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PATIENT AUTONOMY AND CRIMINAL LAW

EUROPEAN PERSPECTIVES

Edited by
Paweł Daniluk

Patient Autonomy and Criminal Law

This book shows how the legal systems of individual European countries protect patient autonomy. In particular, it explains the role of criminal law, that is, what criminal law protection of patient autonomy looks like on a European scale in both legal and social dimensions. Despite EU integration processes, the work illustrates that the legal orders of individual European countries are far from uniform in this area. The concept of patient autonomy here is generally in the context of the patient's freedom from unwanted medical activities: the so-called negative freedom. At the same time, in countries where there are no regulations clearly criminalising the performance of a therapeutic activity without the patient's consent, the so-called positive freedom is also discussed. The book will serve as a valuable reference work for academics, researchers and policymakers working in Health Law, Medical Ethics, Applied Ethics and Criminal Law.

Paweł Daniluk is a Professor in the Institute of Law Studies of the Polish Academy of Sciences.

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Patient Autonomy and Criminal Law

European Perspectives

Edited by Paweł Daniluk

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Introduction

Paweł Daniluk

The relationship between patient and doctor, established in connection with the undertaking and performance of medical activities, has undergone a serious evolution over the centuries, as part of broader social and legal changes. From the perspective of a patient's self-determination and conscious decision making about their own life and health, this evolution can be described as a winding path from paternalism to patient autonomy. The beginnings of medicine were characterised by a paternalistic approach to the patient. It is significant, for example, that in the works of Hippocrates, who as one of the precursors of modern medicine is called the 'father of medicine', as well as in the famous Hippocratic Oath,[1] no attention is paid to the need to take into account the patient's will to undergo medical activities. On the other hand, it emphasises the need to take care of the patient's health, influence their way of life, or withhold information about their state of health from them, which, in fact, leads to the conclusion that the decision to subject a patient to certain medical actions belonged to the doctor, and the patient was to submit to this decision blindly and unconditionally.[2] Understood in this way, paternalism determined medical practice for hundreds of years, although, of course, it was presented slightly differently at different times.

When discussing paternalism in medicine, it is worth noting that nowadays the concept of paternalism appears ambiguous, and it is perceived differently by varied authors dealing with this issue.[3] The classic and probably the most widespread definition is considered to be that of G. Dworkin, according to whom paternalism is 'the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness,

1 It is not clear who actually wrote the Hippocratic Oath, but there are many indications that it was not written by Hippocrates himself. See, e.g., L. Edelstein, *The Hippocratic Oath: Text, Translation and Interpretation* [in:] O. Temkin, C.L. Temkin (eds.), *Ancient Medicine: Selected Papers of Ludwig Edelstein*, Baltimore/London 1967, pp. 20–39; J. Jouanna, *Hippocrates*, translated by M.B. DeBevoise, Baltimore/London 1999, pp. 401–402; S.H. Miles, *The Hippocratic Oath and the Ethics of Medicine*, New York 2004, p. 3; S. Nittis, *The Authorship and Probable Date of the Hippocratic Oath*, 'Bulletin of the History of Medicine' 1940, Vol. 8, No. 7, pp. 1012–1021.

2 See, e.g., A.J. Katolo, *Paternalism – Moral Duties of Physicians in the Ancient Medical Ethics*, 'E-Theologos' 2010, Vol. 1, No. 1, pp. 12–15; V. Pelto-Piri, K. Engström, I. Engström, *Paternalism, Autonomy and Reciprocity: Ethical Perspectives in Encounters with Patients in Psychiatric In-patient Care*, 'BMC Medical Ethics' 2013, Vol. 14, p. 2.

3 See, e.g., D. Archard, *Paternalism Defined*, 'Analysis' 1990, Vol. 50, No. 1, pp. 36–42; D.J. Garren, *Paternalism. Part I*, 'Philosophical Books' 2006, Vol. 47, No. 4, pp. 334 et seq.; J. Le Grand, B. New, *Government Paternalism. Nanny State or Helpful Friend?*, Princeton 2015, pp. 7 et seq.; D. VanDeVeer, *Paternalistic Intervention. The Moral Bounds on Benevolence*, Princeton 1986, pp. 16 et seq.

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needs, interests or values of the person being coerced'.[4] For the field of medicine and bioethics, it is characteristic to differentiate paternalism and to perceive within it a hard/strong paternalism and a soft/weak paternalism.[5] Hard paternalism occurs when the patient is able to decide about themselves, including their life and health, and yet the doctor does not take into account the will of such a patient to undergo certain medical activities. The final decision on these activities is left up to the doctor. Soft paternalism also consists of the fact that the doctor decides on specific medical activities for the patient, while paying no attention to the patient's will to undergo these activities. However, in the case of soft paternalism, we are dealing with a patient who is permanently or temporarily unable to decide about themselves, including their life and health (e.g., due to mental illness or a very young age). Of course, in both the case of hard paternalism and soft paternalism, the doctor should be guided by the patient's health interest. Thus, the doctor violates the patient's freedom in order to save or improve their life or health.

A clear departure from paternalism in medicine has been visible only from the second half of the twentieth century.[6] It was combined with broad criticism of the paternalistic attitude of doctors towards patients and a strong emphasis on patient autonomy as a superior value. It is worth noting that this criticism of paternalism in medicine drew abundantly from earlier philosophical views, and, in particular, from the views of J.S. Mill, who is considered 'the greatest critic of paternalism'.[7] Currently, patient autonomy has already become a fundamental principle in medical ethics and medical law,[8] although the dominant role of this principle is sometimes the subject of criticism.[9]

The concept of autonomy, like the concept of paternalism, also does not appear unambiguous and is perceived differently by authors analysing this issue.[10] From the perspective of medical activities and the relationship between doctor and patient, it should first of all be emphasised that patient autonomy assumes that they have the right to decide about themselves and to make informed decisions about their life and health. In turn, the doctor is obliged to respect these decisions, even if they may be unfavourable for the patient in the medical dimension.

4 G. Dworkin, *Paternalism*, 'The Monist' 1972, Vol. 56, No. 1, p. 65.

5 See, e.g., J.F. Childress, *Public Bioethics. Principles and Problems*, New York 2020, pp. 40 et seq.; D.N. Husak, *Legal Paternalism* [in:] H. LaFollette (ed.), *The Oxford Handbook of Practical Ethics*, New York 2003, pp. 394 et seq.; A. Wertheimer, *Rethinking the Ethics of Clinical Research. Widening the Lens*, New York 2011, pp. 24–28.

6 As noted in a broader context by R.D. Truog (*Patients and Doctors – The Evolution of a Relationship*, 'The New England Journal of Medicine' 2012, Vol. 366, No. 7, p. 581): 'Until about 1960, most codes of medical ethics relied heavily on the Hippocratic tradition, framing the obligations of physicians solely in terms of promoting the welfare of the patient, while remaining silent about patients' rights'.

7 G. Claeys, *Mill and Paternalism*, Cambridge 2013, p. 1.

8 See, e.g., G. Laurie, E. Postan (*Rhetoric or Reality: What Is the Legal Status of the Consent Form in Health-Related Research?*, 'Medical Law Review' 2013, Vol. 21, No. 3, p. 372), who even state: 'It is trite to observe that in recent decades, respect for the right to self-determination, or autonomy, has become the dominant ethical principle in bioethics'.

9 See especially C. Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law*, Oxford/Portland 2009, *passim*.

10 See, e.g., T.L. Beauchamp, J.F. Childress, *Principles of Biomedical Ethics*, New York/Oxford 1994, pp. 120 et seq.; G. Dworkin, *The Theory and Practice of Autonomy*, Cambridge 1988, pp. 3 et seq.; J. Feinberg, *The Moral Limits of the Criminal Law. Volume 3: Harm to Self*, New York 1986, pp. 27 et seq.; N. Stoljar, *Theories of Autonomy* [in:] R.E. Ashcroft, A. Dawson, H. Draper, J. McMillan (eds.), *Principles of Health Care Ethics*, Chichester 2007, pp. 11 et seq.

Respect for the patient's autonomy is inextricably linked to the requirement to obtain their consent to medical measures taken for them. It is a consent that, in particular, is informed and voluntary, and thus, for instance, it can be granted only after the patient has obtained all relevant medical information and in conditions where there is no interference with the patient's decision making processes.[11] The doctor, making their medical activities dependent on the patient's prior consent, thus respects patient autonomy, understood as the right to decide about themselves.

Recognising patient autonomy as a fundamental principle of medical ethics and medical law does not mean completely rejecting paternalism. There is little doubt that soft paternalism is acceptable and, in some situations, even necessary.[12] It allows for protecting the life and health of people unable to make decisions about themselves.[13] It would be unacceptable, for example, if a mentally ill person who is not competent to make informed decisions must decide for themselves whether to undergo a medical procedure that saves their life. At the same time, it should be emphasised that soft paternalism does not, in fact, violate patient autonomy since it applies only to those patients who are not able to decide about themselves.[14] Such patients, already deprived of the competence to make informed decisions about their life and health, necessarily do not have autonomy in this respect that could be violated.

The patient's autonomy is undoubtedly related to their freedom,[15] and this, which is important for further considerations, can have a negative dimension (the so-called negative freedom, 'freedom from') or a positive one (the so-called positive freedom, 'freedom to'). The inspiration for such a distinction is the famous essay 'Two Concepts of Liberty',[16] in which I. Berlin distinguished negative freedom and positive freedom. In this view, negative freedom is freedom from interference from other persons (entities), freedom from coercion. Positive freedom, on the other hand, is the freedom to decide about oneself, to realise one's own desires and intentions, to be guided by one's own reasons.

Patient autonomy is not only a philosophical and ethical issue but also an extremely important legal issue. At the foundational level of modern legal systems, it is generally accepted that patient autonomy is an important value that should be subject to legal protection. Of course, this is not an absolute protection because individual legal systems allow for special situations where a doctor can take medical action also without the patient's consent. At the supranational level, patient autonomy has apparently been affirmed by the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,[17]

11 See, e.g., N. Stoljar, *Theories…*, p. 11.

12 See, e.g., T.L. Beauchamp (*Standing on Principles: Collected Essays*, New York 2010, p. 106), which states: 'Given the reasonableness of the claim that nonautonomous preferences can be validly overridden, the conclusions of weak paternalism have been generally accepted in law, medicine, and moral philosophy'.

13 Cf., e.g., L.M. Kopelman, *On Distinguishing Justifiable from Unjustifiable Paternalism*, 'AMA Journal of Ethics' 2004, Vol. 6, No. 2, pp. 72–74.

14 Cf., e.g., E.C. Bullock, *Informed Consent and Justified Hard Paternalism* (a thesis submitted to the University of Birmingham for the degree of doctor of philosophy), Birmingham 2012, pp. 226–227.

15 G. Dworkin (*The Theory…*, p. 6) indicates that the term 'autonomy' is used sometimes as 'an equivalent of liberty (positive or negative in Berlin's terminology)', sometimes as 'identical with freedom of the will'. Moreover, according to G. Dworkin, 'autonomy' is identified with, inter alia, 'freedom from obligation'.

