Marcin Śliwka[1], Anita Gałęska-Śliwka[2]
[1]Department of Civil Law and International Trade, Faculty of Law and Administration, University of Nicolaus Copernicus, Toruń, Poland
[2]Department of Health Law *Collegium Medicum* University of Nicolaus Copernicus, Bydgoszcz, Poland

Regulating end of life decisions in Poland: legal dilemmas

Abstract

Problems concerning discontinuation of overzealous therapy and so called 'living wills" have been ignored in the Polish law through many years. Intensive transformations which have been made in the field of medical regulations since 1989 could not omit such a sensitive issue. Nowadays in Poland there have been an intensive debate regarding euthanasia, overzealous therapy and living will institutions. The purpose of this article is an analysis of current and suggested standard of law along with writing some remarks of comparative law nature. The issues raised in a public debate are similar to those once discussed in other European countries and the United States.

Key words: euthanasia, overzealous therapy, living will

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Crime of euthanasia versus discontinuation of overzealous therapy

In the Polish juridical literature euthanasia is divided into active and passive. The passive euthanasia (also called as negative) is sometimes recognized as: „discontinuation of medical treatment of curable disease in regard to a patient who is simultaneously subjected to incurable disease, doctor's refusal of employment of extraordinary life saving means and employment of only ordinary means, discontinuation of patient's treatment in accordance with his/her demands, or discontinuation of patient's treatment without his/her consent when a doctor regards that further treatment only prolongs patient's suffering, or unconditional refusal of any intervention at time of dying" [1]. The active euthanasia (called positive) is defined as an act of behavior which consists of action in order to cause or hasten someone's death through, for example, delivery of lethal dose of drug or other deprivation of life [2].

In the international and comparative law there is almost universal prohibition of active euthanasia and doctor's participation in the suicide act. Human life is protected by numbered of legal regulations. For example, article 6 International Covenant on Civil and Political Rights anticipates that „Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Similarly article 2 European Convention on Human Rights: „Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." This excludes possibility of performing euthanasiap understood as a deliberate doctor's action aiming at shortening of patient's life. For example, the European Court of Human Rights in case of Diane Pretty v. UK stated that prohibition in

Address for correspondence: Marcin Śliwka PhD
Department of Civil Law and International Trade, Faculty of Law and Administration University of Nicolaus Copernicus
ul. Gagarina 15, 87–100 Toruń, Poland
Tel: +48 607 822 270, fax: +48 56 611 40 05
e-marcin.sliwka@gmail.com

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delivery of assistance in suicide commitment may admittedly lead to interference into private life, but such interference is treated as reasonable in a democratic country [3].

Both euthanasia and medically assisted suicide are usually prohibited in accordance with penal law regulations. For example, in the United Kingdom, in case of *R v Cox* [4], the court found guilty of an attempt of murder a doctor who, according to patient's wish, delivered her with lethal dose of chlorine potassium. [5] Similarly in Germany where paragraph 16 of the German Physicians Association guidance prohibits medical personnel to shorten human's life actively and overrule his own or family interests on a basis of a good of patient. The French deontological code, in article 38, prohibits a doctor to bring deliberately death on a patient. A physician should accompany a patient at last moments of his life and pay to him as much attention as it is necessary to provide him with proper comfort and sense of dignity. [2] In Europe active euthanasia and medically assisted suicide are, under some terms, permitted in the Netherlands, Luxemburg, Belgium (euthanasia but not assisted suicide) [6-12], and medically supported suicide is permitted inter alia in Switzerland [3].

In accordance with an article 150 of the polish penal code each who kills human being on his demand and under influence of compassion for him is subjected to imprisonment from 3 months through 5 years [13]. This crime, according to the article 150, is of common character, even if a perpetrator of this crime will be a doctor or another member of medical personnel [14, 15]. In exceptional situations a court may apply extraordinary mitigation of punishment, or even may desist from its execution. A doctor is not permitted provide any assistance to his/her patient in committing suicide act. The article 151 of the penal code constitutes: „Who, by persuasion or by assistance, leads human being to attempt on his life is subjected to punishment of imprisonment from 3 months through 5 years" [16–19].

