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IMPLEMENTATION OF PATIENT AUTONOMY PRINCIPLE UNDER THE CONDITIONS OF PENITENTIAL ISOLATION

INTRODUCTION

Humans, since they are a creature at the highest level of genetic and biological development from conception to death, are equipped with a wide range of laws that have special protection. The foundation of these laws is the inherent and inalienable dignity of the human being, sometimes also referred to as universal and inalienable. The concept of dignity has been regulated in international law and also in national legislation, and as J. Zajadlo points out, it was even given a higher level of importance along all rights and freedoms. The dignity is inextricably linked, as defined in act 38 of

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the Constitution of the Republic of Poland of 7 April 1997[2] to the right to life and, consequently, the right to health guaranteed in act 68 of the Constitution. It should be emphasized that the fundamental law in act 38 includes an activity-oriented norm which covers the legislative action to protect life[3] by the legislator, regardless of the social position, financial situation, family, or even health status of the subject[4].

The right to health, as a direct correlator of the right to life, is also linked to the generally accepted principle of autonomy of the will, including the autonomy of the will of a patient. It is a basic rule of current medical ethics and bioethics[5], and at the same time, the departure from the paternalistic model in medicine of the authoritarian attitude of the medical staff towards the sick person[6]. Patient's autonomy is a manifestation of his collaborative approach and understanding of the importance of his participation in treatment and therapy[7]. However, the question arises as to how this postulate is implemented in relation to a patient who receives medical treatment under penitentiary isolation. Taking the above into account, it is important to consider whether this principle is limited, and whether the conditions in which the patient is located leads to his discrimination or reduction in his chances of recovery or even the salvation of life, keeping in mind the importance of securing his personal freedom and free will.

1. THE PRINCIPLE OF AUTONOMY OF WILL

The principle of autonomy of an individual's will is a foundation upon which philosophical, legal and ethical theories are based[8]. It is also inseparably linked to the constitutional principle of human dignity and it might be treated as its extension, particularly with regards to people in a difficult life situation caused by an illness or any other health-related issue, especially in a situation when this principle changes into the principle of patient's autonomy. Currently, autonomy is a fundamental rule of modern philosophy and ethics[9]. In bioethics, it is recognized as a *hallmark*[10], or as a *leading idea*[11].

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[2] Konstytucja RP z dnia 7 kwietnia 1997 roku (Dz.U. 1997 nr 78, poz. 483).

[3] B. Banaszak, M. Jabłoński, *Teza 2 do art. 38*, [In:] J. Boć (ed.), *Konstytucje Rzeczypospolitej Polskiej oraz komentarz do Konstytucji RP z 1997 roku*, Wrocław 1998, p. 78.

[4] P. Kuczma, *Prawna ochrona życia*, [w:] M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, p. 34.

[5] M. Nowacka, *Filozoficzne podstawy zasady autonomii pacjenta*, „Probl. Hig. Epidemical" 2008, No. 89 (3), p. 326.

[6] T. Biesaga, *Autonomia lekarza i pacjenta a cel medycyny*, „Medycyna Praktyczna" 2005, No. 6, p. 20.

[7] Ibidem.

[8] J. Kaczor, *Zasada autonomii woli w świetle filozofii liberalnej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, Rok LXIII, Zeszyt 1 – 2, https://repozytorium.amu.edu.pl/bitstream/10593/5208/1/01_Jacek_Kaczor_Zasada%20autonomii%20woli%20w%20%C5%9Bwietle%20filozofii%20liberalnej_1-25.pdf [access: 18.03.2017].

[9] G. Hołub, *Co skrywa zasada autonomii?*, [w:] G. Hołub, P. Duchliński, T. Biesaga (ed.), *Od autonomii osoby do autonomii pacjenta*, Kraków 2013, p. 141.

[10] A.R. Jonsen, *The birth of Bioethics*, "Oxford University Press", New York 1998, p. 334.

[11] O. O'Neill, *Autonomy and Trust in Bioethics*, "Cambrige University Press", Cambrige 2002, ix.

1.1. THE AUTONOMY OF WILL IN AMERICAN DOCTRINE

In 1970s, the United States Congress established the National Commission for the Protection of Human Subjects in Biomedical and Behavioural Research[12]. The work of the Commission resulted in issuing the *Report and Recommendations: Research on the Fetus* in 1975 as well as *The Belmont report: Ethical principles and guidelines for the protection of human subjects of research* in 1979[13], so-called The Belmont Report.

Departure from a traditional concept of dignity is considered to have originated in 1979, when autonomy was considered above other ethical values in American theological and bioethical doctrines, primarily due to practical reasons[14]. Such an overvaluation was associated with occurring more commonly in everyday life requirements and questions related to issues such as the beginning and end of human life, in vitro fertilization, prenatal diagnosis, cloning, stem cells, scientific research or medical experiments[15]. This matter became extremely important due to the need to develop clear, understandable and valuable canons necessary for decision-making in the field of medical practice, or creating legal solutions dictated by the need to adapt to the development of biology, genetics or biotechnology[16]. The Belmont Report mentioned the pointed above to the existence of three basic ethical principles, namely – the principle of respect for persons with regard to the informed consent, the principle of beneficence associated with risk - benefit assessment and the principle of justice related to qualifications of people for research and medical experiments[17]. However, it must be emphasised that although the principle of respect for a person was correlated with the obligation to provide information and, consequently, obtaining a person's consent to take a specific action, it was also intended to protect the dignity of a human person[18]. This protection covered not only those able to understand their situation, but also those who were not able to make independent decisions, while emphasising the right of everybody to be provided with an assistance regardless of whether or not this person was capable of consciously exercising its autonomy[19]. Based on those acts, the higher lever protection covered children, minors and legally incapacitated[20]. Such a well-thought protec-

