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Administrative Limitations of Patient's Autonomy – Remarks on Involuntary Treatment

Abstract: Public administration operates under a wide variety of legal forms as well as regulates a broad scope of citizens' day-to-day activities. Disease surveillance conducted by specialized organs called 'administrative police' is one of many subjects of state interest that is also vital for individuals' self-determination. Under the competences of epidemic intelligence, public authorities may also interfere within the scope of patients' autonomy, e.g. compulsory vaccination. However, the given procedural standard is not sufficient, i.e. procedural guaranties which are optimal for mere adjudicative, '*court-room*', adversarial process of decision-making seems to lessen the right to fair administrative trial and as such may be recognized as unconstitutional one. This is to say administrative proceedings are not coherent with the essence of patient's autonomy doctrine (concept). In this study authors address several issues connected both with the legal framework of proceedings before 'administrative police' and judicial review of public authorities' actions which affect the individual's right of self-determination.
Keywords: regulatory power, administrative proceedings, involuntary treatment, disease surveillance

1. Introduction

From the perspective of medical ethics, the principle of patient's autonomy is limited to the regularity according to which medical surgeries may be performed on an autonomous person solely upon his or her consent¹. The structure of many vital institutions of medical law such as, e.g. medical secret, apparently embraces respect

1 See: W. Załuski, Autonomia, (in:) A. Górski (ed.) *Leksykon prawa medycznego* – 100 podstawowych pojęć, Warszawa 2012, p. 3.

for the patient's autonomy². A concern for the patient's autonomy in a therapeutic process vividly depicts tensions between paternalism³ and individualism (autonomy)⁴ within the operation of the healthcare system *in genere*. Hence, it indicates conflicts of interest in medicine⁵ that are an immanent part of a therapeutic activity, or even notorious contestability of ensuing legal interpretative issues⁶.

The issue of a restrictive role of administrative measures interfering in the patient's autonomy has already been discussed in the literature⁷. However, previous studies have focused on the analysis of inherent systemic features referring to the practice of public administration operation to a lesser degree. For this reason, our article may be treated as systemization of the issues that have already been signalled in earlier studies. It seems that a special position of a patient as an addressee of actions undertaken by public authorities requires the revision of available forms of impact thereon as well as verification of actions launched in order to enforce obligations imposed on public administration. Pending debate on the procedural framework of public administration operation towards individuals⁸ has considerably affected the choice of the topic herein. Thus, the issue of adequacy of administrative regulatory powers used by the legislator remains up-to-date. It should also be mentioned in the introduction that our further considerations refer solely to procedural aspects

- 2 See: K. Michalak, "Tajemnica lekarska jako gwarancja autonomii pacjenta – krytyczna analiza dogmatyki". Selected theses referred to in this study thesis were delivered during the II National Conference of the Law of Patients "Limits of patient's autonomy". The text takes into account and developed the results of the discussion held during the conference.
- 3 As to the concept under medical law see: W. Załuski, (in:) A. Górski (ed.), *op. cit.*, p. 145. See also H.R. Wulff, S.A. Pedersen, R. Rosenborg (transl. Z. Szarawarski), *Filozofia medycyny – wprowadzenie*, Warszawa 1993, p. 237 (in:) Compare also: B. Gert, C.M. Culver, K.D. Clouser, *Paternalism and Its Justification*, (in:) *Bioethics: A systematic approach*, Oxford 2006.
- 4 As to the concept under medical law see: W. Załuski (in:) A. Górski (red.), *op. cit.*, p. 1.
- 5 Widely on the conflicts of goods in medicine see: A. Górski, *Leczyć czy nie leczyć? Dylematy podejmowania leczenia z punktu widzenia konfliktu dóbr*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2011, special issue, p. 151-160. Also: A. Górski, *Lekarz w procesie karnym (wybrane zagadnienia)*, (in:) P. Kardas, T. Sroka, W. Wróbel (co-ed.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, t. 2, Warszawa 2012, p. 1597 and following.
- 6 Similarly: K. Gromek, *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 2004, p. 9., J.C. Joerden, *Medizinstrafrecht – Einführung*, (in:) J.C. Joerden, A.J. Szwarc, K. Yamanaka (ed.) *Das vierte deutsch – japanisch – polnische Strafrechtskolloquium der Alexander von Humboldt – Stiftung*, Poznań 2011, p. 145.
- 7 Por. M. Boratyńska, *Szczepienia ochronne małoletnich a wykonywanie władzy rodzicielskiej. Uwagi na tle wyroku NSA*, "Prawo i Medycyna" 2013, No. 3-4, p. 88; T. Dukiet-Nagórska, *Uwagi na temat Ustawy z dnia 6 września 2001 r. o chorobach zakaźnych i zakażeniach*, "Prawo i Medycyna" 2002, No. 11, p. 26.
- 8 Compare: *Reforma prawa o postępowaniu administracyjnym. Raport zespołu eksperckiego*, Warszawa 2016, *passim*; accessible at: <http://www.nsa.gov.pl/wydarzenia-wizyty-konferencje/uzupelniony-raport-ekspercki-nt-reforma-prawa-o--postepowaniu-administracyjnym,news,24,327.php>.