16 I. Berlin, *Two Concepts of Liberty* [in:] I. Berlin, *Four Essays on Liberty*, London/New York 1969, pp. 118–172.

17 ETS No. 164.

which is in force in some European countries.[18] This Council of Europe Convention contains, in particular, rules relating to consent to medical intervention (Chapter II). Three general principles in this regard are expressed in Art. 5 of the Convention, according to which: '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'.

The legal systems of individual European countries protect the autonomy of the patient, using legal instruments of various natures: administrative, civil and criminal. Of course, criminal law, according to its nature, should play the role of *ultima ratio* here.[19] This does not mean, however, that the use of criminal law instruments to protect patients' autonomy is of marginal importance on the European scale. On the contrary, as you will find out in the course of further reading of this book, this meaning is important. This should not be surprising, given that the violation of a patient's autonomy by unlawfully performing a medical intervention without their consent interferes with human dignity, a fundamental value.[20] Such interference, given the extreme importance of human dignity in the European legal orders, justifies using criminal law instruments to protect patient autonomy.

This book aims to show how the legal systems of individual European countries protect patient autonomy. In particular, it is about explaining criminal law's role here, i.e., what criminal law protection of patient autonomy looks like on a European scale. This is an important problem, not only in the legal, but also in the social dimension. After all, there are still some countries in Europe where patient autonomy is violated relatively often, and the law does not provide effective protection. For example, in Poland, despite the existence of extensive and detailed regulations regarding informed consent, there are still serious practical problems with patients being provided with correct information by medical staff.[21] Consequently, with far-reaching deficits in the information provided prior to medical intervention, it is difficult to assume that the consent given by the patient is informed consent, and thus corresponding to the requirements of the law. Although the patient formally grants consent to medical intervention; in fact, he/she does not know exactly what they are agreeing to and what may result from it, which does not allow talking about an autonomous decision. Nor can we lose sight of the fact that even in countries where patient autonomy seems

18 The list of these countries is available here: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=164 (accessed: 12 March 2022).

19 See, e.g., M. Kettunen, *Legitimizing European Criminal Law: Justification and Restrictions*, Cham 2020, p. 169; K. Nuotio, *Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach* [in:] R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds.), *The Boundaries of the Criminal Law*, New York 2010, pp. 255–257.

20 Cf., e.g., S. Michalowski, *Article 3 – Right to the Integrity of the Person* [in:] S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford/Portland 2014, p. 47.

21 One of the questionnaire studies conducted in Poland showed that as many as 41% of cardiac patients were not given information required by the law on alternative treatment methods. Even further, as many as 47% of cardiac patients were not informed about the possible undesirable effects of the medical procedure (U.B. Kulikowska, D. Huzarska, J.A. Piątkiewicz, A. Szpak, *Prawo pacjenta do wyrażenia zgody na zabieg operacyjny – regulacje prawne a opinie pacjentów szpitala*, 'Medycyna Ogólna' 2008, Vol. 14, No. 1, pp. 90, 93). Broader Polish sociological research leads to the conclusion that doctors generally do not present alternative therapies, rarely inform patients about the purpose of additional commissioned tests, and rarely provide information on the mode of action of prescribed medicine (A. Ostrowska, *Paternalizm czy partnerstwo? Relacje między pacjentami a lekarzami w Europie* [in:] H. Domański, A. Ostrowska, P.B. Sztabiński (eds.), *W środku Europy? Wyniki Europejskiego Sondażu Społecznego*, Warsaw 2006, p. 190).

to be widely respected by medical workers, there are drastic cases of violations. One example was an event in Belgium, when a Nigerian prostitute was forced to undergo an abortion and gave invalid consent to it, and the doctor performing the abortion was aware of this.[22]

Patient autonomy is a broad concept, however, for the purposes of the considerations presented in this book, this concept is generally narrowed down to the patient's freedom from unwanted medical activities (therapeutic and non-therapeutic). We are therefore talking about the aspect of patient autonomy that can be described as the so-called negative freedom ('freedom from'). At the same time, due to the specific situation of the patient, this negative freedom is reduced here to freedom from therapeutic or non-therapeutic medical activities that are performed without their consent or against their will. The focus on this aspect of patient autonomy, which can be described as freedom from unwanted medical activities, is justified by the fact that this important problem has not yet been the subject of wider research on a European scale. In particular, there is a lack of comparative law research that would show how criminal law in Europe protects the so-called negative freedom of the patient. However, the situation is different when considering the so-called positive freedom of the patient. In relation to criminal law, this freedom has already been the subject of numerous studies, including comparative law studies, which have primarily concerned euthanasia[23] and abortion.[24] Therefore, this book focuses on the hitherto unexplored so-called negative freedom of the patient.

At the same time, it should be noted that the specificity of the legal systems of some European countries, especially those in which there are no regulations clearly criminalising the performance of a therapeutic activity without the patient's consent, justify a slightly broader view of patient autonomy. In some cases, this meant seeing it not only as the so-called negative freedom, but also as the so-called positive freedom ('freedom to'). This is because in some countries the law and legal inquiries (of representatives of legal science and jurisprudence) have not focused on a criminal law assessment of unwanted medical activities, and often even ignore this problem. However, much attention is paid to the expectations of patients who demand specific medical actions from doctors. The problem of euthanasia or abortion appears here. It is also clear that in cases of euthanasia and abortion we are dealing not with criminal law protection of patient autonomy, but with criminal law limitation of patient autonomy.

It is obvious that the content of the studies included in this book, which relate to individual European countries, has been largely determined by the specificity of the legal systems in force there. We are talking mainly about the specificity of the detailed legal regulations relating to patient autonomy, as well as about the legal problems specific to them, which can, and do, appear differently in different countries. Nevertheless, each of the studies on individual countries attempts to deal with the following issues in the field of legal protection of patient autonomy.

The starting point is to present the legal bases for respecting patient autonomy existing in individual countries. This concerns both the more general grounds, contained primarily in the constitutions of individual countries, and the detailed regulations requiring the consent of the patient or their representative (e.g., the parent, when the patient is a minor) to a medical activity.

Another issue that requires clarification concerns the conditions for legally effective consent to a medical activity, as provided for in individual countries. They include, among

22 More on this in the Belgium chapter of this book.

23 See, e.g., J. Griffiths, H. Weyers, M. Adams, *Euthanasia and Law in Europe*, Oxford/Portland 2008.

24 See, e.g., A. Eser, H.G. Koch, *Abortion and the Law: From International Comparison to Legal Policy*, translated by E. Silverman, The Hague 2005.

others, the patient reaching a certain age, being in an appropriate mental state, provision of information to the patient prior to consent, and maintaining the required form of consent. These conditions must be met for a medical activity, undertaken on the basis of the patient's consent, to be considered legal under the law, including criminal law. At the same time, it should be clarified in which situations the law of individual European countries allows for the performance of a medical activity without consent, and thus in which cases performing a medical activity without consent is not illegal, hence not a crime. This may involve situations where compulsory medical activities are justified, for example, by the need to fight infectious diseases (the current dilemma around compulsory vaccinations to counter the COVID-19 pandemic is a relevant example here) or to treat mentally ill people. It is also impossible to ignore controversies related to the admissibility of violating a patient's autonomy in order to save their life.

Within the framework of purely criminal law considerations, first of all it is necessary to answer the question of whether there are special penal provisions in the legal systems of individual European countries that criminalise the performance of a medical activity without consent. In other words, the point is to establish whether the criminal law of individual countries provides for special types of offences consisting of subjecting a patient to medical activity, either without their consent or against the will of the patient or their representative. Such special offences existing in a country, if any, will be detailed. On the other hand, if a given country does not provide for such special types of crimes, an analysis will be carried out to determine under which general criminal provisions the performance of a medical activity without consent or against the will of the patient or their representative becomes punishable. In this regard, it must be considered how such an activity should be classified as, for example, a general crime against human freedom or against their health. At the same time, it cannot be ruled out that there will be countries where the legal protection of patient autonomy is not of a criminal nature but is found, instead, at the civil or administrative level.

This book consists of twenty-two chapters. Each of these is devoted to criminal law protection of patient autonomy in a specific European country (Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Czech Republic, Finland, Germany, Greece, Italy, Latvia, Lithuania, Montenegro, Netherlands, Norway, Poland, Portugal, Russia, Serbia, Slovenia, Spain, Switzerland and Turkey).[25] Authors from these countries deal with the issues outlined above. The book ends with an extensive conclusion, which compares the legal systems of the individual countries in terms of their criminal law protection of patient autonomy. Not only are the similarities and differences described, but attempts have also been made to reconstruct certain models or tendencies when it comes to ways to protect a patient's freedom from unwanted medical activities. In summary, an attempt has also been made to answer the question of which of the criminal law systems protecting patient autonomy is the most appropriate, and this, in turn, resulted in some recommendations as to the optimal way to protect patient autonomy by the means of criminal law in Europe.

25 In accordance with the original intention of the editor of this book, the analysis was to cover all European countries. However, this intention was not realised. The main reason was that it was not possible to find sufficiently competent authors in some countries willing to describe the criminal law protection of patient autonomy there. In some situations, the authors who undertook to produce analysis of the legal orders of a given country were not able to fulfil this task, mainly due to serious health problems (this book was written during the COVID-19 pandemic, which unfortunately also affected some authors). Ultimately, however, we managed to cover twenty-two countries, which represent a significant number of legal orders.

1 Patient autonomy and criminal law
An Austrian perspective

Joanna Długosz-Jóźwiak

1.1 Constitutional legal basis for respecting the patient's autonomy

The constitutional legal basis for respecting the patient's rights in Austria, including their right to autonomy, stems mainly from the principle of the division of powers between the federation and the Länder and the principle of respect for and protection of human freedoms and fundamental rights.[1] At the constitutional level, the patient's autonomy is protected from the perspective of many fundamental rights. In this approach, the patient can even be perceived as the subject on which the main issues of human rights protection are focused.

The protection of human dignity[2] is considered the starting point for respecting the patient's autonomy. However, unlike the legal systems of many European countries, the protection of dignity has not been expressly stated in the Austrian Constitution.[3] It is derived from the European Convention on Human Rights and Fundamental Freedoms (ECHR) with its additional protocols, having a constitutional rank in Austria, and from the EU Charter of Fundamental Rights (EU CFR), which does not have a constitutional status but, according to the case law of the Austrian Constitutional Court, the rights guaranteed therein may, within a certain framework, 'be regarded as guaranteed constitutional rights in proceedings before the Constitutional Court'.[4]

At the constitutional level, human dignity, derived from Art. 1 of the EU CFR, is protected in several dimensions.[5] From the perspective of respecting the patient's autonomy, the protection of bodily integrity in the course of medical treatment is particularly relevant, not only in terms of the prohibition of torture and cruel and degrading treatment (cf. Art. 3 of the ECHR), but also in terms of delimiting boundaries in certain fields of medicine.