[12] G. Hołub, *Co skrywa zasada…*, s. 141.
[13] Ibidem, these Documents were issued by the National Commission of the United States, pointing to the principle of respect for the person for her dignity.
[14] T. Biesaga, *Autonomia a godność osoby* [in:] G. Hołub, P. Duchliński, T. Biesaga (ed.), *Od autonomii osoby…*, p. 170.
[15] Ibidem.
[16] Ibidem.
[17] T. Beauchamp, *The Origins, Goals, and Core Commitments of the Belmont Report and Principles of Biomedical Ethics*, [in:] J.K. Walter, E.P. Klein (ed.), *The Story of Bioethics. From Seminal Works to Contemporary Explorations*, Washington 2003, p. 18.
[18] Ibidem.
[19] Ibidem.
[20] M. Therese Lysaught, *Respect: Or, How Respect for Persons Became Respect for Autonomy*, „Journal of Medicine and Philosophy" 2004, No. 29, p. 665-680.

tion predominantly considered a human as a person, a subject who has certain rights. Autonomy was not the principle which identified a human - it was the human who was the most essential element, in some way superior. Thus, the principle of autonomy is expressed in the idea of primacy of individual and, therefore, the values which characterise it over importance and good of the community or even the state apparatus[21].

The catalogue of three ethical principles was further clarified at a later date[22] and in its final version it adopted the following norms: the principle of beneficence, the principle of autonomy, the principle of harmlessness and the principle of justice[23]. It should be emphasized that the principle of respect for a person has been transformed into the one of will's autonomy, and the norm of beneficence became a basis for establishment of the principle of harmlessness[24].

1.2. THE ESSENCE OF THE PRINCIPLE OF AUTONOMY OF WILL

The term autonomy comes from Greek words *autos* – own, *nomos* – right[25] and it is an ambiguous concept.

According to G. Holub, the principle of autonomy of will originates from the so-called common morality which, the creators of principality T.L. Beauchamps and J.F. Childress[26], attempted to define and determine. They pointed out that "in the broadest and most ordinary sense, common morality includes socially accepted norms of human conduct. It recognizes certain types of behaviour as acceptable, while others as unacceptable (...). Common morality is a social institution that uses the code of learned standards"[27]. According to American bioethics, in terms of autonomy one may point to a sovereignty in relation to external coercion and an obligation to spot a difference between the independent subject and the independent choice made by it[28]. R.R. Raden and TL Beauchamp emphasise that there is a possibility that an individual might be in a situation when, despite its autonomy, he or she is unable to make an independent decision leading to sovereign choices, which is often related

[21] J. Kaczor, *Zasada autonomii woli w świetle filozofii liberalnej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, Rok LXIII, Zeszyt 1 – 2, https://repozytorium.amu.edu.pl/bitstream/10593/5208/1/01_Jacek_Kaczor_Zasada%20autonomii%20woli%20w%20%C5%9Bwietle%20filozofii%20liberalnej_1-25.pdf [access: 18.03.2017].

[22] It was made by two americans – Tom Beauchamp and James Childress. They are known for being a creators of so – called *principium* (T.L. Beauchamp, J.F. Childress, *Zasady etyki medycznej*, Warszawa 1996).

[23] G. Hołub, *Co skrywa zasada*…, p. 142.

[24] B. Gert, Ch.M. Culver, K.D. Clouser, *Bioethics: A return to Fundamentals*, "Oxford University Press", New York 1997, p. 74.

[25] M. Machinek, *Autonomia jako wartosc i problem moralny w relacji lekarz – pacjent*, http://www.mp.pl/etyka/podstawy_etyki_lekarskiej/57229,autonomia-jako-wartosc-iproblem-moralny-wrelacji-lekarzpacjent [access: 17.03.2017].

[26] G. Hołub, *Co skrywa zasada*…, s. 142.

[27] T.L. Beauchamp, J.F. Childress, *Zasady etyki*…, p. 14.

[28] Ibidem, p. 131.

to some external factors such as coercion or lack of knowledge[29]. The essential element of autonomy is rationality, which in some cases becomes a basic component that allows to classify certain decisions or actions of a human as independent, or not. Autonomy is sometimes perceived as a subcategory of freedom, since not every manifestation of freedom is an independent act[30].

Lack of unambiguity within the understanding of the principle of autonomy allows for many interpretations of this notion. It may be understood as a kind of independence of act demonstrated in voluntariness and intentionality[31]. Autonomy may also be acknowledged as act in accordance with general principles and values followed by an individual, his or her predispositions, personality, or idea of life[32]. Autonomy might also be presented in the form of the so-called effective reflection based on the need of making decision after prior consideration of its various possible effects and their evaluation[33]. This principle can also be understood as a behaviour that is a result of a moral statement based on making decisions and acting in accordance with accepted and followed moral principles[34].

A particularly important issue in regards to the principle of autonomy, is related to it respect, in its fundamental meaning expressed in respecting another individual and not interfering in its autonomy[35]. However, it should be borne in mind that the broader scope of respect covers activities that do not fall within the scope of the sovereignty of another person by guaranteeing and supporting capability of an individual to make decisions independently and, therefore, providing assistance in order to overcome fears and all other barriers hindering, overcoming and questioning autonomy[36].

According to A. Ryan, the most far-reaching implications related to autonomy may be found in liberal theories emphasizing the fundamental importance of a human who has an ability to make independent, sovereign decisions, power over self and own property[37]. The principle of liberal autonomy and its respect has its foundation in the science and philosophy of Immanuel Kant and Stuart Mill.