In light of the Polish Penal Code regulations it appears to be problematic to distinguish between euthanasia and so called withdrawal of overzealous therapy. The opinions are divided. Sometimes both situations are interpreted entirely pointing that discontinuation of overzealous therapy is identical to passive euthanasia. It comes out from the fact that euthanasia homicide, as a rule, may be committed by action as well as by discontinuity of action to which, inter alia, is included resignation from support of patient's life functions [14].

According to the Polish law overzealous therapy is most often defined as „an excessive, superfluous, artificial life support of patient with lethal disease or injury changes of basic organs with exercise of extraordinary means which only cause prolongation of suffers of the patient and in no case upgrade his/her quality of life" [2]. The Catholic Church approach in face of euthanasia and overzealous therapy was expressed in many documents. One of the first which mentioned the problem was the Saint Officium Decree dated on the 27th November 1940, in which the eugenic euthanasia of disabled human beings conducted in accordance with the Nazi program T4 was to what negatively assessed [20–23]. In 1957 physicians were addressed on subject of moral problems of anesthesia, in which the Pope stated that employment of pain appeasement means is allowed and recommended even when, as a consequence, the employed treatment causes risk to shorten patient's life. Even though it was also underlined that any direct form to shorten patient's life is forbidden because „it implicates direct governing over patient's life" [24]. In the same year in an address on resuscitation problems the Pius XII made a division between ordinary and extraordinary means exercised in medicine. According to the Pius XII a physician is entitled to undertake specified methods, for example artificial respiration, also is entitled to take decision of their discontinuation in case when the applied action is not effective [24].

In the Catholic Church Catechism it can be read that „euthanasia as action or discontinuation of action which itself or in anticipation causes death in order to liquidate pain constitutes homicide and is deeply against human being personal dignity", and in the Encyclical Vita was added that assistance in suicide „was not to be justified even when it was committed on demand".

What are the differences between euthanasia (especially passive) and discontinuation of overzealous therapy? In the Polish juridical doctrine and the Church science usually division is introduced into proportional and disproportional means [2], "as usual (proportional — the author's remark) are considered the means which employment gives rational hope for recovery and simultaneously does not cause unbearable suffer to a patient and a state of discomfort. In opposition to this as extraordinary means are recognized such forms of treatment which employment does not come with rational hope of recovery or pain appeasement, or which employment results in collateral effects in form of unbearable suffer or a state of discomfort [2]. Simi-

lar divisions are sometimes applied in the American juridical system [3]. For example, in a sentence issued in case of the *In re Quackenbush* it was stated that: public interest in area of human's life protection is weakening and individual's right for privacy is growing up along with scope of medical intervention [25]. Deciding, whether important charges connected with therapy should be undertaken it is necessary to take into account the period of time of which human's life is able to be prolonged and conditions under which it will be conducted [26]. In case of *Colyer* [27] a court stated that public interest in area of human's life protection may require provision of life saving service against patient's will. This interest weakens in such situation when treatment only delays death of human being who is in incurable or lethal state. If required treatment is highly distressful and invasion the right of lethally diseased human must prevail [28].

In the doctrine of Polish juridical system the most important problem connected with qualification of employed to a patient means on proportional and disproportional is a proper qualification of artificial nutrition procedure (in dying patients). According to M. Safjan, former president of the Polish Constitutional Tribunal, „there are moral and ethics reasons to state that human's disconnection from artificial nutrition system in such situation is not euthanasia but only discontinuation of already initiated — though extended in time — dying process" [29].