of proceedings involving patients with particular focus on the legal framework of public authorities' actions⁹.

The sphere of patient's rights¹⁰ in the systemic approach is potentially restricted in the effect of the application of administrative measures of impact exerted upon an individual in many cases¹¹. Nevertheless, one level of this interference that may be analyzed appears particularly vital for the protection of patient's rights. It is administrative involuntary treatment in the consequence of a decision-making process¹² of administrative authorities. The right to consent to medical interventions¹³ undeniably belongs to the canon of patient's rights. On the one hand, it is a declaration of the state's respect for each individual's dignity and physical integrity¹⁴ as well as privacy¹⁵, while on the other hand, it creates an element of special bond based on trust between a patient and doctor¹⁶. Fulfilling its regulatory powers, the State takes advantage of proper measures of impact, among others to maintain order, security or public health. The activity of administrative authorities

9 In particular, the disputed issues related to the possibility of establishing the affiliation of a specific regulation formula to one of the classically separated branches of law are disregarded; see the classification of procedures in the Act of 19 August 1994 on the protection of mental health. Compare: P. Wszolek, *Kryteria wyodrębniania prawa administracyjnego*, Warszawa 2016, *passim*.

10 Therefore, it is too too narrow to treat the view expressed in the literature that the obligation to vaccinate is only a "restriction of civil rights and freedoms"; see: I. Jaworska, *Odmowa szczepienia dziecka i jej konsekwencje prawne*, "Przegląd Prawa Publicznego" 2017, No. 3, p. 60-62. Although it is notorious that the right to self-determination has law-constitutional provenance, the analysis of administrative means of influencing the sphere of patient's rights is characterized by a series of peculiarities which cannot be *prima facie* overlooked. Thus, the limitation of the administrative analysis of coercion of treatment and only to the problems of constitutional rights and freedoms is a simplified exponential formula.

11 It is enough to indicate here, strictly for administrative and legal regulation of the patient's relation within the administrative facility, which is an independent public health care facility; see about it: A. Zemke-Górecka, *Status prawny samodzielnego publicznego zakładu opieki zdrowotnej i jego prywatyzacja*, Warszawa 2010, *passim*.

12 The use of imprecise expression referring to one of the legal forms of public administration activity, which is an administrative decision, is a necessary simplification. Through the decision-making process we will understand all the cases in which the public administration body in a formal way interferes directly with the sphere of patient's rights. This concept will cover administrative decisions as well as administrative performance titles for the purposes of this article.

13 Compare: A. Augustynowicz, A. Czerw, *Stosowanie środków przymusu bezpośredniego przez personel medyczny w procesie diagnostyczno-terapeutycznym w podmiotach leczniczych innych niż szpitale psychiatryczne – zagadnienia wybrane*, "Prawo i Medycyna" 2013, No. 1-2, p. 35.