Kant as one of the first philosophers formulated the notion of autonomy in a particularly broad significance and characteristics known to modern times. He interpreted autonomy as an attribute of will guided by the principle of obedience to practical

[29] R.R. Raden, T.L. Beauchamp, *A History and Theory of Informed Cons*ent, "Oxford University Press", New York 1986, p. 8.
[30] R. Gillon, *Philosophical Medical Ethics*, John Wiley & Sons, Chichister 1986, p. 61.
[31] B.L. Miller, *Autonomia a odmowa poddania się leczeniu ratującemu życie*, [in:] W. Galewicz (ed.),*Wokół śmierci i umierania*, Kraków 2009, p. 117-121.
[32] Ibidem, p. 117.
[33] Ibidem, p. 119.
[34] Ibidem, p. 120.
[35] R. Gillon, *Philosophical*…, p. 62.
[36] T.L. Beauchamps, J.F. Childress, *Zasady*…, p. 136.
[37] A. Ryan, *Liberalizm*, [w:] R.E. Godin, P. Pettit (ed.), *Przewodnik po współczesnej filozofii politycznej*, Warszawa 1998, p. 395.

dispositions[38]. Kant's autonomy is one of the qualities of human will and, therefore, it is possible to associate it with a legal nature[39]. Kant idicated a close link between autonomy and human liberty. He emphasized that there is no hierarchical value more important than a subject – a human who is a creator of autonomy[40]. He completely rejected the possibility of using coercion to convince the subject to accomplish goals or any values that he is not the creator of[41]. He believed that such coercion would lead to the objectification of a human being, at the same time criticizing the idea of paternalism[42]. Kant derived the principle of autonomy from human dignity, and considered the law as a guarantor of both autonomy as well as dignity and liberty of an individual[43]. In this context, it would be inaccurate to omit Kant's second moral imperative, which commands that both an individual and another human being never become merely an objective, but are always a goal in and of itself[44].

The autonomy of individual and associated with it independence were related to considerations regarding the definition of their scope, as well as, the answer to the question of whether there is any possibility of their identification. Debates regarding the freedom of act of an individual and his or her independence with respect to the state authority and any other entity were made. A particularly important point in this context are the observations of John Stuart Mill, who formulated the principle of harm based on the assumption that any influence on decisions made by adult and reasonable person is prohibited, and human behaviour affects his own future, interests and might also affect the interests of other people but only on the condition that they agree to it[45]. The philosopher emphasized that the scope of freedom of an individual is clearly defined and that it is defined by the freedom of another human being[46]. He pointed out that people who require assistance and care from others (people who are "underage") should be protected from their own undertaken acts as well as from external injuries[47].

However, the fact that the principle of autonomy is inextricably linked to a person, which seems to be obvious, should not be overlooked. Definition of a person was made by John Locke, among others, who stated that it is a human who is perceived

[38] I. Kant, *Uzasadnienie metafizyki moralności*, Warszawa 1953, p. 78.
[39] Ibidem.
[40] J. Kaczor, *Zasada autonomii woli w świetle filozofii liberalnej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, Rok LXIII, Zeszyt 1-2, p. 7, https://repozytorium.amu.edu.pl/bitstream/10593/5208/1/01_Jacek_Kaczor_Zasada%20autonomii%20woli%20w%20%C5%9Bwietle%20filozofii%20liberalnej_1-25.pdf [access: 18.03.2017].
[41] Ibidem.
[42] Ibidem.
[43] Ibidem.
[44] I. Kant, *Uzasadnienie*…, p. 62.
[45] J.S. Mill, *O wolności*, [w:] *Utylitaryzm. O wolności*, Warszawa 2005, p. 225.
[46] Ibidem, p. 102.
[47] Ibidem, p. 130.

as a self-conscious being that is a subject of its own intellectual acts[48]. On the other hand, the autonomy of individual is defined by Locke as a comprehensive, full and inseparable right of ownership with regards to himself or herself, and being a component of natural law it is not possible to transfer it to another entity[49].

1.3. FREEDOM AND AUTONOMY

Based on the Polish legal system, autonomy is primarily derived from the fundamental principle of dignity, as well as from act 31 of the Constitution, in which the principle of liberty, bodily inviolability and personal freedom of each person was determined accordingly. Those principles are the protection measures in case there is a risk of attack on legally protected good[s50]. However, the question arises – what is the difference between the liberty defined in act 31 and the personal liberty defined in act 41 of the Constitution?

As stated by W. Skrzydlo, human liberty may be considered in different contexts, but above all it is considered in the context of act 41 of the Constitution, which guarantees the bodily inviolability and personal freedom of a human being and, thus, the possibility of personal limitations only in strictly defined cases on the social basis[51]. The obligation of defining limitations by referring to the Act provides another guarantee in the form of possible reduction of personal freedom's scope while eliminating any voluntariness in this sphere, in particular so that a public authority and executive organs always act on the basis of delegation of legislative power[52].

In the doctrine, it is also debated that freedom defined in the art. 31 should not be identified with personal liberty and, thus, it should be defined as one of the foundations on which the set of human rights and liberties is defined in the Constitution of the Republic of Poland and, hence, the other rights and freedoms only develop and improve the principle of at 31[53].

Alternative way to answer the above question is to point out that there is a possibility of distinguishing personal liberty defined in the act 41 and, consequently, the coexistence of it besides liberty defined in the act 31[54]. The argument supporting this thesis may be primarily associated with the situation in which a person is deprived of liberty. Specifically, the person might benefit from his guaranteed liberty

[48] J. Locke, *Rozważania dotyczące rozumu ludzkiego*, t. I, Warszawa 1955, p. 471.
[49] M. Nowacka, *Filozoficzne podstawy zasady autonomii pacjenta*, „Probl. Hig. Epidemiol" 2008, No. 89 (3), p. 328-329.
[50] Wyrok Trybunału Konstytucyjnego z dnia 11 czerwca 2002 roku, sygn. SK 5/02.
[51] W. Skrzydło, *Komentarz do art. 41 Konstytucji Rzeczypospolitej Polskiej*, [in:] W. Skrzydło (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lex 2013, Nr 428294.
[52] Ibidem.
[53] L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2008, p. 89 i n.
[54] P. Hofmański, *Prawo do wolności i bezpieczeństwa osobistego*, [in:] *Szkoła praw człowieka. Teksty wykładów*, Warszawa 1996, p. 185.

in the aspect of his conduct (not deprivation or restriction of liberty), for example, within the scope of making decisions relating to person's health, which is demonstrated in the autonomy of a person and, consequently, autonomy of a patient, as well as conscience, or religion.