The requirement to respect the patient's autonomy also derives its constitutional foundation from the right to life and the right to bodily inviolability (cf. Art. 85 of the Austrian Constitution, Art. 2 of the ECHR). In particular, the determination of the scope and intensity of the protection of human life is the subject of much controversy. As an example, the contentious issues of the beginning of human life or the legal permissibility of disposing of

1 Ch. Kopetzky, *Verfassungsfragen des Patientenschutzes* [in:] Österreichische Juristenkommission (ed.), *Patientenrechte in Österreich (Kritik und Fortschritt im Rechtsstaat Bd 17)*, Wien 2001, p. 19.

2 W. Kluth, *Die verfassungsrechtliche und europarechtliche Verankerung von Patientenrechten – Grundfragen und Einzelanalyse* [in:] V. Schumpelick, B. Vogel (eds.), *Arzt und Patient: eine Beziehung im Wandel. Beiträge des Symposiums vom 15. bis 18. September 2005 in Cadenabbia*, Freiburg 2006, pp. 135–138.

3 The Law: *Bundes-Verfassungsgesetz*, StF: BGBl. No. 1/1930 as amended (hereinafter: Austrian Constitution).

4 Cf. Decision of the Constitutional Court *(Verfassungsgerichtshof)* of 14 March 2012, U 466/11 ua.

5 W. Kluth, *Die verfassungsrechtliche*…, pp. 137–138.

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one's own life that justifies suicide and also legitimises active euthanasia carried out by third parties (especially doctors) could be mentioned here. The latter issue becomes problematic in the context of the requirement to obtain legally valid consent from the patient or their representative.

Also, the right to health protection, including the right to adequate and comprehensive medical care, can be derived from the right to life and the right to bodily integrity. Furthermore, due to the fundamental importance of the right to life, the admissibility of interference with it in the course of medical treatment is subject to particularly high formal requirements as regards the fulfilment of the duty to provide information, to give valid consent or to comply with the standards of treatment in accordance with the current medical knowledge. This also includes the right to bodily integrity, which covers the protection of health in both the biological-physical and the psycho-spiritual sense, as well as the protection of bodily integrity.[6]

Moreover, the patient's autonomy is protected under the constitutional right to privacy (cf. Art. 8 of the ECHR).[7] Various guarantees can be derived from it. In this context, the protection of the sphere of private life, which is particularly relevant in the case of hospital treatment, and the protection of the right to self-determination are of the utmost importance. The rights of the patient or their representative to medical information, to give valid consent to treatment and to cooperate with healthcare professionals in the course of treatment stem from the right to self-determination. Furthermore, it includes the right not to be informed about the planned treatment, and not to receive the treatment itself.

It should be emphasised, however, that the constitutional protection of the patient's autonomy takes place not so much in their relationship with the state but in the relationship between themselves and a doctor (or another entity, e.g., an insurer). In view of this, inasmuch as the actions of the doctor (or another entity) are also based on constitutional grounds, collision situations may arise.

1.2 Consent to treatment by the patient or his or her representative

The consent to treatment given by the patient or by another entity authorised to represent the patient is fundamental to assessing the lawfulness of the medical treatment provided. Therefore, it is necessary to distinguish all the statutory requirements for the legal validity of consent – general and specific, where the former apply to all cases of medical treatment and the latter only to a specific type of treatment or to a specific type of person.

1.2.1 Prerequisites for the legal validity of consent

The legal validity of consent is, however, subject to the following requirements: First, the person giving the consent must be entitled to give it and have the capacity to give it. Second, consent must be the result of a voluntary decision by the person giving it, based on a sound appreciation of the facts. Third, the person entitled to give consent should be duly informed of the intended treatment before it is provided. And fourth, consent must be expressed in an appropriate form and at a time prescribed by law.

6 Ibid., pp. 143–145.
7 Ibid., pp. 146–148.

In principle, it is a holder of a legally protected interest who is entitled to give consent. By expressing consent, the person declares that they agree to the infringement of their legal interest. In the case of consent to medical treatment, it will usually be a patient approving the interference with their bodily integrity based on medical indications and, in exceptional cases, another entity appointed to represent the patient, i.e., a statutory representative or a guardianship court.[8]

On the other hand, a person who recognises and understands the meaning of their behaviour and is able to independently assess the circumstances that enable them to consciously and voluntarily express their will and make an autonomous therapeutic decision is capable of giving consent. To determine whether the patient has the capacity to give consent in a specific situation, the patient's age and degree of maturity (psychological and physical state) and obtaining of professional and reliable medical information by the patient are decisive.

1.2.1.1 The patient's age as a determinant of capacity to consent

In a typical situation, consent to perform medical treatment is given by an adult on their own. In principle, persons over 18 years of age are fully capable of giving consent if their psychophysical state is good enough to allow them to consciously and voluntarily make a decision to undergo treatment (cf. § 252 (1) of the Austrian CC[9]).

However, sometimes the capacity of an adult to make autonomous decisions may be disabled due to mental illness or similar mental disorder. Therefore, if a doctor, on the basis of the medical history, decides that an adult is incapable of making an informed and voluntary decision and expressing their will regarding medical treatment, he or she is obliged, as a first step, to make a visible effort to involve the person's relatives, close persons or specialists who have particular experience in dealing with people in difficult life situations in order to support this person in the decision-making process. The doctor is released from this duty only if the adult patient makes it clear that they do not accept the involvement of other persons and the provision of medical information to the others (cf. § 252 (2) of the Austrian CC). However, if, with the indicated support of others, the adult patient has acquired the capacity to make an informed and voluntary decision and express their will, the consent to the treatment given by them is valid.

However, if this is not the case, i.e., the adult patient remains permanently incapable of giving consent because the support provided has not been effective or the patient has objected to the involvement of others and the provision of medical information to them, it is necessary to obtain surrogate consent from the representative of the adult patient incapable of expressing their will. Surrogate consent can be given by an authorised entity (cf. § 253 (1) Austrian Civil Code),[10] which can be a legal representative, i.e., a proxy in the event of incapacity to act independently (*Vorsorgebevollmächtigte*)[11] or an adult's statutory representative (*gesetzlicher Erwachsenenvertreter*).[12] In addition, the adult patient may be represented by an

8 For details see below.

9 Austrian Civil Code: *Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, StF: JGS No. 946/1811 as amended (hereinafter: Austrian CC).

10 For the procedure for appointing representatives and the duration of the representation, see § 243–246 of the Austrian CC.

11 For details on the proxy in the event of incapacity to act independently, see § 260–263 the Austrian CC.

12 For details on the adult's statutory representative, see § 268–270 of the Austrian CC. It is only worth pointing out that the statutory representative of the closest person is their one or more next of kin,

adult's court-appointed representative (*gerichtlicher Erwachsenenvertreter*)[13] appointed by a guardianship court or an adult's representative of choice (*gewählter Erwachsenenvertreter*).[14]

It should be emphasised that the representative's activity does not limit the autonomy of an adult patient in the exercise of their right to self-determination.[15] Moreover, the representative has a duty to ensure that the represented person could, within their possibilities and abilities, organise their living conditions in accordance with their wishes and ideas and to enable them, as far as possible, to manage their own affairs. In addition, the representative must notify the person represented in good time of intended decisions affecting their person or their assets and give them the opportunity to comment on them within a reasonable period of time. The position of the represented person must be taken into account, unless this would seriously endanger their well-being (cf. § 241 of the Austrian CC). If the represented patient is an adult patient, in case of doubt it should be assumed that they wish to undergo treatment if there are medical indications for this (cf. § 253, paragraph 1 *in fine* of the Austrian CC).

In medical practice, however, consent to treatment may be refused. If an adult patient, who is incapable of making a conscious and voluntary decision, makes it clear that they object to medical treatment or its continuation, and their representative agrees to the treatment, then the representative's consent needs to be additionally approved by the guardianship court (cf. § 254, paragraph 1 of the Austrian CC).

On the other hand, if it is the person representing an adult patient who refuses to provide treatment to the patient or to continue their treatment, then such refusal will be valid, provided that it does not conflict with the will of the represented person. Otherwise, the doctor may ask the court to overrule the refusal of the representative or appoint another person to represent the patient.

The situation is different when the patient is a minor. In the case of a patient under the age of 18, the capacity to give consent depends essentially on the psychophysical state of the patient, i.e., whether, in a specific situation, they show sufficient maturity to recognise and understand the significance of their decision. In particular, it is a question of whether the minor patient is capable of correctly assessing the discomforts and risks of the disease and weighing them up appropriately against the benefits of treatment.[16] It should be borne in mind that the consequences of a decision to refuse treatment are more difficult to assess than a decision to approve treatment.[17]

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enumerated in § 268, paragraph 2 of the Austrian CC, i.e., the parents and grandparents, children of full age and grandchildren, siblings, nieces and nephews of the person of full age, his or her spouse or registered partner and their cohabitant, if the latter has been living with them in the same household for at least three years, as well as the person designated by the patient.

13 For details on the adult's court-appointed representative, see § 271–276 of the Austrian CC.

14 For details on the adult's representative of choice, see § 264–267 of the Austrian CC.

15 This also applies if the patient, who is incapable of making an informed and free decision at the time of the treatment, has expressed his/her opposition to undergo the treatment in a previously drawn up living will (advance, or *pro futuro* declaration), and there are no grounds for considering this declaration as non-binding. In such a case, it is obligatory to withdraw from treatment without consulting the patient's representative (cf. § 253, paragraph 4 of the Austrian CC).

16 H. Fleisch, *Der chirurgische Eingriff aus der Sicht des Juristen*, 'Österreichische Juristen-Zeitung' 1965, p. 436.

17 K. Schmoller, *§ 110* [in:] O. Triffterer, Ch. Rosbaud, H. Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, Band 4, Salzburg 2019, margin no. 43.

The Austrian literature uniformly recognises that a minor showing an average degree of maturity, i.e., the minor who has reached the age of 14,[18] may independently consent to an 'unproblematic' medical procedure. However, the criterion of 'unproblematic' and the minor's maturity quality remain unclear concepts, and their scope of meaning may be disputed. As a specific point of reference in legal practice, it is proposed that, first, such treatment may involve a serious threat to life or serious risk of severe harm to health and, second, that the capacity to consent increases with the age of the minor.[19]

Consequently, with regard to a minor under the age of 14, it has been assumed[20] that despite the lack of sufficient maturity, the minor may give valid consent only to the lightest procedures (e.g., dressing of an abrasion). This is tantamount to the implied consent of the minor's parents placing the minor under the care of a doctor in order to carry out a medical procedure.

Since 2013, the statutory minors' right to consent to treatment has been regulated in § 173 of the Austrian CC.[21] It stipulates that only a minor who has reached the age of 14 and is sufficiently mature, and, therefore, capable of making decisions, may give their own consent to a medical procedure. In case of doubt, such decision-making capacity of the minor is presumed.