In the Catholic Church science there is a dominating approach in accordance with which artificial nutrition or hydration of a patient with employment of stomach probe is a proportional means. However, one needs to note that in the American juridical system such procedures are commonly recognized as health service [30]. A court in case of the *In re Gardner* [31], comparing discussed process with other life supported procedures, admitted that food and water deliveries to a patient possesses in itself some kind of symbolic derived from relations between a parent and a fed child. This symbolic disappears in case of artificial nutrition against will of the diseased. In case of the *In re Estate of Longeway* [32] a court, sentencing that there is a basic difference between traditional and artificial nutrition, stated that the second mentioned procedure had a character of medical procedure and against which there was a possibility of refusal expressed by an entitled person. In the similar spirit statements were expressed by the Highest Court of Ireland [33], Scotland [34], RSA [35], the British House of Lords [36] along with the German [37] and the Dutch courts [38–40].

Pointing at other differences which occur between euthanasia and overzealous therapy it is frequently underlined that the aim of euthanasia differs from the aim of discontinuation of overzealous therapy. According to M. Machinek „(…) the difference relies, from one hand, on the aim which stimulated acting (a patient or a doctor) and, from the other hand, on the selection of means. In case of euthanasia the direct aim of action (or discontinuation of action) is causing patient's death in accordance with his/her (sometimes only assumed) request. Selection of means also unambiguously leads at the same direction. In case of overzealous therapy its aim is neither shortening nor prolonging of patient's life but is his/her protection against additional suffers when in area of therapy nothing can be done for him/her. Resignation from extraordinary activities, disproportional and, in addition, usually costly and painful simply means not setting obstacles in regard to inevitable death" [41]. In a sentence issued in case of the *Tune v. Walter Reed Army Medical Hosp* [42] a court admitted that in case regarding disconnecting of life support machinery the issue of suicide prevention is not applied in situation when permission admitted by a court is not applied to end of health life with assistance of artificial means, but only permits on further development of natural factors [43]. In the *Matter of Conroy* a court stated that expression of objection in face of life support intervention must not be properly recognized as an attempt of suicide commitment. (...) When death finally comes it will be a normal consequence of disease development, but not a consequence of autonomously hurt injuries [43].

Since 1991 Poland has been a member of the European Council, intergovernmental organization uniting almost all European countries, involved in, first of all, human rights protection, democracy and co-operation of all country members in area of culture. Debate on the subject of overzealous therapy must consist of approaches to numerous Resolutions and Recommendations issued in a frame of the European Council.

In Recommendation 779 in case of rights of diseased and dying individuals from 1976 it is underlined that development of modern diagnostic and treatment methods may lead to impersonal treatment of patients for whom protection of attributed to them rights becomes more and more challenging. Creators of the Recommendation underline that prolongation of human's life is as equally fundamental factor as minimizing of pain suffered by a dying person. A doctor undertaking all possible steps in

order to soften suffers is not allowed to deliberately hasten natural process of dying.

In the Recommendation 1418 (1999) in case of human rights protection and protection of dignity of lethally diseased and dying individuals it was underlined that the right for dignified death is endangered by, inter alia:

— unsatisfactory access to palliative care and to pain killing means;
— artificial prolongation of dying process through employment of disproportional means or continuation of further therapy without a patient's acceptance;
— lack of psychological support and limitations of science development of personnel conducting palliative care;
— unsatisfactory assistance and support for family members and intimates of lethally diseased and dying individuals;
— sensed by patients threat in face of loss of independence and becoming burdensome for family and medical institutions;
— deficit of funds and means dedicated for care of lethally diseased and dying individuals.

In an article 3 of the Venetian Declaration regarding lethal diseases you can read, inter alia: „A doctor in any case should constrain from administering extraordinary means which will not be able to bring any advantage for dying".