On the other hand, B. Banaszak points out that within the constitutional concept of human liberty it is primarily a matter of ensuring the protection of ability of controlling oneself at any place and at any time and, thus, it is essentially about the personal liberty of the subject[55].

1.4. CONFLICT OF PATERNALISM WITH PATIENT AUTONOMY

Patient's autonomy is a fundamental principle of modern bioethics and medicine[56]. In terms of its general definition, it is based on the assumption that a patient who is aware of his or her own condition and capable of making decisions should make that decision on his or her own, without any involvement of third parties, in accordance with his or her own convictions[57].

However, the relationship patient-physician was not always based on the currently accepted principle of patient's autonomy, since there was another one in place that used to be followed for many years – the principle of paternalism based on the attitude of the father who showed concern about the well-being of his family, especially children under his care who were unable to express their will, while refusing to take into account their views in a particular matter[58]. The paternalistic theory applied to adults capable of understanding and expressing their conscious will leads to negative perception and understanding of the theory, whereas applied to patient is an indication of authoritarian attitude of the physician towards the patient whose life is in danger[59]. The existence of moderate and radical paternalism is indicated in the field of bioethical science in the relationship physician-patient[60].

Talking about a moderate paternalism, it is permissible to object against a harmful act directed towards the patient, but only if it is absolutely non-voluntary or if a short-term intervention is necessary in order to determine whether it is voluntary or not[61]. It is accepted in situations where a patient suffered as a result of an accident or is suffering from mental illness, and his or her actions do not show the characteristics of voluntariness or, even more, are directed against his or her own life

[55] B. Banaszak, *Konstytucja Rzeczypospolitej polskiej. Komentarz*, Warszawa 2009, p. 175.
[56] M. Nowacka, *Filozoficzne*…, p. 326.
[57] Ibidem.
[58] T. Biesaga, *Autonomia lekarza i pacjenta a cel medycyny*, „Medycyna Praktyczna" 2005, No. 6, p. 20.
[59] Ibidem.
[60] J. Feinberg, *Legal Paternalism*, Can J. Philos 1971, p. 105-125; D.C. Thomasma, *Beyond medical paternalism ant patient autonomy: a model of physician conscience for the physician – patient relationship*, Ann. Intern. Med. 1983, No. 98, p. 243-248.
[61] J. Feinberg, *Legal…,* p. 133.

or health[62]. On the other hand, the radical paternalism is based on the consent to prevent a harmful act of a patient, even if there is an assumption that it is undertaken independently[63].

As argued by T. Biesaga, on the one hand a disapprobation towards authoritarian attitude in medicine emphasized the role of a patient and at the same time evoked the principle of dignity and liberty of a human (including a patient), and on the other, the perception of patient autonomy did not fully yield the expected effects[64]. The polemic between paternalism and autonomy eventually came down to a conflict between an egocentric liberty of the physician and a particularism of the patient[65]. It is debated, however, that a specific part of paternalism in the physician-patient relationship seems to be justified and the dispute is primarily based on its scope and the degree of its application[66]. Considering such an issue, the following question arises – in what situations is the principle of paternalism allowed to be used? It seems reasonable to refer to the purpose of medicine and, consequently, to the benefit of a patient and its application to the greatest extent as well as the benevolent act of medical personnel towards the patient. It is often the case that patient's approbation of physician's paternalistic behaviour results from his willingness to take responsibility for himself and the consequences of his decision that may not always be beneficial for the patient. On the other hand, this leads to a violation of liberty and dignity of the patient[67]. It is, therefore, extremely important to integrate a specialist knowledge of a physician and a professional nature of his or her actions intended to protect health and life of a human being while respecting and ensuring the principle of patient's autonomy, who in the vast majority of cases, does not have a necessary knowledge to make a fully sovereign decision regarding further medical proceedings in his case[68]. The physician is obliged to respect autonomy of the patient, which is not so much a result of a moral obligation, but rather a respect for the patient's well-being[69]. It should be emphasized that in such respect with regards to autonomy the responsibility is not greater for the physician, since autonomy is supplemented by responsibility of the patient[70]. A duty of a physician is primarily based on informing the patient about possible consequences, both positive and negative, of a specific action undertaken by a medical staff to which the patient eventually agrees or refuses to agree after considering all the circumstances.

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62 T. Biesaga, *Autonomia*…, p. 20.

63 E.D. Pellegrino, D.C. Thomasma, *For the patien's good: the restoration of beneficience in health care*, "Oxford University", New York 1988, p. 49.

64 T. Biesaga, *Autonomia*…, p. 21.

65 Ibidem.

66 R. Gillon, *Etyka lekarska – Problemy filozoficzne*, Warszawa 1978, p. 78-83.

67 M. Nowacka, *Filozoficzne*…, p. 326.

68 Ibidem.

69 Ibidem, p. 327.

70 Ibidem.

Furthermore, as pointed out by E.D. Pellegrino, "The patient's right to reject unwanted forms of treatment has been neglected for too long (...) Moreover, the unexpected development of medicine has made the choice of treatment fundamental, as compared to any previous possibilities. The principle of patient's autonomy has been recognized as protection against the misappropriation of his or her right to participate in decisions concerning his or her life"[71]. Referring to Locke's ownership right of a person, the physician does not have any authority to make decisions for the patient, and the patient is not entitled to accept the paternalistic attitude of the physician[72]. However, it is necessary in any case to behave in accordance with Aristoteles' theory of the golden measure, which was aptly stated by T. Brzeziński, who argued that: "Paternalism, although often legally incapacitated for the patient, was a relationship based on a responsibility for the patient's fate and on empathy so it agreed with what we understand as humanitarianism. A relationship solely based on written rights and obligations becomes a formal relationship where the physician will be more eager to follow the law, rather than consider the consequences of such a procedure. Apart from introduction of a more sophisticated technique into medicine alongside the increasingly narrow specialization of physicians, this is another step that, if improperly used, might cause further dehumanization of medicine"[73].