14 Compare: D. Karkowska, *Prawa pacjenta*, Warszawa 2009, p. 126, 385.

15 Compare: M. Świdorska, *Przymus leczenia i innych zabiegów medycznych*, "Prawo i Medycyna" 2004, No. 3, p. 27-29.

16 W literaturze wskazuje się, iż wymóg zgody kreuje partnerską relację pomiędzy pacjentem a lekarzem; por. M. Filar, *Postępowanie lecznicze (świadczenie zdrowotne) w stosunku do pacjenta niezdolnego do zgody*, "Prawo i Medycyna" 2003, No. 5, p. 41.

involving the above-mentioned objective is defined as policing¹⁷. Implementation of powers inherent to police may *in concreto* imply interference in the sphere of individual's rights and freedoms. The example of such impact is admissibility of restricting individual's self-determination in the face of socially desirable¹⁸ medical intervention. This subject matter is closely related to the forms of coercive fulfilment of duties inherent to the bodies of public authorities.

Two hypothetical factual states are in particular indicated as potential sources of involuntary treatment justifying its revision. These embrace widely understood mental health and epidemic threat¹⁹. The first of the above-mentioned spheres of interference is characterized by a complex nature and strong judicial protection of individual's rights. The protection of patient's rights seems optimal²⁰ in this case. A special role of the court, in particular, and procedural guarantees allow to presume²¹ that despite intensive restriction of the individual's right of self-determination, a minimal standard enshrined both by domestic and international law²² is preserved. For these reasons as well as rich literature on the control over legality of measures applied under the Psychiatric Law, this issue does not require additional analysis entailing unnecessary repetitions. What is more, qualifying treatments referring to the subject course of proceedings arise doubts. Not without a reason, we could seek administrative law elements²³ in the activities pursued by

17 Compare: J. Dobkowski, *Policja administracyjna. Zagadnienia doktrynalno-instytucjonalne*, "Samorząd Terytorialny" 2004, No. 7-8, p. 9-11.

18 The consent of the patient as a category remaining in connection with the social interest was already analyzed in literature; see: M. Sośniak, *Z problematyki zgody chorego na poddanie się zabiegowi leczniczemu*, "Polski Tygodnik Lekarski" 1960, No. 46, p. 1784.

19 Compare. L.K. Paprzycki, *Stosowanie przymusu w postępowaniu psychiatrycznym (w świetle obowiązującego prawa oraz projektu ustawy o ochronie zdrowia psychicznego)*, "Postępy Psychiatrii i Neurologii" 1993, No. 2, p. 311; A. Augustynowicz, A. Czerw, *Stosowanie środków...*, p. 36; M. Filar, *Postępowanie lecznicze...*, *op. cit.*, p. 44. *Kwestie definicyjne zdrowia psychicznego, zaburzeń o raz innych stanów wymagających asystencji lekarskiej* por. Por. K. Dąbrowski, (in:) K. Dąbrowski (ed.), *Zdrowie psychiczne*, Warszawa 1985, p. 8 and following.

20 Nevertheless, from a procedural point of view, judicial control over the use of psychiatric constraints may raise doubts. The literature indicates inefficiency and limited effectiveness of judicial protection instruments in this regard; see. one instead of many K. Michalak, J.G. Firlus, *Wybrane aspekty sądowej kontroli stosowania przymusu leczenia – przegląd zagadnień ze szczególnym uwzględnieniem szybkości postępowania*, "Jurysta" 2016, No. 9, p. 16-17.

21 Although in the scope of individual systemic and procedural solutions relating to the proceedings before the guardianship court, criticism was formulated in the literature. See: J. Nelken, *O konieczności kontroli sądowej nad przymusowym umieszczeniem w szpitalu psychiatrycznym*, "Nowe Prawo" 1983, No. 3, p. 77-78.

