 2004, p. 28). The use of the term "patient" as part of the criteria for an offence in the context of the person granting consent means that the scope of penalisation under Article 192 § 1 PC covers only those cases in which the patient does not give independent consent (i.e. the consent he/she is the only authorised to express), or does not grant it concurrently with the legal representative or actual guardian (cumulative consent), but does not apply to cases where only substitute consent is required (Daniluk, 2013/2, p. 54). Any interpretation leading to the extension of this

³⁷ Consolidated text, Journal of Laws of 2020, item 2050.

³⁸ At the request of the legal representative, relatives within lineal consanguinity, siblings or an actual guardian, or, the family court may *ex officio* refer a minor addict to forced treatment and rehabilitation.

³⁹ Consolidated text, Journal of Laws of 2021, item 534.

⁴⁰ The accused is obliged to undergo external examination of the body and other examinations not involving violation of the bodily integrity.

⁴¹ The accused shall undergo psychological and psychiatric examinations and examinations combined with the performance of medical procedures on his body, with the exception of surgical procedures, provided that they are carried out by an authorised health professional keeping the rules of medical expertise and do not endanger the health of the accused, if these examinations are indispensable.

⁴² Consolidated text, Journal of Laws of 2021, item 53.

⁴³ Where the life of a convicted person is in serious danger, as diagnosed by at least two medical practitioners, the necessary medical procedure may be performed, including surgery, even though the convicted person has objected to this (§ 2). In the event of objection by the convicted person, the penitentiary court shall decide about the medical procedure. The court decision may be appealed against (§ 3). In a case of emergency, if there is an imminent danger of death of the convicted person, the need for surgery is decided by the medical practitioner (§ 4). It is worth noting that, pursuant to Article 119 § 1, a convicted person who, in order to enforce a particular decision or proceedings of an executive body or to evade his/her obligation, causes in his/her own body an injury or derangement of health, may be charged, apart from disciplinary responsibility, in whole or in part to the costs associated with treatment.

⁴⁴ Consolidated text, Journal of Laws of 2020, item 849.

provision also to substitute consent would be contrary to the principle of *nullum crimen sine lege stricte*. Penalizing also the lack of substitute consent would require modification of the features contained in Article 192 § 1 PC for example by introducing the words: "Whoever performs a therapeutic procedure without the required consent ..." or "Whoever performs a therapeutic procedure without the consent of the authorised person ..."

4 Subject of the offence

There is no consensus among scholars in the field regarding the nature of the offence specified in Article 192 § 1 PC. Some argue that this is a type of crime that pertains only to a specified offender, and thus its perpetrator can only be a person authorised to perform medical activities (primarily a doctor, but also a nurse or physician assistant). This interpretation is justified when we consider that the elements of this provision include such terms as "patient" and "therapeutic procedure" (Marek, 2010, p. 442; Mozgawa, 2016, p. 561). Others, however, perceive Article 192 § 1 as describing an offence of an universal nature (Hypś, 2017, p. 927; Zoll, 2017, p. 613). Given the dichotomy of views, the following postulate for the law as it should stand can be adopted as legitimate. If this offence were to be viewed as the type limited to a specified offender, then Article 192 § 1 of the Penal Code should read "Whoever appropriately licensed, performs ...". However, in order to clearly indicate the universal nature of this deed, the term "patient" should be replaced by the phrase "the person subject to a therapeutic procedure", and thus the provision would state "Whoever performs a therapeutic procedure without the consent of the person undergoing such procedure ..." (Wala, 2020, p. 520).

5 Subjective aspects

Undoubtedly, the subjective aspects of the offence under Article 192 § 1 PC are characterised by intentionality, and both direct intent and *dolus eventualis* may be considered (Fiutak, 2016, p. 373). *Dolus eventualis* may in principle relate only to the element of lack of consent. Undertaking the very procedure, due to its therapeutic nature, requires a direct intention, i.e. the perpetrator must be directed towards achieving the therapeutic goal. The so-called *quasi-dolus eventualis* may also be the case. This will occur when the perpetrator performs the therapeutic procedure, which was covered by his direct intention, but in the context of the lack of consent for such an

action, he was aware of this and at the same time agreed to this situation (Wala, 2020, p. 520). As Kubicki rightly notes, when investigating the subjective aspects of this offence, it is always necessary to thoroughly assess whether the perpetrator's error occurred as to the law or as to the fact, as this may lead to the actor's exculpation (Kubicki, 2000, p. 43).

6 The range of penalty

The offence discussed herein is punishable with three types of alternative penalties: a fine (from 10 to 540 day-fine units); or restriction of liberty (from one month to two years); or, imprisonment (from one month to two years), and thus has the status of misdemeanour. The enforcement of the sentence of imprisonment (not exceeding one year) may be conditionally suspended. Due to the upper limit of the range of penalty of imprisonment provided for in Article 192(1) PC, conditional discontinuance of criminal proceedings is possible (Article 66 PC), provided, of course, that all the conditions listed therein are met. The court may also refrain from imposing the penalty (pursuant to Article 59 PC) for the reason that the penalty does not exceed three years of imprisonment (provided that the social harmfulness of the prohibited act is not significant). In such an event, the court imposes a penal measure, forfeiture, or a compensation measure (of course, assuming that the objectives of the punishment are met in this manner).