2. UNDERSTANDING THE CONCEPT OF A PATIENT

In light of the above considerations, the word patient is very important. It comes from the Latin language, precisely, from the expression "patient", which means "sufferer", "sick"[74]. Sometimes it is also linked to the English word "patient" or "showing patience". As J. Bujny points out, referring to the Polish dictionary in which the word "patient" is understood as "a sick person referring to a physician for medical advice, being under physician's care"[75], or a Polish foreign word dictionary indicating that the patient is "a sick person looking for medical advice from a physician, being under physician's care"[76] stresses that in referring to the above definitions of the word "patient", both terms, "patient" and "sick person" can be used interchangeably[77]. Nevertheless, the definition of a "patient" specified by World Health Organization indicates that a patient is anyone taking advantage of medical service, regardless of whether he or she is healthy

[71] E.D. Pellegrino, *The Philosophy of Medicine Reborn. A. Pellegrino Reader*, [in:] H.T. Engelhardt, F. Jotterand (ed.), *Patient and Physician Autonomy. Conflicting Rughts and Obligations in the Physician – Patient Relationship*, Notre Dame 2008, p. 207.
[72] M. Nowacka, *Filozoficzne*…, p. 329.
[73] T. Brzeziński, *Etyka lekarska*, Warszawa 2002, p. 61.
[74] J. Bujny, *Prawa pacjenta. Między autonomią a paternalizmem*, Warszawa 2007, p. 9, *Słownik wyrazów obcych* PWN, Warszawa 1999, p. 809.
[75] E. Sobol, *Mały słownik języka polskiego*, Warszawa 1995, p. 591.
[76] E. Sobol, *Słownik wyrazów obcych*, Warszawa 1995, p. 809.
[77] J. Bujny, *Prawa*…, s. 9.

or sick. On the other hand, a physician has a duty to examine a patient, make a diagnosis and implement the appropriate treatment based on his/her medical knowledge[78]. Thus, a dictionary definition of a patient is much broader than the definition of a sick person, because he/she may not be suffering from any disease symptoms (as the patient may be referring to a physician only for a consultation, preparing for a transplant, which requires the patient to be fully healthy at the time of surgery[79], or it could be a woman giving birth[80])[81]. The way in which the concept of a patient is understood is also related to the act 2 rule. 1 point 10 of the law of 15 April 2011 on the medical activity[82], in which the health benefit was determined. According to the regulation above, the benefit should be understood as actions to preserve, restore or improve person's health, and any other medical activities resulting from the healing process or separate laws regulating the way of their implementation, so in accordance with the literal sense, these are not the only actions undertaken while dealing with sick person. The health care services act of 30 August 1991[83], contained a range of exemplary health care services, which included, among others, medical examination and counseling, treatment, care for a healthy child, diagnostic tests (including medical analysis), and even vaccination. However, this act was derogated in January 2011.

It should also be noted that in the Polish legal system until 2007 there was no legal definition of the concept of patient. An attempt to unify the understanding of it was in the draft law of 2008 on the protection of individual and collective rights of a patient and the Patient Rights Ombudsman, which was to become part of laws governing health protection[84], based on act 3 point 2, a patient was defined as a person receiving the health benefits from the benefits provider. However, the legal definition of a patient may be used for marketing purposes only recently, based on act on the rights of a patient and the Patient Rights Ombudsman as of November 6, 2008[85], where in act.

[78] E. Syweńki, D. Suchańska, D. Dobrowolska, R. Góralewicz-Lenartowicz, L. Baran, M. Berghausen-Mazur, *Płód jako pacjent – rys historyczny*, „Perinatologia, Neonatologia i Ginekologia", tom 1, zeszyt 4, p. 314-318, 2008, s. 314, http://www.ptmp.com.pl/png/png1z4_2008/pngz14-12.pdf [access: 20.03.2017].

[79] D. Ponczek, *Prawa pacjenta w Polsce*, Łódź 1999, p. 7.

[80] M. Boratyńska, P. Konieczniak, *Prawa pacjenta*, Warszawa 2001, p. 12-13.

[81] K. Wojtczak indicates that the understanding of the concept of „patient" should be considered on the basis of the notion of „health" as a defined human condition, which indicates complete prosperity both physically and psychologically and socially, while stressing that this is not simply a matter of no illness or also flawed (K. Wojtczak, *Rozważania nad pojęciem pacjenta*, [w:] J. Filipek (ed.), *Jednostka w demokratycznym państwie prawa*, Bielsko-Biała 2003, p. 744-750). These considerations are largely based on the health issue identified by the World Health Organization (WHO) as a state of well-being at the physical, psychological and social level, and therefore not only a condition associated only with the absence of illness or also inadequate (Konstytucja Światowej Organizacji Zdrowia (WHO) z 22 lipca 1946 roku, Dz.U. 1948, nr 61, poz. 477, ze zm.).

[82] Ustawa z dnia 15 kwietnia 2011 roku o działalności leczniczej (Dz.U. 2016.2260).

[83] Ustawa z dnia 30 sierpnia 1991 roku o zakładach opieki zdrowotnej (Dz.U. 2011, nr 45, poz. 235).

[84] Projekt ustawy z 2008 roku o ochronie indywidualnych i zbiorowych praw pacjenta oraz Rzeczniku Praw Pacjenta, http://orka.sejm.gov.pl/proc6.nsf/projekty/283_p.htm [access: 20.03.2017].

[85] Ustawa z dnia 6 listopada 2008 roku o prawach pacjenta i Rzeczniku Praw Pacjenta (tekst jedn. Dz.U. z 2016 r., poz. 1070).