For the time being the problem of discontinuation of overzealous therapy has not been directly regulated in the Polish juridical system. However, it does not mean that in this issue the legislator remains totally in silence. In accordance with content of article 20 of act dated on 6 November 2009 on patient rights and patient rights ombudsman (Diary of Acts 2009, number 52, position 417) a patient has the right for dying in peace and dignity. In case of faulty offence of the law a court may adjudge appropriate amount of money on directed social object in accordance with an article 448 of the Civil Code. The legislator did not precise definition of dying „in peace and dignity". Following guidelines of these definitions it is necessary to pay attention to regulations of the Doctors Code of Ethics which describe doctor's responsibilities in terminal states. The mentioned act, voted by the Extraordinary Convention of Physicians, only formally is deprived of juridical power. At that moment you can recollect entire scope of juridical regulations in accordance of which a doctor is obliged to follow statements of the mentioned code. For example, an article 4 of act dated on 5 December 1996 on professions of physicians and dentists (uniformed text: Diary of Acts in 2008, number 136, position 857) obliges doctors to fulfill their responsibilities in accordance with current guidelines of medical science, according to rules of professional ethics and with duly carefulness. According to the statute dated on 2 December 2009 on doctors chambers the Country Convention of Physicians is under obligation to pass resolution regarding ethics rules and professional deontology. Physicians are therefore obliged to follow ethics rules and professional deontology along with other regulations regarding doctors professional responsibilities. What is more, they are subjected to professional responsibility in front of doctor courts for acting against ethics rules and professional deontology [3–46].

Creators of doctors code of ethics made difference among non-permissible euthanasia, assistance in suicide and overzealous therapy. In accordance with article 31 „Doctors are prohibited either from employment of euthanasia or delivery of assistance in suicide commitment by a patient". However, in a terminal condition a doctor has no obligation to initiate and conduct resuscitation or overzealous therapy along with employment of extraordinary means (article 32). Obviously it does not discharge a doctor from responsibilities of duly carefulness to provide a patient with humanitarian terminal care and dignified conditions of dying. A doctor until end should allevate suffering of patients in a terminal condition and, as far as it is possible, support a quality of terminating life (article 30).

In case of lack of legal regulations in regard to discontinuation of overzealous therapy a doctor is obliged to abide by citied regulations of the Medical Code of Ethics. In opposite case a doctor is exposed to civil responsibilities for offence of patient's rights on dying in peace and dignity. Similar solutions are applied also in the Western countries [3], which exclude euthanasia and medically supported suicide and more often they allow to discontinue overzealous therapy in situation when human's life inevitably comes to the end. For example, British courts highlight that in such case a doctor is not further obliged to abide by duty to prolong patient's life [47]. Also the American courts underline that dying patients more often need comfort and care instead of principal treatment [48]. In case of *Foody v. Manchester Memorial Hosp.* a court stated that discontinuation of treatment was ethically permitted when it did not offer any further hope for attainment of therapeutic objective. Ethical rules, with some exceptions, do not require from a doctor

to carry all his/her duty aiming at prolongation human's life at all costs [26].

Discontinuation of therapy as a consequence of objection expressed by a patient

From the crime of euthanasia and discontinuation of overzealous therapy there are other cases in which discontinuation of further treatment is a consequence of objection expressed by a patient (distinctly articulated, submitted pro futuro or reconstructed with employment of accessible means of evidence).

As far in case of discontinuation of overzealous therapy making decision is related with a negative assessment of therapeutic chances, as far in case of objection the issue matters, first of all, to respect for autonomy and privacy exercised by each human being.

It is suggested that a legislator should regulate both institutions apart from each other through introduction separated laws for discontinuation of overzealous therapy and patient's objection. In the first case precise regulations are required, particularly in area of: definition of overzealous therapy, scope of doctor's authorization and influence of third parties (for example patient's family members and third parties). In case of creation an institution which would allow to take into account the patient's objection it is necessary to define the way which would be employed in order to fix, without any doubts, patient's will. This might be a tricky task as he or she might be no longer able to express his/her wishes.

Norms protecting human rights grant each individual right to private life. The Polish courts interpret this act widely as right to life in accordance with own choices and right to decide of own fate. Ignoring objection expressed by a patient and in consequence his/her enforcement to be subjected to medical intervention may lead to offence, inter alia, an article 8 of the European Convention for Human Rights. Also the European Convention of Bioethics in article 9 demands to take into account previously expressed wishes of interested individual in regard to medical intervention if at the moment of its conduct a patient is not in ability to express his/her will. This opinion is recognized in legislature of the European Court of Human Rights [49] and courts of other countries. For example, the Highest Court of the Federal Republic of Germany in a sentence dated on 13 September 1994 stated that right for autonomy gives a patient possibility to express his/her objection in some terms as for medical intervention aimed at support his/her life [50]. The Highest Court of Ireland stated that part of right to privacy is the right to express consent or objection regarding medical service [28]. The right does not pass away only due to existing requirement to employ life supporting procedures or that a loss of consciousness occurred. The element of right to privacy is the right to dying in a natural way, with dignity, with a presence of the least pain.