However, if a minor with a high degree of maturity consents to treatment that is usually associated with serious or lasting impairment of physical integrity or personality, the parallel consent of the parent or other person entrusted with the minor's care and upbringing (cf. § 173, paragraph 2 of the Austrian CC), i.e., the minor's legal guardian (*Erziehungsberechtigte*),[22] is required. This includes, in particular, surgical procedures and other therapeutic activities that usually pose a serious threat to life or carry a significant risk of serious damage to health.

As in the case of an adult's representative, the activity of the minor's legal representative does not, however, exclude their autonomy in making decisions about undergoing treatment. In matters related to the care and upbringing of minors, parents must take into account the will of the minor, unless this conflicts with the child's best interests or their living conditions. The will of the child is all the more decisive, the more they are able to understand the reasons and significance of the treatment and to determine it on this basis (cf. § 160, paragraph 3 of the Austrian CC).

The Austrian legislator, however, introduces one absolute limitation to this autonomy. This is because neither a minor child nor the parents can consent to a medical procedure that aims to permanently render the minor child incapable of reproducing (cf. § 163 of the Austrian CC).

On the other hand, if the medical procedure concerns a minor who is incapable of making a conscious and voluntary decision, it is necessary to obtain the consent of their statutory representative. In a typical situation, these are parents who have parental authority over the

18 See also E. Gleixner-Eberle, *Die Einwilligung in die medizinische Behandlung Minderjähriger: Einen arztrechtliche Untersuchung im Rechtsvergleich mit Österreich und der Schweiz sowie mit Blich auf das internationale Privat- und Strafrecht*, Heidelberg 2014, pp. 13–14.

19 See, inter alia, R. Soyer, S. Schumann, *§ 110* [in:] F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Wien 2016, margin no. 18/1. Instructively, the author cites the examples of a 16 year old being able to give consent for a blood sampling and a 17 year old for a tooth extraction.

20 R. Soyer, S. Schumann, *§ 110*…, margin no. 18/2 and references indicated therein.

21 See also E. Gleixner-Eberle, *Die Einwilligung*…, pp. 17–128.

22 See § 181, paragraph 4 of the Austrian CC.

minor (cf. § 158, 160 of the Austrian CC), whereby each parent is, in principle, entitled and obliged to represent the minor independently (cf. § 167, paragraph 1 of the Austrian CC). The care and upbringing of the minor can be entrusted to a legal guardian, from whom, in this case as the minor's legal representative, consent to the minor's treatment must be obtained (cf. § 181, paragraph 4 of the Austrian CC).

However, if a minor is incapable of making decisions, and the treatment is usually associated with serious or lasting impairment of the minor's bodily integrity or personality, in addition to the consent of the parent or guardian, a medical certificate issued by a doctor independent of the attending doctor is required to confirm the minor's incapacity and the necessity of the treatment to safeguard the child's best interests (cf. § 213, paragraph 2 of the Austrian CC).

In the absence of such a medical certificate, or if the minor incapacitated patient indicates that they object to the treatment, the court's approval is also required in addition to the consent of the parent or guardian. On the other hand, if the parent or guardian objects to the treatment, thus endangering the minor's best interests, the doctor may request the court to overrule the refusal or appoint another guardian for the minor.

1.2.1.2 Adequate prior information as a determinant of capacity to consent

To assess whether the patient's consent is legally valid, it is also important that reliable medical information has been imparted to the patient beforehand. The capacity to consent to a medical procedure is determined by the patient's (or their representative's) capacity to recognise and assess the significance of their decision, which, in principle, requires that they have been provided with professional and comprehensive information on the planned treatment. Consent to treatment is, therefore, valid only if the person entitled to give it has first been adequately informed of the nature of the planned treatment, the method of treatment as well as its consequences.[23] Therefore, the fulfilment of the information duty serves to safeguard the patient's autonomy as regards the independent decision to undergo treatment. Therefore, the patient must be informed about all the reasons and importance of the treatment, even if they are incapable of making an informed and voluntary decision regarding the treatment.[24]

The mere provision of therapeutic information, on the basis of which the patient will be able to proceed properly with their treatment, including, inter alia, the necessary cooperation with medical personnel and the avoidance of situations that might jeopardise the effectiveness of the treatment, should be strictly distinguished from the duty to provide the patient with information on their right to self-determination, in terms of both content and formal requirements.

While the provision of information on the right to self-determination should enable the person entitled to decide to undergo treatment, the therapeutic information is, in fact, part of the treatment itself. As a consequence, failure to inform the entitled person about their right to self-determination may result in criminal liability under § 110 (1) of the Austrian

23 E.E. Fabrizy, *Strafgesetzbuch, Kommentar*, Wien 2018, § 110, margin no. 2.

24 This may be waived only if the provision of this information would be virtually impossible or would be detrimental to the patient's best interests (cf. § 253, paragraph 2 of the Austrian CC).

Penal Code,[25] while the lack of or failure to provide therapeutic information is already a violation of the principles of medical practice and may be qualified as (intentional or unintentional) inflicting damage to health.[26]

In the light of § 110 of the Austrian Civil Code, this means that if the doctor does not offer the patient any treatment, there is nothing that the patient has to be informed about. On the other hand, for patients for whom the doctor is a guarantor by virtue of the contract binding upon him, and who must be treated in order to save their life or health, the doctor is obliged to provide appropriate treatment as well as the necessary information about the illness from which they suffer if only to arouse their motivation for the treatment.[27]

It is assumed that the scope of the information duty is determined by the circumstances of a specific case, i.e., the planned treatment procedure,[28] including, in particular, the anticipated intensity of interference with the patient's legal interests and the resulting risk of violation of these interests, as well as the need to obtain information, signalled by the patient or their representative. The Austrian doctrine (scholarship) emphasises[29] that the time factor is also relevant, i.e., the less urgent the treatment procedure, the more detailed the explanations should be.

The fulfilment of the information duty, therefore, consists in explaining to the patient the essence of the planned procedure (i.e., its type and intensity as well as expected results) before its commencement, as well as informing them about the expected consequences of the procedure, especially if the procedure may cause irreversible changes in the patient's body, and possible risks, complications and side effects of the procedure. The person carrying out the treatment is also obliged to provide the patient with information on alternative methods of treatment as well as to convey to the patient any rationale against undergoing the treatment.[30]

There is no percentage threshold of probability of the occurrence of certain treatment results, side effects or risks to a patient's life or health that, if reached, would determine the need to inform the patient.[31] Moreover, it is assumed that the patient should be informed of any risks that could lead them to refuse consent to the procedure, cancel the procedure or decide to perform the procedure elsewhere.[32] However, the scope of information on possible risks depends on the correlation between these risks and the importance of the planned treatment for the patient's health.

The importance and urgency of treatment are the two main factors that may limit the requirements regarding the scope of the duty to inform about the risks associated with a therapeutic procedure. In the case of emergency procedures, which cannot be postponed and which are necessary to save the patient's life or protect against serious damage to health, it is sufficient to inform the patient about the greatest threats to their life and health.

25 The Law: *Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB)*, StF: BGBl. No. 60/1974 as amended (hereinafter: Austrian PC).

26 See, inter alia, R. Soyer, S. Schumann, *§ 110…*, margin no. 19; K. Schmoller, *§ 110…*, margin no. 55.

27 See, inter alia, R. Soyer, S. Schumann, *§ 110…*, margin no. 19.

28 Ibid., margin no. 20.

29 Ibid., margin no. 20.

30 K. Schmoller, *§ 110…*, margin no. 58.

31 G. Grünwald, *Die Aufklärungspflicht des Arztes*, 'Zeitschrift für die gesamte Strafrechtswissenschaft' 1961, Vol. 73, pp. 5–44.

32 H. Fleisch, *Der chirurgische Eingriff…*, p. 432; R. Soyer, S. Schumann, *§ 110…*, margin no. 21 and references indicated therein.

However, in the course of diagnosing the disease, as well as in the course of non-urgent treatment aimed at removing only minor ailments, it is necessary to provide comprehensive and exhaustive information about all possible complications, both typical and incidental.[33] In the case of the latter, it is necessary to follow the principle that the greater the potential damage that may arise as a result of the treatment procedure, the more necessary it is to inform the patient even about such possible risks and complications, the statistical probability of which is low. Consequently, Austrian case law has held[34] that, for a patient's consent to heart surgery to be valid, it is necessary to inform the patient in advance of the risk of brain damage, even though the probability of such damage does not exceed 1%, because of the serious risk to the patient's life posed by the planned surgery; however, in the case of thyroid nodule surgery, it was assumed that there is no need to inform the patient about the risk of vocal cords inflammation, which occurs only in about 2% of cases and is not directly life threatening, against the probability of developing cancer at the level of 20%.

Therefore, it can be assumed that the provision of information to the patient about any possible significant risks and complications associated with the procedure is always required, unless the patient expressly opts out. For if the person entitled to consent clearly does not perceive the existence of serious, or even life threatening, risks, it is doubtful whether their decision to refrain from obtaining information about the planned procedure can be considered to have been taken consciously and in accordance with common sense. In such a case, the doctor, who is obliged to inform, must also verify whether the patient is aware of the consequences of their decision.

Despite the existence of certain standards in clinical practice, it is unacceptable for medical professionals to take an exclusively schematic approach to the patient (or their representative) and to provide them with only general information, disregarding the patient's individual needs and individual cognitive abilities. Such conduct can expose the doctor to criminal liability for the offence of unauthorised treatment under § 110 of the Austrian PC.[35] In fact, the failure to provide the patient with reliable medical information prior to the treatment excludes the possibility of giving valid consent to the procedure.

1.2.1.3 Time and form of consent

The last prerequisite for the consent to treatment to be valid is that consent has been given in an appropriate form and time prescribed by law.

Consent to a medical procedure may be given verbally or in writing, or implicitly by the patient submitting to the treatment, and it is valid only in relation to the doctor to whom it has been given.[36] Implied consent can be effective only if all necessary information about the treatment has been imparted to the patient unless they already have sufficient knowledge of it.

It is important that the performance of the information duty is carried out in a manner that can be understood by the person giving consent.[37] The provision of information only in writing (e.g., on a form) generally makes it impossible for the doctor to make sure that

33 R. Soyer, S. Schumann, *§ 110…*, margin no. 22.
34 Quoted after: R. Soyer, S. Schumann, *§ 110…*, margin no. 22.
35 For details, see below.
36 H. Fleisch, *Der chirurgische Eingriff…*, pp. 434–436.
37 Information contained in forms used in medical practice must also be assessed in this context; cf. R. Soyer, S. Schumann, *§ 110…*, margin no. 24.

the patient has actually understood the content of the form. For this reason, especially in the case of more serious medical procedures, such as surgical operations, it is recommended to provide information verbally, supplementing the content of the form. In Austrian medical practice, this procedure is referred to as the gradual provision of information.