3 point 4, the legislator defined a patient as a person applying for health care or health services to their provider or a person performing medical profession.

2.1. A PATIENT UNDER THE CONDITIONS OF PENITENTIAL ISOLATION

On the basis of the above considerations, the question arises as to whether a person staying in a detention center can also be perceived as a patient. Undoubtedly, a person staying in a penitentiary unit is in a unique life situation, just because of the mere fact of deprivation of liberty, and consequently numerous other limitations. Based on that fact, it is important to ask a question whether more important is the execution of the sentence imposed on the imprisoned person, or whether the priority in this case has the imprisoner's health protection. Undoubtedly, the overriding priority is the life and health of the person, subject to constitutional guarantees, and consequently personal rights in the form of the right to life and health. Unfortunately, based on practice, a person who is deprived of liberty is mainly considered, especially by prison officers, primarily as a convict, then as a patient.

In the Polish legal system, prison health system guarantees to persons deprived of their liberty a health care under the provisions of act 102 rule 1 of the law of 6 June 1997 of Penal Code (hereinafter referred to as the "Criminal Code")[86], which secures the right to medical treatment for prisoners. According to act 115 rule 1 and 3 of Criminal Code, prisoners are provided with free health services, medicines and sanitary items[87]. The legislator did not specify on the ground of the Criminal Code, the interpretation of medical benefits, so it seems justified to understand them as indicated above, based on the law of medical activities. In addition, under the act, health services for persons deprived of their liberty are provided primarily by treatment providers that specialize in those services (Act 115 § 4 and 5 of the Criminal Code) – therefore, prisoners should be guaranteed with an access to health services in penitentiary, only if necessary, outside of this institution. Health services are provided to convicts in facilities forming part of the organizational structure of penitentiary units (outpatient clinics, patients' chambers, prison hospitals, diagnostic laboratories, dentist, rehabilitation and physiotherapy clinics)[88]. In addition, the imprisoned person is entitled to select a treatment from a doctor's of his/her choice and to the use of any additional medicines and medical products, but only in particular cases and only with the consent of the director of the penitentiary after consultation with the prison doctor (act 115 § 6 of the Criminal Code). At the same time it should

[86] Ustawa z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy (tekst jedn. Dz.U. z 2016 r., poz. 1948).
[87] Convicts are not covered by health insurance, art. 66 ustawy z dnia 27 sierpnia 2004 roku o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (tekst jedn. Dz.U. z 2016 r., poz. 960).
[88] D. Rogala, A. Banach, D. Jachimowicz-Gaweł, Ż. Skinder, *System opieki zdrowotnej nad osobami osadzonymi w zakładach penitencjarnych w Polsce*, „Hygeia Public Health" 2013, No. 48 (4), p. 442, http://www.h-ph.pl/pdf/hyg-2013/hyg-2013-4-441.pdf [access: 20.03.2017].

be stressed that medical care for persons deprived of their liberty is free of charge, the funding comes from the state budget. In addition, medical staff working in the penitentiary unit is obliged to guarantee to prisoners who are under ambulatory care a 24-hour medical supervision. It needs to be highlighted that hospitals in the organizational structure of a penitentiary unit are excluded from the possibility of performing specialized procedures due to lack of appropriate medical equipment (refers mainly to cardiology, ophthalmology, neurosurgery or transplantology).

Based on the discussion above, whether a person staying at a detention centre should be identified with the patient in the indicated sense, the answer seems obvious and brings us to a very accurate definition of a patient by K. Wojtczak where the concept of a patient consists of three elements to gain full understanding of it[89]. The first basic one, is that the above concept is only associated with a human being, individual, a physical person[90]. The second element refers to a natural person whose health care is provided by the entitled person regardless of the person's entitled to receive it, or whether he or she is still waiting to receive such benefit[91]. Thirdly, the concept of a patient as a person relates to an individual who has a specific bond with a member of medical staff or particular unit, because he or she is receiving health care services or is expecting to receive them[92]. Going further, not taking into account any moral or ethical values or any social issues in relation to people who were convicted, and consequently they have been placed in a place of detention, moreover they are in need for health care, it is important to point out that in each case they completely and unequivocally fulfil the criteria to recognize them as patients, because of the basic principles of humanitarianism.

3. AUTONOMY OF OBJECTS IN DETENTION CENTRES AND ITS POSSIBLE LIMITATIONS

Despite the commonly accepted principle of patient autonomy, which is applied regardless of the patient's condition, there is a possibility of emphasizing its limitations that result from either legal aspects, or aspects without normative qualities.

Bioethics indicate that an extremely frequent limitation of patient autonomy are situations when the patient's ability to make decisions on his or her own is restricted, in case it would lead to harmful effects on health and, above all, it would pose a threat to health conditions of the public, third parties, innocent, or simply would involve having to make substantial financial outlays[93]. This is a reference to the philosophy of au-

[89] K. Wojtczak, *Rozważania*…, p. 750.
[90] Ibidem.
[91] Ibidem.
[92] Ibidem.
[93] T.L. Beauchamp, J.F. Childress, *Zasady.*.., p. 137.

tonomy determined by J.S. Mill, articulated by the fact that the limit of autonomy is established "externally"[94].

A generally accepted principle is also related to a rule associated with a consent of the patient (or another authorized entity) to receive therapeutic treatment (medical treatment), but this is an issue of such an extensive scope that it will only be mentioned in this document. This matter is specified in detail by the provisions of act 31 and the subsequent Act of 5 December 1996 on the professions of doctor and dentist[95], as well as by the Act 5 of 6 November 2008 on the Patient Rights Act and Patient Rights Ombudsman. This prerogative was also a subject to sanctions specified in the art. 192 of June 6, 1997 Criminal Code, which established fines, restriction of liberty or deprivation of liberty for up to 2 years in case of performing a medical treatment without consent of the patient[96]. The implementation of such an operation also gives rise to civil damages[97] and constitutes a violation of the Medical Code of Ethics, specifically act 15[98] and, consequently, under the Act of 2 December 2009 on medical centres the physician may also be professionally liable[99].