22 M. Balicki, *Przymus w psychiatrii – regulacje i praktyka*, "Prawo i Medycyna" 1999, No. 1, p. 42; K. Korzan, *Postępowanie w sprawach ochrony zdrowia psychicznego*, "Rejent" 1996, No. 6, p. 23-24.

23 Literature analysis seems to justify this thesis in part. Let us note, therefore, that the role of the court and the judge on the basis of the psychiatric act remains undetermined, and the nature

legitimate and official entities initiating individual proceedings. Nevertheless, this issue may merely be signalled here as it exceeds the framework of this study.

A basic part of the study will be devoted to the second group of proceedings, i.e. those connected to the prevention and counteraction of infectious diseases²⁴. It is undeniable that legal measures of interference into the sphere of the patient's autonomy are of administrative law nature in this case. A basic question arises here whether the legislator has effected normative correlation of the *stricte* administrative proceedings with the complicated issue of patient's rights. In other words, whether Acts regulating proceedings before the bodies of sanitary police and the provisions of general administrative procedure²⁵ that are additionally applied²⁶ fulfil the standard of respect for patient's rights²⁷.

of some activities seems to be borderline. Compare with the legal form of the judge who visits the psychiatric hospital: M. Sychowicz, *Postępowanie sądowe w sprawach z ustawy o ochronie zdrowia psychicznego*, "Przegląd Sądowy" 1995, No. 1, p. 7.

24 The proceedings in this category of cases are primarily regulated by the Act of 5 December 2008 (Consolidated text Journal of Laws, item, 2013, issue 947) [Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu i zwalczaniu zakażeń i chorób zakaźnych u ludzi (tekst jedn. z 2013 r. poz. 947), in short "Epidemiological act"]. However, up-to-date rest the references for Act of 14 March 1985 on the State Sanitary Inspection (Consolidated text Journal of Laws 2015, issue: 1412, in short: uPIS) [Ustawa z dnia 14 marca 1985 r. o Państwowej Inspekcji Sanitarnej [Tekst jedn. z 2015 r. poz. 1412, in short uPIS] at least for two reasons. First of all, it is the basic source that creates task-oriented scope of activities of the sanitary police. Secondly, in the face of still-present doubts in the scope of determining the appropriate legal form of imposing selected duties, a subsidiary reference to these cases in the uPIS is appearing, where the legislator speaks explicitly about the decisions of the forms of communicating the will of the administrative organ.

25 The basic act regulating the general administrative (jurisdictional) proceedings is the Act of 14 June 1960 – The Code of Administrative Procedure [ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, (tekst jedn. Dz.U. z 2016 r., poz. 23)], in short k.p.a.].

26 In the face of the phenomenon of the "decodification" of administrative procedure, there are no doubts that the procedure of compulsory treatment and research aimed at preventing epidemiological threat belongs to the group of separate (specific) administrative proceedings; see about the issue of the system of administrative proceedings T. Woś, (in:) T. Woś (ed.), H. Knysiak-Molczyk, A. Krawiec, M. Kamiński, T. Kielkowski, *Postępowanie administracyjne*, Warszawa 2013, p. 85-88; Z. Kmiecik, *Zarys teorii postępowania administracyjnego*, Warszawa 2014, p. 69 and following.

27 This question remains valid only in those cases where k.p.a is applicable in other cases – in the absence of formalized proceedings aimed at concretising substantive law standards – the protection of individual rights will be exhausted in the judicial control of public administration performed by administrative courts and in the intra-administrative control procedures prescribed in the enforcement proceedings.