Furthermore, the information must be provided in good time before a therapeutic procedure is undertaken, so that the person entitled to give consent, before the procedure starts, can read it, understand it, possibly ask questions and then make a voluntary decision about the treatment.

It has already been pointed out to the view uniformly represented in the Austrian doctrine[38] according to which the prior provision of reliable medical information to the patient about the planned treatment procedure serves to actualise their autonomy in the exercise of their right to make a voluntary therapeutic decision or even to enable them to make such decision. Therefore, this is not necessary if the person entitled to consent already has sufficient knowledge of the nature of the planned procedure, its consequences and possible complications as well as the possibility of alternative treatment. Therefore, as a rule in medical practice, the duty to provide information is waived if the patient can predict the course of treatment and its effects, which is especially the case in routine medical procedures (e.g., tooth filling or blood testing) or when the patient is a healthcare professional.[39] However, it seems that if there is a risk of serious complications or occurrence of unexpected circumstances during the treatment, the duty to provide professional and comprehensive medical information is still the case.

However, the patient may voluntarily opt out of receiving information about treatment, but it must be clearly communicated to the doctor before he fulfils his obligation to inform the patient. The patient's silence does not mean a lack of will to be informed about the planned treatment. In the event of a clear opt-out, the doctor is not obliged to force the patient to listen to the information about the treatment.[40] Nevertheless, the patient's refusal to obtain such information, based on their erroneous beliefs, renders the consent to treatment invalid.

1.2.2 Lawful performance of a medical procedure without consent or against the will

The lack of consent to treatment is generally one of the circumstances for criminal liability for the criminal offence of unauthorised treatment under § 110 of the Austrian PC. Sometimes, however, it will be legal to carry out a medical procedure without the consent or even against the will of the patient or their legal representative. This is determined by the age of the patient and the type and circumstances of a medical procedure.

The first possibility to legally perform a medical procedure without the need to obtain legally valid consent of the patient is regulated in § 252 (4) of the Austrian Civil Code and concerns the situation where an adult patient is to receive treatment. In a typical situation, the doctor is obliged either to provide the patient with reliable medical information before they make a decision about the treatment or to make efforts to involve relatives in supporting the patient in the decision-making process, if, on the basis of a medical history, the

38 Ibid., margin no. 25.

39 A. Tipold, *§ 110* [in:] O. Leukauf, H. Steininger (eds.), *Strafgesetzbuch Kommentar*, Wien 2017, margin no. 10.

40 K. Schmoller, *§ 110…*, margin no. 58.

doctor deemed the patient incapable of making an informed and voluntary decision and expressing their will (cf. § 252, paragraph 2 of the Austrian CC). However, if the delay in taking these measures would involve a threat to the patient's life, risk of serious harm to health or severe pain, the doctor may abandon them and undertake treatment without the required consent of the patient. In this case, the norm of § 110 (2) of the Austrian PC, waiving the unlawfulness of the doctor's action, applies.[41]

The second situation is normatively described in § 253 (3) of the Austrian CC and concerns the performance of medical treatment on an adult patient who is incapable of making an informed and voluntary decision and expressing their will about undergoing treatment. However, the consent of the representative is not required if the delay resulting from the need to obtain it would cause a threat to the patient's life, a risk of serious harm to health or severe pain. Thus, if the postponement of the procedure would result in a risk to the patient's life or health, the practitioner may undertake the treatment without the required consent of the representative (cf. § 110, paragraph 2 of the Austrian CC).

The third group of circumstances determines the legality of treatment of an adult patient incapable of making an informed and voluntary decision, undertaken against the will of the subject entitled to give consent. As indicated, when the procedure is opposed by the patient, court approval is required, even if the patient's representative consents to the treatment. If, on the other hand, the patient's representative refuses to give consent and does so against the patient's will, the legality of the medical procedure is conditioned by the court's decision to overrule the representative's objection or to appoint another person to represent the patient. Such decision may be requested by a doctor. However, the above-mentioned court decisions are not required if the delay related to court proceedings endangers the patient's life, poses a risk of serious harm to their health or severe pain (cf. § 254, paragraph 3 of the Austrian CC) or a medical procedure is performed in such circumstances without the court approval does not constitute a criminal offence (cf. also § 110 (2) of the Austrian PC).

Legal performance of a medical procedure without the consent or against the will of a patient also takes place when the patient is underage. It should be reminded that three types of situations can be distinguished here: first, a minor gives their consent for the treatment; second, the parallel consent of a statutory representative (i.e., a parent or guardian) is required; and third, it is necessary to obtain the surrogate consent of the minor's statutory representative. However, if the minor's treatment is so urgent that a delay resulting from the need to obtain the consent (any of the above) would endanger the minor's life or involve a risk of serious damage to their health, then neither the minor's consent nor the (parallel or surrogate) consent of their parent or guardian is required (cf. § 173 (3) of the Austrian PC). In this case, if the consent has not been given, the doctor may undertake life-sustaining treatment (e.g., a blood transfusion) even if the relevant court decision has not yet been made[42] (cf. also § 110 (2) of the Austrian PC).

It should be emphasised that, in the circumstances of the indicated threats to the life or health of the patient, treatment without consent should also be started when there is a probability that it will have to be continued even after the above-mentioned threats have ceased to exist. However, if they cease, it is necessary to immediately obtain consent to continue the treatment from the patient, his or her representative or the guardianship court.

41 R. Soyer, S. Schumann, *§ 110…*, margin no. 18/3 and references indicated therein; in detail see below.
42 K. Schmoller, *§ 110…*, margin no. 83.

1.3 Prohibition of unauthorised treatment (§ 110 of the Austrian PC) as an instrument of criminal law protection of the patient's autonomy

The patient's autonomy in Austria is primarily safeguarded by the regulation of § 110 of the Austrian Penal Code, according to which:

§ 110. (1) Whoever treats another person without the latter's consent, albeit in accordance with the rules of medical science, shall be sentenced to a term of imprisonment of up to six months or a fine of up to 360 daily rates.
(2) If the perpetrator has not obtained the consent of the treated person on the assumption that a delay in treatment would seriously endanger his/her life or health, he shall be subject to the punishment specified in paragraph 1 only if the alleged threat did not exist and the perpetrator could have realised it, had he exercised due care (§ 6).
(3) The perpetrator shall only be prosecuted if the person who received the unauthorised treatment so requests.

It is one of the three national regulations that are in force in the legal systems of European countries (besides Poland and Portugal) that criminalises the performance of a medical procedure without the consent of the patient. At the same time, it serves to normatively define some rights and duties in the doctor-patient relationship.

1.3.1 Protected legal interests

The criminal offence stipulated in § 110 of the Austrian PC is referred to as unauthorised medical treatment (*eigenmächtige Heilbehandlung*). Its main object of protection is the individual's right to self-determination. It stems from the construction of features of this criminal act, where – irrespective of medical indications and the way in which the patient is treated, based on professional knowledge and experience (*lege artis*) – it is forbidden to undertake treatment without the consent of the person being treated, and thus to 'treat them without authorisation'. The recognition of the individual's right to self-determination as the main object of protection of the discussed regulation is also supported by systemic considerations – it is contained in the third chapter of the third part of the Austrian PC titled: 'Criminal acts against freedom'.[43] Obviously, the protection of the indicated legal interest on the basis of § 110 of the Austrian PC is limited to the right to self-determination with regard to the violation of bodily integrity (health) in connection with a planned medical procedure.

Also from the perspective of medical practice, the essence and key importance of § 110 of the Austrian PC concern the protection of the patient's right to self-determination. And it is the necessity to obtain the patient's consent for treatment, stated explicitly in this regulation that accentuates the importance of the patient's right to self-determination. In this way, the legislator highlights the importance of not only the patient's right to being informed about the planned treatment, but also the patient's right to make the final decision on undergoing treatment.

The recognition of the patient's autonomy as the main object of protection may also be derived from the private prosecution procedure under § 110 of the Austrian PC. In fact, it

43 Different stance by K. Schmoller, according to whom the main object of protection of this regulation is bodily integrity; K. Schmoller, *§ 110*…, margin no. 12.

depends on the decision and initiative of the victim whether a private prosecution is brought, opening the possibility of punishing the perpetrator (cf. § 110 (3) of the Austrian PC).[44]

It should furthermore be recognised that a secondary object of protection of § 110 of the Austrian PC is bodily integrity (human health).[45] Against this background, however, there are certain divergences in Austrian doctrine regarding the perception of a medical procedure. Some representatives of the doctrine consider it an action satisfying the statutory features of inflicting harm to health (cf. § 83 of the Austrian PC), but not contrary to law. On the other hand, others exclude the recognition of a medical procedure as a prohibited act under § 83 of the Austrian Penal Code due to the inability to assign an outcome, lack of intent and non-violation of the rules of care.[46] Regardless of the position presented in this matter, it must be acknowledged that imposing a criminal sanction on medical treatment without the patient's consent (cf. § 110 of the Austrian PC) is an expression of the legislator's intention not to perceive the performance of a medical procedure based on medical indications and in accordance with the principles of medical art (*lege artis*) as a punishable infliction of bodily harm.

1.3.2 Treatment

Section 110 of the Austrian Penal Code regulates the criminal offence of a general nature. Therefore, its perpetrator may be any person capable of bearing criminal responsibility, including, in particular, doctors, nurses and other healthcare practitioners as well as the victim's relatives.

The criminalised conduct has been normatively described as 'treatment'. In view of the statutory requirement to act in accordance with the rules of medical knowledge, the interpretation of this term is limited exclusively to medical (therapeutic) activities; moreover, it is recognised that these activities should be carried out in the form of an action. At the same time, a treatment procedure, once started, is also an activity that continues without further human actions until it is finished with an active intervention.[47] This leads to the conclusion that § 110 of the Austrian PC stresses the activities of medical professionals. This is because the therapeutic activities undertaken by them, although constituting an interference in the bodily integrity of the patient but aimed at improving their health, are not qualified as causing bodily harm, provided that they were performed in accordance with the principles of medical knowledge and experience (*lege artis*). In contrast, undertaking therapeutic activities in violation of the principles of medical knowledge, as well as undertaking non-curative (non-therapeutic) medical activities[48] is outside the scope of § 110 (1) of the Austrian PC,

44 However, the doctrine stresses that such prosecution procedure results in limited application of this regulation in practice because the prosecutions are not occurring if the patient's request is not being sought; cf. K. Schmoller, *§ 110…*, margin no. 15; H. Zipf, *Probleme eines Straftatbestandes der eigenmächtigen Heilbehandlung. (dargestellt an Hand von § 110 öStGB)* [in:] A. Kaufmann, G. Bemmann, D. Krauss, K. Volk (eds.), *Festschrift für Paul Bockelmann zum 70. Geburtstag am 7. Dezember 1978*, München 1979, pp. 588–589.

45 R. Soyer, S. Schumann, *§ 110…*, margin no. 2.

46 For more details M. Burgstaller, E.E. Fabrizy, *§ 83* [in:] F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Wien 2016, margin nos. 19–20, 30.