However, with regard to people deprived of their liberty the principle of patient autonomy suffers from limitations, in particular when referred to a patient undergoing a particular treatment without his or her consent. Such a possibility is provided for by Art. 118, among others, which states that in case of an immediate danger threatening a life of a sentenced person, there is a possibility of performing a medical (even surgical) procedure even if the sentenced person objected. However, such a situation must be identified by at least two physicians, and then the competent authority able to approve the procedure is the penitentiary court. This does not apply, however, to emergency cases when the physician may decide to perform a medical intervention. There are many arguments in favour of such a regulation. First of all, it is argued that the detainee, while in detention centre, may be limited to a certain extent in his or her independence particularly by other fellow prisoners, which often leads to acts of aggression directed at himself or herself in the form of self-harm, including suicides[100]. At the same time, it should be indicated that it is the responsibility of the Prison Service officers to ensure that people sentenced to imprisonment or temporarily detained and those

[94] G. Hołub, *Co skrywa zasada*…, p. 147.

[95] Ustawa z dnia 5 grudnia 1996 roku o zawodach lekarza i lekarza dentysty (tekst jedn. Dz.U. z 2017 r., poz. 125).

[96] Ustawa z dnia 6 czerwca 1997 roku kodeks karny (tekst jedn. Dz.U. z 2016 r., poz. 437).

[97] Ustawa z dnia 23 czerwca 1964 roku kodeks cywilny (tekst jedn. Dz.U. 2016 r., poz. 380).

[98] Kodeks Etyki Lekarskiej, http://www.nil.org.pl/__data/assets/pdf_file/0003/4764/Kodeks-Etyki-Lekarskiej.pdf [access: 21.03.2017].

[99] Ustawa z dnia 2 grudnia 2009 roku o izbach lekarskich (tekst jedn. Dz.U. z 2016 r., poz. 65).

[100] T. Szymanowski, Z. Świda, *Kodeks karny wykonawczy. Komentarz. Ustawy dodatkowe, akty wykonawcze,* Librata 1998, s. 227; T. Kolarczyk, S. Wrona, *Samobójstwa tymczasowo aresztowanych i skazanych*, „Przegląd Więziennictwa Polskiego" 1977, No. 16-17, p. 47.; in the 80s and 90s of the last century, suicide accounted for 30.3% of deaths in prisons (J. Malec, *Samoagresja osób pozbawionych wolności*, [w:] *Stan i węzłowe problemy polskiego więziennictwa*, cz. II, Biuletym Rzecznika Praw Obywatelskich, Warszawa 1997, s. 179).

who are subject to custodial sentences and coercive measures resulting in deprivation of liberty have their rights respected, in particular humanitarian living conditions, dignity, healthcare and tolerance of religion[101].

A particularly large group in terms of detained people are patients who committed self-harmful acts, which involves performing an act that leads to a harm to themselves[102]. The category of self-inflicted acts might also include refusing to eat, and it is indicated that it is justified to using artificial nutrition in such a situation in order to protect life and health of the detainee. First and foremost, the arguments in favour of applying the construction of state of higher necessity in such a situation were raised by the literature relating to infringement of a legally protected good in order to protect another good of a higher social value[103]. On the other hand, however, one should remember about the already mentioned liberty, personal liberty, ability to make decisions about oneself, human autonomy and patient autonomy. This theory is, however, undermined by the fact that in the discussed case both liberty as well as health and life belong to the same and not different entities, which would justify the use of the state of higher necessity[104]. Executive Criminal Code of 1969[105] included the possibility of compulsory treatment and, consequently, compulsory eating. At that time, competencies of the physician included making a decision regarding the necessity of performing specific medical procedures, including feeding the patient despite a lack of his or her consent.

Currently, under the applicable executive criminal code, the legislator did not envisage the possibility of using forced treatment of the detainee. The only indication in this respect seems to be art. 116 of Executive Criminal Code including the open catalogue of obligations of the detainee, in particular the provisions defining the rules and procedures of punishment established in the penal institution of order as well as the execution of orders of superiors and other authorized persons. Within the scope of this provision, the legislator included only the detainee's obligation to surrender, irrespective of obligations set out in the regulations regarding the elimination of infectious diseases, venereal diseases and tuberculosis, alcoholism and drug addiction – defined by the legislation medical examination, treatment, medical procedures, sanitation and rehabilitation, as well as tests for a presence of alcohol, drugs or psychotropic substances, and the sentenced person who was ordered to have psychological or psychiatric examinations performed by a penitentiary judge is also obliged to provide the investigator with information regarding his or her health condition, previous illnesses and injuries, the conditions

[101] Ustawa z dnia 9 kwietnia 2010 roku o Służbie Więziennej (Dz.U. 2016, poz. 1250).

[102] T. Leśniak, W. Szota, *Zachowania samoagresyjne jako problem penitencjarno-psychologiczny. Z praktyki wymiaru sprawiedliwości*, No. 3, 1983, s. 129, self harm can include for example so-called spriking (in eye something objects), dusting (pouring various materials in eyes), incision (cut the veins, tendons) or swallowing something

[103] A. Zoll, *Odpowiedzialnośc karna lekarza za niepowodzenia w leczeniu*, Warszawa 1988, p. 18-19; A. Liszewska, *Problem zgody pacjenta jako dylemat aksjologiczny*, „Prawo i Medycyna" 1999, nr 1, p. 85-90.

[104] Ibidem.