If convicted of this offence various punitive measures also may be taken against the perpetrator. First, the perpetrator may be prohibited from practising a specific profession (for example, medical practitioner, nurse) or holding a specific position (for example, head of the hospital). As Kłaczyńska reasonably observes, this measure should be applied with great caution. The circumstances of the case should be thoroughly analysed and there should be clear evidence that the perpetrator has actually abused his/her profession or has shown that his/her continued practice of the profession puts at risk essential goods protected by law before such a harsh penalty is imposed (Kłaczyńska, 2014, p. 488). Secondly, it may also be possible to make the judgment public. Public disclosure should be limited to cases where the court considers it reasonable, in particular due to the social effect of the conviction, and as long as it does not infringe upon the aggrieved party's interest. Other possible penal responses to this crime include: forfeiture of tangible items, forfeiture of

financial benefits from the offence, or the obligation to compensate for damage or compensation for harm suffered.

7 Mode of prosecution

The offence in question may be prosecuted only upon the victim's complaint, which means that a request for prosecution by the victim is always required to initiate penal proceedings. Once the prosecution request is filed, the proceedings are conducted *ex officio*. The request may be withdrawn; in the pre-trial proceedings with the consent of the public prosecutor, and in judicial proceedings with the consent of the court, but only before the trial at the first main hearing is commenced. Reapplying is inadmissible. It seems that this prosecution mode is the right solution, as it takes into account situations where the patient had not consented to the therapeutic procedure, but once carried out, he/she considered that procedure nevertheless needed. Of course, the expression of such consent *ex post* does not lead to the legalisation of the therapeutic procedure itself, but will be reflected in the failure to bring a request for prosecution and, therefore, due to a procedural obstacle (Article 17(1) item (10) of the Code of Penal Procedure) will result in the inability to hold the person who carried out the procedure criminally liable.

8 Conclusion

To sum up, it can be concluded that the protection of the patient's autonomy regarding the decision to undergo a therapeutic procedure is appropriately regulated in the Polish penal law system. Medical legislation contains a number of solutions that guarantee the freedom of the individual regarding health services, while Article 192 PC duly sanctions any violation of patients' rights. Furthermore, the existence of a separate provision, expressly relating to the performance of a medical procedure without the consent of the patient, rationally points to the importance of the autonomy of the will of persons undergoing medical intervention as a socially relevant legal interest in a democratic state governed by the rule of law. At the same time, there are socially justified exceptions to the need to obtain consent from a person undergoing medical treatment. Importantly, the offence in question is quite rarely the subject of criminal proceedings in Poland, as evidenced by the fact that in the period 2002-2017, there were only 28 final convictions (Wala, 2020, p. 528). As indicated in the doctrine, in the case of performing a medical procedure without the

patient's consent, the so-called "dark number" of such offences may be significant. Thus, the sparse number of criminal convictions can rationally be explained primarily by the fact that this offence is prosecuted only upon the victim's complaint. It may be thought that in the case of successful medical procedures, but undertaken in violation of the standard contained in Article 192 § 1 PC, patients may not be interested in punishing the person who contributed to the improvement of their health (Wala, 2020, p. 529). However, this does not change the fact that maintaining the discussed offence in the Polish Penal Code is a rational solution.

Legislation, Acts, Regulations and Court Decisions

- Constitution of the Republic of Poland, Journal of Laws of 1997, item 483.
- Act of 21 November 1967, on the general duty of defence of the Republic of Poland, Consolidated text, Journal of Laws of 2021, item 372.
- Act of 26 October 1982, on education in sobriety and prevention of alcoholism, Consolidated text, Journal of Laws of 2021, item 1119.
- Act of 19 August 1994, on the protection of mental health, Consolidated text, Journal of Laws of 2020, item 685.
- Act of 5 December 1996 on the professions of medical practitioner and dentist; consolidated text: Journal of Laws of 2021, item 790.
- Act of 6 June 1997, Penal Code, consolidated text: Journal of Laws of 2021, item 2345.
- Act of 6 June 1997, Code of Criminal Procedure, Consolidated text, Journal of Laws of 2021, item 534.
- Act of 6 June 1997, Penal Enforcement Code, Consolidated text, Journal of Laws of 2021, item 53.
- Act of 29 July 2005, on the prevention of drug addiction, Consolidated text, Journal of Laws of 2020, item 2050.
- Act of 5 December 2008, on the prevention and control of infections and infectious diseases in humans, Consolidated text, Journal of Laws of 2021, item 2069.
- Act of 6 November 2008, on patients' rights and the Ombudsman for Patients' Rights; consolidated text, Journal of Laws of 2020, item 849.
- judgment of the Supreme Court of 29 December 1969, (II CR 551/69, OSPiKA 1970, vol. 11, item 224.
- Judgment of the Appellate Court of Lublin of 27 February 1991 (I ACa 16/91), OSA 1991, no. 2, item 5.
- Judgement of the Supreme Court of 28 November 2007 (V KK 81/O7), OSNKW 2008/2/14.
- Judgment of the Appellate Court in Katowice of 19 February 2008 (I Aca 34/08, PS 2011, no. 4, p.144.
- Judgment of the Supreme Court of 16 May 2012, (III CSK 227/11), Biul. SN 2012/7/13.
- Decision of the Supreme Court – Penal Chamber of 10 April 2015 (III KK 14/15), OSNKW 2015 no. 9, item 77.

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