47 R. Soyer, S. Schumann, *§ 110…*, margin no. 5. For a different stance, see K. Schmoller, *§ 110…*, margin no. 107.

48 This refers, inter alia, to cosmetic treatments.

but it can be classified as the criminal offence of causing bodily harm (§§ 83–89 of the Austrian PC) or the criminal offence of coercion (§ 105 of the Austrian PC).

Therefore, treatment is any therapeutic activity in the area of prophylaxis, diagnosis, therapy, rehabilitation or obstetrics (cf. § 252, paragraph 1 of the Austrian CC) involving the interference in the sphere of bodily integrity of the patient and carried out by a doctor or another person performing a medical procedure to save the patient's life, health or reduce the patient's physical or mental suffering.[49] Thus, the existence of medical indications is a condition for taking a therapeutic activity. The concept of medical indications should be understood broadly as covering all activities that fall within the scope of medically justified actions, and therefore are beneficial from the patient's perspective as they are aimed at improving their physical or mental condition. At the same time, it is not limited to action necessary and required to treat a particular illness or reduce the patient's suffering but covers all actions the undertaking of which is justified by the probability of achieving this result, which is possible from the perspective of medical knowledge and experience.

1.3.3 Lacking consent

Obtaining legally valid consent from the patient, their representative or the court[50] determines the legality of the medical procedure, being an expression of respect for the patient's will and a manifestation of their right to self-determination. In contrast, the lack of the required consent (understood as a refusal to grant consent or granting legally invalid consent[51]) is one the statutory features of the criminal act specified in § 110 (1) of the Austrian PC and, thus, constitutes one of the conditions for criminal liability for unauthorised treatment.

It should be recalled that for the consent to be legally valid, several conditions must be satisfied. One of them is the doctor's duty to provide the patient with reliable medical information before the treatment procedure is performed. The due performance of this duty by the doctor and providing the patient with professional and comprehensive information on the planned treatment determines the patient's capacity to consent to the treatment. This means, therefore, that the failure to provide the patient with reliable medical information excludes the possibility of the patient giving legally valid consent. The performance of a medical procedure by a doctor under such circumstances may, therefore, lead to his criminal liability under § 110 (1) of the Austrian PC.

However, if a doctor does not provide information properly before the treatment because he wrongly considers that his duty does not include all relevant information related to the treatment, or if he does not provide the patient with reliable information because he wrongly believes that the patient already has sufficient knowledge about the planned treatment, it must be assumed that he is in error as to the circumstance excluding the unlawfulness of the act, resulting in the abrogation of intentionality (cf. § 8 of the Austrian PC), which precludes the liability under § 110 (1) of the Austrian PC. In principle, the situation where the doctor, when giving the treatment, does not realise that the consent was given on the basis of erroneous assumptions on the part of the patient, which prejudiced the patient's decision to undergo the treatment, should be assessed in a similar way.

49 R. Soyer, S. Schumann, *§ 110…*, margin no. 8.
50 For the statutory requirements for consent to treatment, see in detail above.
51 H. Zipf, *Probleme…*, p. 584.

Some doubts are also raised by the situation in which a representative of a patient who is incapable of making a conscious and free decision and expression of will concerning medical treatment obtains incomplete information from the doctor on the state of health of the patient whom he or she represents and, on that basis, gives his or her consent. Carrying out medical treatment in such circumstances is not, in principle, tantamount to a violation of the norm contained in § 110 (1) of the Austrian PC, as criminal liability for unauthorised treatment may take place only in the case of treatment without the consent of the person entitled. However, if the representative gives consent without being fully informed of the extent of the illness of the represented patient, such consent is deemed to be valid, even if the patient's condition is more serious than the representative was aware of at the time of giving consent.

However, a situation in which the patient's health condition is so serious that adequate information about it could dissuade the person representing the patient from giving his consent to a medical procedure, even if only because of justified doubts about the legitimacy of its performance, should be assessed differently. Such consent, given on the basis of extremely incomplete medical information, should be considered legally invalid, even if the treatment itself has a beneficial effect on the patient's condition.

It should also be noted that the prerequisite of lack of legally valid consent expressed in § 110 (1) of the Austrian PC remains in a certain relation to § 90 of the Austrian PC, which regulates the lawful excuse for the victim's consent to violation of their health or for a threat to their physical safety. The main difference, however, is that the regulation of § 110 (1) of the Austrian PC does not make the effectiveness of the consent obtained conditional on the fact that the medical procedure is not contrary to right conduct (principles of social coexistence). Indeed, carrying out a medical procedure in accordance with medical science and with the patient's consent is always in line with right conduct.[52]

1.3.4 Specific lawful excuse – § 110 (2) of the Austrian Penal Code

Section 110 (2) of the Austrian PC contains a particular lawful excuse that arises when the perpetrator has not obtained the required consent of the patient (or the patient's representative) and carries out a medical procedure, unintentionally wrongly assuming that the postponement of treatment would seriously endanger patient's life or health. This construction combines features of the following lawful excuses: state of superior necessity and implied consent of the victim, creating an independent circumstance repealing unlawfulness[53]; hence, the reference to the general principles of the two indicated classical circumstances excluding unlawfulness is unjustified.[54]

This regulation also combines two problems. First, it describes the circumstances under which a medical procedure performed without the required consent is unlawful. Second, it extends the scope of criminalisation of an act defined as unauthorised medical treatment by a new type of conduct consisting in the performance of a medical procedure without the required consent in the situation of an inadvertent erroneous assumption that a circumstance excluding unlawfulness exists, where such a false assumption would typically exclude criminal liability for an intentional act.

52 K. Schmoller, *§ 110*…, margin no. 35.

53 K. Bruckmüller, S. Schumann, *Die Heilbehandlung im österreichischen Strafrecht* [in:] C. Roxin, U. Schroth (eds.), *Handbuch des Medizinstrafrechts*, Stuttgart 2010, p. 829.

54 Cf. A. Tipold, *§ 110*…, margin no. 19. Critical standing: H. Zipf, *Probleme*…, pp. 586–588.

1.3.4.1 Exclusion of the unlawfulness of non-consensual treatment in the circumstances of serious risk to the life or health of the treated person

In the light of the provisions of § 110 (2) of the Austrian Penal Code, the actions of the doctor performing the treatment procedure without obtaining the consent of the patient or another authorized entity (representative, court), because the delay related to the necessity to obtain it would actually seriously threaten the patient's life or health, are not contrary to the law and, thus, do not constitute grounds for criminal liability. However, the scope of this lawful excuse is quite limited. The decisive factor here is whether the time needed to obtain the consent would bring serious risk to the patient's life or health.[55] Furthermore, it must be noted that a 'serious risk' is a vague concept and its interpretation poses certain difficulties. Some representatives of the Austrian doctrine[56] incorrectly assume its semantic identity with 'severe bodily harm' (cf. § 84 (1) of the Austrian PC). However, the phrase used in § 110 (2) of the Austrian PC seems to have a wider scope and covers all cases of a serious threat to human life or health, i.e., such a threat that is immediate and exceeds the threshold of insignificance (e.g., medical intervention in the case of an unconscious patient brought from an accident showing numerous injuries and fractures).[57]

The lawful excuse under § 110 (2) of the Austrian PC will not apply, however, when a patient capable of making an informed and voluntary decision and expressing their will in the subject of treatment refused to give consent or the doctor did not ask for it because he anticipated the patient's refusal.[58] The fact that the treatment had a beneficial effect on the patient's health obviously does not justify the legality of the procedure. In such a situation, the doctor is subject to criminal liability under § 110 (1) of the Austrian PC. The patient has the right to object to the treatment, both potentially (e.g., to any blood transfusion that would be carried out on them in the future) and in a specific situation (e.g., to a specific surgical procedure that is currently proposed to the patient). In fact, the Austrian doctrine assumes that the patient's declaration is binding on the doctor and that the failure to respect it is punishable, even if the patient refuses to give their consent to the treatment because they wish to die.[59] This is particularly important in the case of *pro futuro* (advance) declarations (also referred to as 'living will'),[60] which limit the scope of the obligation to provide treatment. Generally speaking, they contain a refusal to give consent to treatment (any, or in a specified scope, e.g., artificial respiration, artificial nutrition) that would potentially be provided in the future, and at the time when the treatment becomes necessary the patient is not capable of making an informed and voluntary decision and expressing their will (e.g., due to unconsciousness).

However, the general principles must be applied to a person who has made a failed suicide attempt. Treatment of a person who has attempted suicide against their unambiguously

55 K. Schmoller, *§ 110.*..., margin no. 81.

56 See, inter alia, K. Schmoller, *§ 110.*..., margin no. 82.

57 Cf., inter alia, K. Bruckmüller, S. Schumann, *Die Heilbehandlung*..., p. 830; R. Soyer, S. Schumann, *§ 110.*..., margin no. 31.

58 Cf., inter alia, K. Schmoller, *§ 110.*..., margin no. 80.

59 H. Zipf, *Probleme*..., pp. 587–588.

60 K. Schmoller, *§ 110.*..., margin no. 76 et seq. For details regarding the Austrian regulation of *pro futuro* declarations in the law: *Bundesgesetz über Patientenverfügungen* (BGBl. I Nr. 55/2006). see, inter alia, K. Bruckmüller, S. Schumann, *Die Heilbehandlung*..., pp. 832–865; R. Soyer, S. Schumann, *§ 110.*..., margin no. 32/1.

expressed will infringes such person's autonomy.[61] If, however, it is not possible to recognise the will of the would-be suicide, then § 110 (2) of the Austrian PC would be applicable, waiving the unlawfulness of the medical act undertaken to save life, which the doctor is obliged to do as a guarantor of the patient's legal interests. On the other hand, if the doctor saves the life of a suicide without recognising that he or she is acting against their previously unequivocally expressed will, then such an act should be assessed from the perspective of the lawful exception under § 110 (2) of the Austrian PC, which waives the unlawfulness of the act. It is only where the doctor has unintentionally erroneously assumed that a delay arising from the need to ascertain the will of a person who has attempted to commit suicide would result in a serious threat to their life that it will be possible to hold the doctor criminally liable for the unintentional act.

1.3.4.2 Criminal liability for the unintentional false assumption of a serious threat to the life or health of the treated person

Section 7 (1) of the Austrian PC provides that a prohibited act may be committed only intentionally, unless the law provides otherwise. Consequently, a doctor who arbitrarily performs a medical procedure without the required consent because he either unintentionally wrongly assumed that the delay in treatment necessary to obtain this consent would seriously endanger the patient's life or health or unintentionally misjudged the time required to obtain this consent will not bear criminal liability for an intentional criminal offence under § 110 (1) of the Austrian PC[62] because he erroneously assumed that there was a circumstance excluding the unlawfulness of his act (cf. § 8 of the Austrian PC). However, the doctor may be held liable for an unintentional offence under § 110 (2) of the Austrian PC if, in the exercise of the necessary care (within the meaning of § 6 of the Austrian PC), he or she could have realised that the delay in treatment necessary to obtain consent would not have caused a serious risk to the patient's life or health.[63] Thus, a doctor who intentionally performs a medical procedure without the patient's consent because he or she unintentionally misconceived that a delay in treatment would seriously endanger the patient's life or health will incur criminal liability under § 110 (1) of the Austrian PC.