2. Legal forms of “specification” of obligations restricting patient’s autonomy in administrative law

Considerations on the scope and degree of intensified interference of public authorities towards an individual seem incomplete without the assessment of the normative model of legal forms of communicating the authority’s will²⁸. This issue appears to be limited to an attempt at answering the question about the optimal legal form of public authorities²⁹ (sanitary police) operation in the discussed cases. It is not possible to provide an unambiguous answer to the above *de lege lata* question since the legislator distinguishes a legal procedural form depending on the content and type of obligation³⁰ imposed on the individual. On the one hand, the competence norm obliging a body to issue an administrative decision to update (revise) a factual administrative legal state has been contained in cases described in Art. 33 of the Epidemic Act. Nevertheless, it is difficult to acknowledge that in the discussed cases we can presumably talk about an alleged legal form of an administrative decision³¹ that is appropriate for involuntary treatment. The statutory catalogue is of a closed nature³², *ergo* it may not be subject to extensive interpretation. On the other hand, there is also the issue of preventive vaccination mentioned in Art. 17 of the Epidemic

28 Compare: J. Boć, *Obywatel wobec ingerencji współczesnej administracji*, Wrocław 1985, p. 115.

29 Compare on the subject of determining the designate of the legal concepts, the form of public administration activities, as well as their functions: J. Starościak, *Prawne formy i metody działania administracji*, (in:) *System prawa administracyjnego*, t. 3, Wrocław-Warszawa-Kraków-Gdańsk 1978, p. 39-41. The review of legal forms of operation of the sanitary police is made: M. Janik, *Policja sanitarna*, Warszawa 2012, p. 172 and following.

30 The literature indicates that one of the axioms (peculiarities and specificity) of administrative law is the duality of its norms assuming a dichotomous division of them, taking into account the criterion of influencing the sphere of rights and obligations of the individual; see: J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, p. 135-136. It is notorious, because not all norms constituting the duties of administrative law provenance require authoritative concretization.

31 The doctrine has repeatedly praised the thesis that there exists a presumption of the form of an administrative decision for those cases when the public administration body imposes obligations on the individual or deprives it of its rights: see: M. Romańska, *Komentarz do art. 104 Kodeksu postępowania administracyjnego*, in: H. Knysiak-Molczyk (ed.) *Kodeks postępowania administracyjnego. Komentarz*, Teza 5, Lex Omega; J. Jendrośka, *Potrzeba nowego modelu procedury prawnej w administracji*, “Państwo i Prawo” 2003, No. 3, p. 30. Nevertheless, even with respect to specific rules of enforcing administrative treatment, it is impossible to demonstrate that the body had to necessarily concretize its obligations in the form of an administrative decision. Art. 33 of the epidemiological act explicitly indicates the elements of the administrative factual state which authorize and at the same time oblige the body of the sanitary police to issue an individual administrative act. The purposefulness of using this legal form of communicating the will of the organ remains a separate issue.

32 Compare: based on the previously binding legal status M. Świdarska, *Zgoda Pacjenta na zabieg medyczny*, Toruń 2007, p. 289; T. Dukiet-Nagórska, *op. cit.*, p. 25.

Act. It is *de lege lata* consistently assumed that the obligation to fulfil this duty results directly from the provisions of law³³, therefore, the issue of an administrative decision thereon is inadmissible³⁴. Substantive accuracy and purposefulness of the division introduced by the legislator evoke justified doubts. The normative distinction of methods of “specification”³⁵ of obligations related to the elimination of epidemic threat inevitably results in further modifications referred to the course of verification of sanitary police actions undertaken towards an individual.

Hence, let us briefly consider procedural aspects of the fulfilment of the duty to undergo obligatory preventive vaccination. The structure of this obligation adopted by the legislator is special for at least two reasons. First of all, specification of the norm of substantive law³⁶ (non-specified norms, directly effective)³⁷ is unnecessary here. In other words, a formalized administrative act specifying the content and addressee of the obligation does not exist here. *Sui generis* only the administrative executive deed provides more precise specification of both relevant elements of the obligation. Public administrative authority does not undertake any prior action constituting a procedural act³⁸. Secondly, sanitary police should fulfil the obligation entrusted by

33 Compare I. Jaworska, *op. cit.*, p. 62.

34 Compare: P. Daniel, Egzekucja obowiązku poddania małoletniego dziecka szczepieniu ochronnemu w orzecznictwie sądów administracyjnych, “Przegląd Prawa Publicznego” 2014, No. 4, p. 48; the Judgment of Regional Administrative Court in Bydgoszcz of 4 November 2015, II SA/Bd 871/15, Lex No. 1948739. Therefore, M. Janik’s arguments should be considered incorrect, as it states that the obligation to undergo protective vaccinations suffers from concrete formulation in the administrative decision; see: M. Janik, *op. cit.*, p. 186-187.