[105] Ustawa z dnia 19 kwietnia 1969 roku kodeks karny wykonawczy (Dz.U., 1969, nr 13, poz. 98, ze zm.).

under which he or she was educated and the performed activities essential for examination ordered by a psychiatrist or psychologist. Consecutively, with regard to the food intake, the legislature in 2003[106] introduced the provision of art. 116a of Executive Criminal Code stating that the sentenced person must not refuse to eat meals provided by the prison administration to enforce a specific decision or conduct, and to cause an injury or a health damage to oneself, as well as induce or assist in the conduct of such offenses (if the sentenced person commits the acts mentioned above, one is a subject to disciplinary action under Article 142 of the Executive Criminal Code). It should be emphasized that based on the literal wording of the provision, this prohibition applies only when the detainee performs acts specified in the art. 116a item 5 of the Act, where this action is intended to force a particular decision or procedure and does not refer to refusal to accept food for another reason. However, as argued by J. Malec, acts of self-aggression, which undoubtedly include refusal to accept food, may be dictated by emotional considerations linked to one's situation, separation from family or detrimental judgment for the person deprived of liberty made by court, as well as instrumental considerations whose goal is to force the administration unit to arrange a transfer to another penitentiary facility or force a decision to undergo hospital treatment outside the facility, which undoubtedly makes it possible for the detainee to escape [107]. However, in the event of the detainee's attempt to starve, a referral to the provision of art. 118 of the Executive Criminal Code and an implementation of a specific procedure based on, among others, an obligation to inform a director of the detained centre, the penitentiary judge, at the physician's request. As the Court of Appeal in Cracow stated in its decision dated April 16, 2003, a prison physician, whose job it is to assess the health condition of a detainee, does not need to be a specialist since his or her obligation is not to diagnose or prescribe treatment, but rather to make a judgment whether there is a threat to health or life of the sentenced person, in case of his or her further treatment in the penitentiary facility[108].

It should be mentioned that there is a possibility to oblige the prisoner to go to detoxification or therapeutic treatment, which combines with rehabilitation efforts and a possibility of assessing the offender. The assessment is based on a positive forensic criminological opinion build on the assumption that his or her current posture and behaviour after committing an offense indicate high probability of compliance with the established legal order in the longer term[109]. The legislator provided for such a possibility in act 72 § 1 of the Criminal Code, according to which a court may oblige a convicted person to, among

[106] Novel: Ustawa z dnia 24 lipca 2003 roku o zmianie ustawy kodeks karny wykonawczy oraz niektórych innych ustaw z dniem 1 września 2003 roku (Dz.U. z 2003 r., nr 142, poz. 1380).

[107] J. Malec, *Samoagresja*…, p. 212-213.

[108] Postanowienie Sądu Apelacyjnego w Krakowie z dnia 16 kwietnia 2003 roku, sygn. akt II Akz 121/03, „Krakowskie Zeszyty Sądowe" 2003, No. 5, p. 54.

[109] O. Kąsowska, *Możliwości zobowiązania skazanego do podjęcia leczenia odwykowego, terapeutycznego, oddziaływań korekcyjno-edukacyjnych. Metody prowadzenia terapii, programów korekcyjno-edukacyjnych, profilaktycznych*, http://www.ms.gov.pl/probacja/2014/download,2718,10.html [access: 2.02.2017].

other things, undergo treatment, particularly rehabilitation, or a therapy, and to participate in rehabilitating and educational programs. However, in the indicated cases the imposition of these obligations requires consent of the convict, which does not constitute a restriction of autonomy and is therefore not the subject of this study.

SUMMARY

In the light of the above considerations, the principle of will's autonomy against the idea of paternalism is the core of modern medicine. However, it should be borne in mind that this rule is not absolute. The paternalism of a physician, who rejects to respect patient's will, in any case is in accordance with the ethical and moral principles of the profession. The autonomy of a patient should be analysed in terms of both, the state of a patient and the relation to the physician and his medical knowledge. It should not only include his free will and the ability to decide on his or her own destiny, but also the responsibility for the decisions made; on the other hand, one must not forget about the proper understanding of the autonomy of a physician and his actions where a primary concern and highest value is a wellbeing of a patient. Autonomy as a fundamental principle of patient's rights, as mentioned previously, is not unrestricted. It should be emphasized, that insofar as the legislator gives a possibility of initiating treatment without a consent of a patient to perform certain activities or medical treatment, the institution should not be abused. There should be an unconditional objection to any categorization of patients, irrespective of the cause, and particularly in relation to patients in detention centres. The principle of equal treatment is determined not only by statutory norms, but above all by the Constitution, which guarantees the respect of the fundamental rights and freedoms of the individual, regardless of the situation. It is crucial that in each case both physician and other medical staff are guided primarily by the principle of humanity, demonstrating empathy and understanding to the patient irrespective of his or her situation or past actions. Accordingly, it should be stressed that the patient's autonomy is limited, but these restrictions are only admissible in material, but never in subjective aspect.

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Summary: This paper deals with issues related to the principle of human autonomy, and thus the autonomy of the patient's will. It takes into consideration the origins of the above principle both in the US and Polish law, taking into account bioethical issues. It also points to the relation of autonomy to paternalism. Simultaneously, it attempts to identify the actual implementation of the principle of autonomy of a patient staying at a penitentiary and its possible limitations.

Keywords: autonomy, freedom, prisoner, human rights, patient, paternalism

REALIZACJA ZASADY AUTONOMII PACJENTA W WARUNKACH IZOLACJI PENITENCJARNEJ

Streszczenie: Niniejsze opracowanie podejmuje tematykę związaną z zasadą autonomii człowieka i co się z tym wiąże – autonomii woli pacjenta. Podejmuje rozważania dotyczące genezy zasady autonomii zarówno na gruncie prawa amerykańskiego, jak i polskiego, a także w odniesieniu do kwestii bioetycznych. Wskazuje również na relację autonomii w stosunku do paternalizmu. Tekst ten jednocześnie podejmuje próbę wskazania faktycznej realizacji zasady autonomii pacjenta przebywającego w miejscu detencji oraz jej ewentualne ograniczenia.

Słowa kluczowe: autonomia, wolność, osadzony, prawa człowieka, pacjent, paternalizm