On the other hand, other cases of involuntary treatment without the required consent remain outside the scope of § 110 of the Austrian PC, including, inter alia, the performance of a therapeutic procedure without informing the patient in advance of all possible risks associated with the procedure because the doctor inadvertently mistakenly assumed that either all necessary information had already been provided to the patient by another doctor

61 Cf. R. Soyer, S. Schumann, *§ 110…*, margin no. 32/2; K. Schmoller, *§ 110…*, margin no. 77; D. Kienapfel, V. Schroll, *Strafrecht – Besonderer Teil I, § 110*, Wien 2016, margin no. 34; H. Zipf, *Die Bedeutung und Behandlung der Einwilligung im Strafrecht*, 'Österreichische Juristen-Zeitung' 1977, p. 385. Different standing in: E. Wach, *Strafrechtliche Probleme des Selbstmords*, 'Österreichische Juristen-Zeitung' 1978, p. 483; H. Fleisch, *Der chirurgische Eingriff…*, p. 432.

62 For criticism of the issue of the identical statutory penalty range for intentional and unintentional acts in § 110 (1) of the Austrian PC, due to the different degree of culpability, see K. Schmoller, *§ 110…*, margin no. 103.

63 Pursuant to § 6 (1) and (2) of the Austrian PC, whoever fails to exercise the care that he is obliged to exercise under the circumstances and that he is capable of exercising under his mental and physical conditions and that he can reasonably be expected to exercise, and therefore fails to recognise that he could bring about a situation that corresponds to a statutory offence, acts unintentionally. Whoever considers it possible that he will bring about such a state of affairs but does not intend to do so also acts unintentionally.

or that the patient would avoid them. Moreover, the latter is relevant for the assessment of the lawfulness of a sudden and unexpected extension of a medical procedure (e.g., a surgical operation), the necessity of which only became apparent in the course of the procedure – in Austrian doctrine and case law, the lawful excuse of implied consent is predominantly adopted here.[64]

1.4 Patient autonomy and compulsory vaccination in the context of the COVID-19 pandemic

A special case of the limitation of patient autonomy is the introduction of compulsory vaccination in the context of the COVID-19 pandemic. Austria was the first country in the European Union to adopt compulsory vaccination for persons aged 18 and over.[65] This was introduced to protect public health in view of the insufficient vaccination coverage – despite the general availability of centrally licensed vaccines – to effectively combat the COVID-19 pandemic. Compulsory vaccination should therefore be a sensible instrument to avoid overburdening the health system.

The legal regulation of such a compulsory vaccination is primarily to be measured against Art. 8 of the ECHR. The protective purpose of Art. 8, paragraph 1 ECHR guarantees, inter alia, the right to respect for private life. This also includes the protection of the physical and mental integrity of the individual. However, the constitutionally guaranteed right to respect for private life is not protected in absolute terms; rather, it is amenable to restriction for the protection of other legal interests on the basis of the legal reservation of Art. 8, paragraph 2 of the ECHR. For this reason, the European Court of Human Rights considers interference with Art. 8 of the ECHR because of the compulsory vaccination to be justified under certain conditions and has only recently reconfirmed the conformity of a proportionate compulsory vaccination with the Convention.

Interferences in patients' rights under Art. 8 of the ECHR are justified if they are provided for by law and are necessary in a democratic society to achieve one of the goals mentioned in Art. 8, paragraph 2 of the ECHR. The necessity is assumed if an urgent social need is met. In any case, the severity of the disease, the risk of infectiousness and the danger to the public must be taken into account.

The compulsory vaccination was to be enforced from 16 March 2022. However, even before it comes into force de facto, it was suspended again on the recommendation of a commission of experts and with the decision of the Austrian federal government on 9 March 2022 – for an initial period of three months. This is because, in view of the currently prevalent Omicron variant and the milder courses of the disease, compulsory vaccination is not proportionate. Generally, a later implementation of the compulsory vaccination is preferable to an immediate one. If one vaccinates too early, a substantial part of this newly acquired immunity will fizzle out. However, since it cannot be ruled out that a new variant will burden the health system, the suspension of the compulsory vaccination should be reviewed in three months.

64 R. Soyer, S. Schumann, *§ 110…*, margin no. 34, 35; H. Zipf, *Probleme…*, p. 588.

65 The Law: *4. Bundesgesetz vom 4. Februar 2022 über die Pflicht zur Impfung gegen COVID-19 (COVID-19-Impfpflichtgesetz)*; BGBl. No. 4/2022.

1.5 Summary: Is the patient's autonomy adequately protected by criminal law in Austria?

The above considerations lead to the following conclusions and *de lege ferenda* postulates. First, a separate type of offence that criminalises the conduct defined as unauthorised treatment is necessary for the effective protection of the patient's autonomy with instruments of criminal law. The fact that it has been included in Chapter 3 of the Austrian PC as a criminal offence against freedom further strengthens this protection. It also allows for a clear distinction between the criminal liability of the doctor (and other healthcare professionals) for violating the patient's right to self-determination and criminal liability for violating the patient's life or health.

Second, inclusion of the statutory features in § 110 (1) and (2) of the Austrian PC allows a broad spectrum of conduct to be included within the scope of criminalisation. All of them, however, are based on the act of treatment, understood in the Austrian doctrine and case law as a curative (therapeutic) activity, i.e., undertaken for medical indications and aimed at improving the patient's physical or mental health. However, in view of the dynamic development as well as increasing popularity and accessibility of treatments of aesthetic medicine that are also in this field, various violations of the patient's legal interests are more and more frequent. Therefore, it should be postulated that the scope of § 110 of the Austrian PC should also include medical procedures that do not have a curative (therapeutic) purpose.

Third, as indicated, prior provision of adequate medical information is of key importance for the patient's capacity to give consent to treatment. However, the doctor's duty to inform is not explicitly stated in § 110 (1) of the Austrian PC but it is decoded as one of the elements conditioning the legal validity of consent, which makes its content and scope disputable. Consequently, it would be advisable to consider the inclusion of the duty to inform in the set of statutory features in § 110 (1) of the Austrian PC.

Fourth, doubts are raised in the Austrian doctrine about the legitimacy of the private prosecution procedure. This is because the regulation of § 110 of the Austrian PC is of marginal importance for practice. Therefore, it can be assumed that the change of the prosecution procedure to the prosecution on the injured person's request would increase the number of proceedings, which could also take place in the event of the victim's death and which is not possible under the current legal position.

2 Patient autonomy and criminal law

A Belgian perspective (scalpels needed to replace blunt knives)

Frank Verbruggen

2.1 Consent as the cornerstone of Belgian health law

Belgium uses a broad definition of medical care, which includes aesthetic interventions, reproductive health care, palliative care and euthanasia.[1]

Patient autonomy is the basis of Belgian health law, a fundamental principle also entrenched in statutory law: in relation to the medical profession, patients are entitled to respect for their human dignity and self-determination (Article 5 of the Law on Patients' Rights, hereinafter LPR). This is seen as a specific expression in the medical context of the fundamental right to privacy and the prohibition on unhuman and degrading treatment.[2] Although Belgium has not signed the 1997 Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention),[3] it is nevertheless seen by legal doctrine[4] as the most important source of fundamental rights of patients in Europe.

1 Article 2, 2° Law of 22 August 2002 concerning the rights of the Patient, 'Official Gazette' 26 September 2002, as amended by Art. 8 of the Law of 23 May 2013 defines them as 'services provided by a professional in view promoting, diagnosing, maintaining, restoring or improving a patient's health, to change a patient's appearance for primarily aesthetic reasons or to accompany the dying patient' (our translation).

2 Before the adoption of the LPR, the Court of Cassation had already, in a civil tort case, confirmed that the lawfulness of a medical act affecting the physical integrity of a person presupposes that person's consent to remove the culpable character from the act which is part of the art of healing and which pursues a curative or preventive therapeutic aim. It clarified that sterilisation of a woman without the consent of the husband could not be considered a fault of the medical professional who had performed the operation and that there was no obligation for that medical professional to inform the husband: Court of Cassation, 14 December 2001, No. C980469F, ECLI:BE:CASS:2001:ARR.20011214.4.

3 ETS No. 164, 'United Nations Treaty Series', Vol. 2137, I-37266.

4 H. Nys, *Op welke grondrechten zijn patiëntenrechten gebaseerd?* [in:] A.C. Hendriks, J.H. Hubben, J. Legemaate, et al. (eds.), *Grondrechten in de gezondheidszorg: Liber Amicorum voor prof. mr. J.K.M. Gevers*, Houten 2014, p. 19; H. Nys, *Belang van het Biogeneeskunde-Verdrag van de Raad van Europa voor de ontwikkeling van het medisch recht in Europa* [in:] W. Pintens, A. Alen, E. Dirix (eds.), *Vigilantibus Ius Scriptum: Feestbundel voor Hugo Vandenberghe*, Bruges 2007, pp. 223–236; T. Goffin, *Gezondheidsrecht, Happy Birthday to You!*, 'Tijdschrift voor gezondheidsrecht / Revue de droit de la santé' 2012, No. 1, p. 2; E. Verjans, *Het recht op informatie en toestemming van de patiënt*, Antwerp 2019, p. 84.

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The right of every patient to give informed[5] and free consent prior to any intervention by a medical professional[6] is explicitly established in Article 8, § 1, first indent LPR. Like the self-determination mentioned in Article 5 LPR, this personal right is considered to be the codification of a fundamental right and fundamental principle of health law.[7] It encompasses respect for the physical integrity of the patient, yet it goes beyond that. Consent is required for all interventions, e.g., also for the decision to stop a treatment, an action that, in itself, does not entail a direct infringement of physical integrity.[8] Article 8, § 4 LPR explicitly grants the patient the right to refuse or withdraw consent, which comes down to a right to refuse treatment. The patient can do this against the better judgment of the medical professionals. Apart from the fundamental right to physical integrity and self-determination,[9] reference is also made to the medical contractual relationship as a foundation[10] of this right:[11] the LPR has cast the medical profession as a service provider for the emancipated patient, shedding and even banning a paternalistic medical approach that might have prevailed or at least have been condoned in the past.[12]

Article 8, § 1, second indent LPR states that the consent should be explicitly given unless the practitioner, after having informed the patient sufficiently, can reasonably infer his/her

5 There is only one exceptional situation in which information can be withheld from a patient who wants to be informed: Article 7 LPR allows this only in so far as the disclosure of the information would cause an obvious serious detriment to the health of the patient and on condition that the professional has consulted another professional about the matter.