35 Establishing a “concrete” obligation here is a simplification. This formula cannot be equated with the stages of applying the law by public administration bodies. This different formula for concretizing the obligation is usually reduced to individualizing the addressee of a statutory order.

36 Compare: D.R. Kijowski, (in:) D.R. Kijowski (ed.), *Ustawa o postępowaniu egzekucyjnym w administracji*, Warszawa 2015, p. 163.

37 Compare T. Woś, (in:) T. Woś (ed.), H. Knysiak-Molczyk, A. Krawiec, M. Kamiński, T. Kielkowski, *op. cit.*, p. 45. This method of imposing obligations on individuals should be distinguished from the situation when the order of a particular procedure results from the so-called material and technical activities of organs. The latter are also referred to as acts creating duties in a special way; por. K.M. Ziemiński, Ogólna charakterystyka działań (czynności) materialno-technicznych, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (co-ed.), *System prawa administracyjnego*, t. 5, Warszawa 2013, p. 71-72.

38 It is necessary to bear in mind a specific category of other public administration acts and activities that are also issued outside formalized administrative proceedings. Nevertheless, it is impossible to include in this category the legal forms of public administration activity; see about other acts and activities A. Kisielewicz, *Akty i czynności, o których mowa w art. 3 § 2 pkt 4 ustawy z 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi*, (in:) J. Poślusznny, Z. Czarnik, R. Sawuła (współred.), *Instytucje procesu administracyjnego i sądownictwa administracyjnego*, Przemyśl-Rzeszów 2009.

the legislator with due diligence, i.e. monitor its proper fulfilment by the individual³⁹. In effect thereof, as far as the obligation ensuing directly from the statutory provisions is concerned, an employer shall unambiguously resolve a conflict between the values implied by the potential threat for public health and the individual's right of self-determination. The statutory obligation to undergo preventive vaccination is secured in the course of administrative executive proceedings⁴⁰. Nevertheless, failure to follow a formalized course of the specified obligation to undergo medical treatment does not mean that the individual is deprived of the right to defend their rights⁴¹. A further part of the article will be limited to the analysis of measures applied to fulfil the obligation of preventive vaccination of minors⁴². This analysis will allow to formulate *lex ferenda* postulates thereon.

3. Obligatory preventive vaccination – the fulfilment of administrative law norms (administrative law obligation *ipso iure*)

Failure to undergo the statutory obligation mentioned in Art. 17 of the Epidemic Act in due time obliges the administrative obligee to undertake actions envisaged by the law to apply executive measures⁴³. The fulfilment of obligations of both the obligee and executive authority has been normatively secured by a possibility of challenging their inactivity⁴⁴. At the same time, it should be pointed out that the legislator quite peculiarly structured legitimacy of submitting a complaint to question protraction of involuntary administrative proceedings. It should be underlined that the entity whose legitimacy is based solely on the request to secure factual interest is also entitled to submit a legal measure under Art. 6 § 1a of the Executive Act. It is a special situation insofar as, in principle, objective legal order, general administrative proceedings

39 See: T. Woś, (in:) T. Woś (ed.), H. Knysiak-Molczyk, A. Krawiec, M. Kamiński, T. Kielkowski, *op. cit.*, p. 45; J. Boć, *op. cit.*, p. 60-61.

40 I.e. in the mode and on terms specified in Act of 17 June 1966 on enforcement proceedings in administration (Consolidated text Journal of Laws 2014, item 1619, as amended) [Ustawa z 17 czerwca 1966 r. o postępowaniu egzekucyjnym w administracji (tekst jedn. Dz.U. z 2014 r., poz. 1619 ze zm)], in short: enforcement law.