As a matter of recognition of individual's will as substantial factor patient is granted the right of consent or refusal on face of suggested medical intervention. In accordance with an article 32 passage 1 of act on physician and dentist profession a physician may conduct examination and deliver other medical services after expressing of consent by a patient. The act on patient rights grants a patient the right to express consent in regard to employment particular medical services or his/her refusal after being properly informed [51]. There is a righteous remark of M. Nesterowicz that „general, unlimited right for treatment against patient's will and corresponding obligation to be subjected to treatment" is to be rejected [19]. The basis of any medical intervention may be patient's consent or provision from extraordinary act which permits employment of treatment against patient's will [52–57].

Patient's right to express consent or objection does not pass away in situation in which he/she contracts serious, may be lethal disease. There is more to it, from rational legislator you should demand construction of such legal norms which in rational way allow an individual to employ autonomy and freedom, also in case of loss of awareness. A patient who remains in vegetative state should exercise the same scope of rights as diseased who did not lose conscious. This obligation comes out from entire range of international legal norms which, along with granting rights each human being, prohibit exercising any forms of discrimination.

It is undoubtedly problematic to describe a will of unconscious person or who, under other conditions, is unable to make decision or express his/her will. The burden of making decisions requires to seek for such juridical instruments which, along with protection of autonomy, preclude eventual wrongdoing. Recognition of right to demand discontinuation overzealous therapy in regard to a patient who is unable to make conscious decision requires creation of proper procedures in the frame of which law would be executed [3]. In relation to patients who are unable to take decision in a conscious way it may consist of three components:

— firstly, it is necessary to establish whether a patient submitted an announcement *pro futuro*, expressing his will regarding exercising eventual life supporting procedures (inter alia, so called *living will*, *don't resuscitate orders, durable power of attorney*);
— if a patient did not leave any document or evidence which could be used to read his/her will it is necessary to ascertain, if it is possible, what decision he/she would make if he/she were conscious at that moment (so called s*ubstitutive judgment*) — substitutive test;
— if there are no evidences which could be employed for reconstruction of patient's real will, the subject taking decision on behalf the patient should autonomously establish what is in the best interest of patient (so called *best interest test*) — impartial test [3].

Conclusions

The Polish law does not regulate precisely patient's situation who remains in a vegetative state. In such a case general norms establishing relations patient — doctor should be maintained. In accordance with an act on patient rights a patient has the right of dying in peace and dignity. Guidance from this regulation should be made in accordance with the content of article 32 of the physician code of ethics which anticipates that in terminal states a physician is not obliged to initiate and conduct resuscitation or overzealous therapy along with employment extraordinary means. This regulation should also be applied to cases of patients in a vegetative state in situation when recovery to conscious functioning is seemed to be impossible.

A Polish physician who acts in accordance with content of article 32 of the physician code of ethics restrains from employment of resuscitation, overzealous therapy or exercise of extraordinary means does not commit crime of passive euthanasia. Decision on discontinuation of overzealous therapy differentiates from euthanasia by goal to which a physician strives. As in the first case the matter is concerned on patient's protection from additional suffers when in therapeutic scope nothing can be done for him as in case of euthanasia the principal aim is to shorten life of a human being [41].

From crime of euthanasia and discontinuation of overzealous therapy should be distinguished situations in which discontinuation of further treatment is a consequence of objection expressed by a patient (distinctly articulated, submitted pro futuro or reconstructed with accessible means of evidence), where a base of discontinuation of further treatment remains respect of patient's autonomy in a vegetative state.

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