6 This consent has to been given each time again, for each intervention (G. Genicot, *Droit médical et biomédical*, Brussels 2016, p. 127), unlike the more general contractual consent on the enduring medical relationship between patient and doctor: R. D'Haese, *Medische contracten in het licht van het recht op eerbied voor de fysieke integriteit: De informed consent-vereiste als raakpunt*, 'Tijdschrift voor Belgisch burgerlijk recht' 2010, No. 9, p. 434.

7 C. Lemmens, *Geïnformeerde weigering door de patiënt van verdere tussenkomst (tijdens de behandeling)* [in:] V. Sagaert, et al. (eds.), *Medische dienstencontracten*, Antwerp 2020, p. 315; D. Mayerus, P. Staquet, *La loi du 22 août 2002 relative aux droits du patient et son impact sur la relation patient-médecin*, 'DCCR' 2002, No. 57, pp. 16–17; T. Vansweevelt, S. Tack, *Het recht op gezondheidstoestandinformatie en geïnformeerde toestemming* [in:] T. Vansweevelt, F. Dewallens (eds.), *Handboek gezondheidsrecht*, *II*, Antwerp 2014, pp. 331–332. See also: Opinion of the National Medical Board of 6 May 2017 concerning the informing of the patient about the health situation and the care provided, www.ordomedic.be (the right to information is a fundamental right of the patient).

8 C. Lemmens, *Geïnformeerde weigering*…, 11.

9 Court of Appeals Mons, 29 June 2004, 'Tijdschrift voor gezondheidsrecht / Revue de droit de la santé' 2006, No. 1, p. 34, comment N. Colette-Basecqz; G. Genicot, *Droit médical et biomédical*, Brussels 2016, pp. 157 and 159; O. Guillod, *Introduction. Le consentement dans tous ses états* [in:] A. Laude (ed.), *Consentement et santé*, Paris 2014, p. 1; E. Hannosset, *Consentement éclairé: fondement, méconnaissance, conséquences* [in:] Y.H. Leleu (ed.), *Droit Médical*, Brussels 2005, pp. 227, 244–245; T. Goffin, *De professionele autonomie van de arts. De rechtspositie van de arts in de arts-patiëntrelatie*, Bruges 2011, p. 383; E. Guldix, *Schending van de fysieke integriteit en persoonlijkheidsrechten in het medisch recht* [in:] C. Alexander, E. Guldix, L. Wostyn, et al. (eds.), *Medisch recht: Topics*, Ghent 2014, p. 76. Since Belgium has not signed or ratified the Oviedo Convention, it is not a formal source of Belgian law, but no one seems to disagree with what is stated in its Art. 5.

10 On the foundations, extensively: E. Verjans, *Het recht op informatie*…, pp. 74–85.

11 G. Genicot, *Droit médical*…, p. 159; T. Goffin, *De professionele autonomie*…, p. 360; E. Verjans, *Het recht op informatie*…, pp. 77–79.

12 E. Verjans, *Het recht op informatie*…, p. 30; T. Goffin, *Gezondheidsrecht*…, pp. 2–3.

consent from the patient's behaviour.[13] In practice, implicit consent is often assumed, but the context is of course very important.[14]

For some medical procedures, statutory law lists extra conditions or formalities for consent, which complement the basic rule in the LPR. Parliament wanted to offer extra protection because it deemed these interventions particularly dangerous or sensitive.[15] Such is the case for surgical and non-surgical aesthetic interventions,[16] medically assisted reproduction,[17] organ transplantation,[18] voluntary termination of pregnancy[19] and euthanasia.[20] The Law on euthanasia for instance, excludes the application of the two exceptions to the information duty in the LPR (i.e., the right not to know and the therapeutic exception)[21] and it established extra controls on the voluntary nature of the patient's request for euthanasia.

Medical professionals who intervene without consent often commit a criminal offence (see Section 2.8) and may incur criminal, civil and disciplinary liability.[22] Case law from criminal courts on medical professionals deliberately infringing patient autonomy is, however, extremely scarce.[23]

A controversial 2020 criminal case concerning the euthanasia of a psychiatric patient stands out, not for lack of consent of the deceased patient but because afterwards the patient's relatives questioned its validity. Euthanasia has swiftly become 'normalised' in the years following its introduction in 2002.[24] It therefore came as a surprise to many that the

13 Report 'Parl. Doc. Senate' 2001–2002, No. 2-1250/3, p. 55; House of Representatives 2001–2002, No. 1642/012, p. 34. On explicit and implicit consent: C. Lemmens, *Geïnformeerde weigering*…, pp. 15–16; E. Verjans, *Het recht op informatie*…, pp. 535 et seq.

14 E. Verjans refers to surveys of patients from 2012 and doctors from 2006. For the start of a therapy consent was asked more systematically than for stopping it, for operations almost always (E. Verjans, *Het recht op informatie*…, p. 70).

15 Amendment No. 48 of the government to the Bill to regulate the qualifications to perform invasive forms of medical cosmetics, 'Parl. Doc. Senate' 2012–2013, No. 5-62/5, p. 12. Const. Ct. 27 September 2015, No. 110/2015, B.19.

16 On the difference between the two, see Art. 2 Law on Aestethical Medicine.

17 Law of 6 July 2007 concerning medically assisted reproduction and the destination of supernumerary embryos and gametes, 'Official Gazette' 17 July 2007.

18 Article 9, second indent Law on Organ Transplantation.

19 Article 2, 2°, a) and b) Law of 15 October 2018 on the voluntary termination of pregnancy, the abolition of Art. 350 and 351 Belgian Criminal Code (hereinafter: BCC), amending Art. 352 and 383 BCC and changing several laws, 'Official Gazette' 29 October 2018.

20 Law of 28 May 2002 concerning euthanasia, 'Official Gazette' 22 June 2002. For an evaluation from 2017: C. Gastmans, D.A. Jones, C. MacKellar (eds.), *Euthanasia and Assisted Suicide: Lessons from Belgium*, Cambridge 2017.

21 E. Delbeke, *Juridische aspecten van zorgverlening aan het levenseinde*, Antwerp 2012, pp. 153–154; E. Verjans, *Het recht op informatie*…, p. 290.

22 C. Lemmens, *Geïnformeerde weigering*…, p. 8. For example, a sterilisation performed in the course of a therapeutic abortion, without the patient being fully informed as to the sterilisation and its irreversible nature, was tried as a civil liability case, there was no criminal prosecution: Court of Cassation 14 December 2001, No. C.980469.F, ECLI:BE:CASS:2001:ARR.20011214.4.

23 E. Verjans points out that the rare criminal cases relate to the *absence* of consent. Discussions on the completeness of the information provided to obtain the consent 'will almost never lead to a criminal prosecution, even less so a conviction' (E. Verjans, *Het recht op informatie*…, p. 714). Even the case law she refers to is rare and often predates the LPR or the specific laws on specific medical practices. Published case law usually refers to unintentional medical malpractice, a failure to assist a person in danger (see Section 2.8) or manifestly non-medical interventions, like sexual abuse.

24 In the words of C. MacKellar, *Some Possible Consequences Arising from the Normalisation of Euthanasia in Belgium* [in:] C. Gastmans, D.A. Jones, C. MacKellar (eds.), *Euthanasia*…, p. 219.

public prosecution service and the family of the patient decided to prosecute three doctors (two physicians and a psychiatrist) who had intervened in the procedure and who allegedly had violated the legal rules on euthanasia.[25] The trial rekindled the public debate on the validity of consent given by psychiatric patients and on the limits of patient autonomy.[26] The assizes court acquitted the doctors,[27,28] but the case highlighted a weakness in the criminal law theory that underpins the practice of legal euthanasia. If the medical professional has followed the strict rules on euthanasia, there is a ground of justification for administering a lethal injection that otherwise would be poison murder (see Section 2.6). However, if those rules were not followed, be that intentionally or by negligent behaviour of the doctors, there is no justification. For lack of a specific offence like the one in the Netherlands,[29] the Belgian doctors could be tried only for (poison) murder, a label that many considered inappropriate.[30]

In the same period, one of the best-known urologists in Flanders, previously a commercially successful author and a frequent guest on television shows, was convicted for sexual abuse of a young patient. Both the patient and her mother, as the guardian, had consented at the time of the treatment, but later on they began to doubt whether the intervention had been appropriate. They initiated the criminal prosecution nine years after the facts. The disciplinary instances of the medical profession did not find there had been malpractice and the public prosecution service also considered that the doctor's guilt could not be established beyond reasonable doubt. Whether the gynaecological interventions on the patient made medical sense stood at the heart of the debate, because that was the thin line between

25 It is the only time doctors have been prosecuted in Belgium for an allegedly irregular euthanasia: Y.H. Leleu, *L'euthanasie des patients psychiatriques au banc des accusés*, 'Jurisprudence de Liège, Mons et Bruxelles' 2020, No. 23, p. 1095.

26 On the conditions and the legal rules, see also Opinion No. 73 of 11 September 2017 of the Bio-ethics Committee on euthanasia in case of non-terminally ill patients, psychological suffering and psychiatric disorders: https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/opinion_73_web.pdf

27 Assizes Court East Flanders 31 January 2020, 'Jurisprudence de Liège, Mons et Bruxelles' 2020, No. 23, pp. 1093–1095, https://www.nytimes.com/2020/01/31/world/europe/doctors-belgium-euthanasia.html; https://www.bbc.com/news/world-europe-51322781.

28 The public prosecution service did not appeal to the Court of Cassation, only the victims. This means that the acquittal is definitive and the criminal procedure is finalised. However, the Court of Cassation quashed the decision in relation to one of the three doctors, which means that the Court of Appeals could still establish tort liability based on a different assessment of the behaviour of the doctor than the one made by the jury and the assizes court. Court of Cassation 15 September 2020, P.20.0240.N, ECLI:BE:CASS:2020:ARR.20200915.2N.2, see Section 2.6.

29 Article 293 Dutch Criminal Code: '1. A person who intentionally ends the life of another person at his/her express and serious request shall be punished with a term of imprisonment not exceeding twelve years or a fine of the fifth category. 2. The offence referred to in the first paragraph shall not be punishable if it is committed by a physician who meets the due diligence requirements referred to in section 2 of the Act on the review of termination of life on request and assistance with suicide and notifies the municipal coroner in accordance with section 7, second paragraph, of the Act on the delivery of corpses' (our translation).

30 Authors have favoured a specific offence for irregular euthanasia, referring to the Dutch and Swiss examples, suggesting imprisonment of ten to fifteen years: E. Delbeke, *Juridische aspecten…*, pp. 275–278. She also suggest a differentiation (pp. 280–287), not every infringement of the rules should receive the same sanction, e.g., non respect for the waiting period would deserve a lesser sentence. In the same sense: M. De Hert, *Drie euthanasie-artsen vrijgesproken voor moord door het hof van assisen / Trois médecins euthanasieurs acquittés du chef d'assassinat par la Cour d'assises*, 'Tijdschrift voor gezondheidsrecht / Revue de droit de la santé' 2020, No. 4, p. 335.