41 The administrative enforcement procedure itself is intended to protect the rights of the individual.

42 In order to simplify the argument, we make the assumption that a minor who is an indirect addressee of the activities of the sanitary police body is under the age of 6.

43 Organ administracji publicznej występujący w roli wierzyciela ma obowiązek doprowadzenia do przekształcenia stanu rzeczywistego (zastanego) do stanu określonego treścią zakazu ustawowego; por. co do znaczenia sformułowanej w art. 6 § 1 ustawy egzekucyjnej dyrektywy postępowania wyrok WSA w Gliwicach z 29 maja 2013 r., I SA/Gl 146/13, Lex No. 1346882.

44 Compare on the importance of the legal remedy referred to in art. 6 § 1a of the act on enforcement, M. Mikosz, Konstrukcja i rozpoznawanie środków zaskarżenia bezczynności w ustawie o postępowaniu egzekucyjnym w administracji, "Samorząd Terytorialny" 2007, No. 7-8, p. 129-132.

in particular, create measures to protect the individual's⁴⁵ justified legal interest⁴⁶. We should remember that with regard to the monitored fulfilment of obligatory preventive vaccination of minors, the catalogue of entities potentially legitimate to submit a complaint about inactivity may be quite wide. It seems that the subject scope of legitimacy to submit the discussed legal measure may embrace a head (manager) of an administrative facility the minor attends, e.g. a kindergarten⁴⁷.

Apart from the practical aspect of secured efficiency of executive proceedings, we should pay attention to a crucial element of legal provenance ensuing from the content of Art. 6 § 1a of Executive Act. A complaint about the obligee's inactivity allows to carry out a preliminary review of admissibility of initiated and pending executive proceedings. Notoriously, a negative prerequisite of the fulfilment of the statutory obligation, including executive proceedings due to order non-enforceability, are long-term medical contraindications to vaccinate the child⁴⁸. The submission of a complaint about the obligee's inactivity also allowed to verify this circumstance. The obligee is not inactive if the enforcement of the obligation is inadmissible. Significantly enough, the entity questioning the administrative obligee's inertia, may also initiate a judicial review of the legality of conduct of the body responsible for the fulfilment of obligatory preventive vaccination.

Hence, in case of no medical contraindications and assumed fulfilment of the obligation of information by a doctor⁴⁹ ensuing substantive and technical action

45 Compare: K. Jadny-Jendrońska, J. Jendrońska, System jurysdykcyjnego postępowania administracyjnego, (in:) System prawa..., t. 3, p. 189: "The Code based the concept of the page on two equivalent tests – on the legal obligation and legally protected interest (...)"

46 Compare regarding the way of understanding and sources of legal interest on the basis of general administrative proceedings of R. Kędziora, Kodeks postępowania administracyjnego. Komentarz, Warszawa 2014, pp. 248-249.

47 In the context of a problematic issue related to the admissibility of refusal to admit a minor to an administrative establishment in the event of a failure to fulfill the obligation to vaccinate, the legal measure provided for in art. 6 § 1a of the act on enforcement, it appears to be particularly useful. See: on the correlation of the obligation under art. 17 of the epidemiological act and admissibility of refusal to enter kindergarten Information on the activities of the Children's Ombudsman for 2015 and remarks on the state of observance of children's rights, Warszawa 2016, p. 145; M. Boratyńska, *op. cit.*, p. 79.

48 See: P. Daniel, *op. cit.*, p. 52; M. Boratyńska, *op. cit.*, p. 75, here the equivalence of both duties was indicated. A medical qualification test can be regarded as a complementary component of the general statutory obligation to undergo protective vaccinations. On the marginal note, medical contraindications are a negative premise of coercion in general; compare: J. Sawicki, Przymus leczenia, eksperyment, udzielenie pomocy i przeszczep w świetle prawa, Warszawa 1966, p. 82.

49 Information and explanation of therapeutic activities remain in correlation with each other; A. Górski, O obowiązku lekarza poinformowania pacjenta o zgodzie pacjenta za zabieg, "Studia Iuridica" 2001, t. XXXIX, p. 85; A. Górski, czynność lecznicza i czynność nielecznicza (in:) A. Górski (ed.), *op. cit.*, p. 13-18. Also: R. Kędziora, Problematyka zgody pacjenta w świetle polskiego ustawodawstwa medycznego, "Prokuratura i Prawo" 2003, no 7-8, p. 57. The literature indicates that the legislator, in the case of an obligation to submit to the obligation of protective

undertaken by him or her⁵⁰ in the form of summoning for a qualifying examination due to a notified lack of consent of the entity⁵¹ mentioned in Art. 5 par. 2 of the Epidemic Act for preventive vaccination, sanitary police is obliged to undertake first actions regulated by the Epidemic Act. Most of all, in accordance with the principle of a threat, the authority should provide the fulfilment of the obligation without the need to apply executive measures⁵². A possibility of withdrawing from the need to apply state coercion appears to be particularly desirable in the discussed case⁵³. This issue is also related to the forecast efficiency of measures of impact applied by executive authorities upon entities responsible for the fulfilment of the obligation of preventive vaccination of minors.

Among two potentially available executive measures (a coercive fine and indirect coercion⁵⁴), prior futility of their application may be reasonably assumed⁵⁵. The above expressed thesis seems to be confirmed by the normative shape of both manners of execution. The legislator orders an executive authority to apply such measures which, on the one hand, will prove efficient and, on the other hand, least burdensome for their addressee. Indeed, the person responsible for the fulfilment of the obligation should first be fined so that this measure of impact could enforce him or her to exercise the duty. However, it does not seem to be the only available means to enforce the obligation⁵⁶. Selecting and applying means of its activity, the

vaccination, pays special attention to the obligation to inform the patient about the existence and content of the obligation; see. A. Augustynowicz, A. Czerw, *op. cit.*, p. 37. A separate and very controversial issue is the issue of the subjective scope of this information obligation related to the presence of a parent when vaccinating a minor, por. R. Kubiak, *Szczepienie dziecka bez obecności rodziców*, "Medycyna Praktyczna", accessible at: <http://www.mp.pl/szczepienia/prawo/zapytajprawnika/71977,szczepienie-dziecka-bez-obecnosci-rodzicow> (accessed: 15 September 2016).

50 See: I. Jaworska, *op. cit.*, p. 64.

51 The singular used in this case is a simplification. It is obvious that both the warning as well as the enforcement title and active participation in the enforcement proceedings concern both legal guardians of the minor. So for parents: the Judgment of Regional Administrative Court in Cracow od 25 October 2012 III SA/Kr 1532/11, Lex No. 1235560.

52 See: T. Lewandowski, *Glosa do wyroku NSA z dnia 8 lipca 2009 r.*, II FSK 618/08, Thesis No. 3, Lex/el 2011.

53 In the case of non-compliance with the obligation of protective vaccination we deal with the so-called indirect coercion. Its essence boils down to the possibility of applying sanctions of an administrative nature for the purposes of enforcing the order while excluding the possibility of the use of force in the form of physical strength and other forms of direct impact on the patient; see. as to the definition: M. Świdarska, *Zgoda Pacjenta...*, p. 248. Although administrative sanctions seem to be too narrowly understood here. It is impossible to accept, because direct coercion of the enforcement law in the administration is not a legal and administrative sanction.

54 Compare: I. Jaworska, *op. cit.*, p. 70.

55 Regarding the limited effectiveness of direct administrative and legal coercion compare: A. Augustynowicz, A. Czerw, *op. cit.*, p. 39-40.

56 art of the literature assumes that enforcement measures are only to be used to discipline legal guardians, for example. P. Daniel, *op. cit.*, p. 49; M. Świdarska, *Przymus leczenia...*, *op. cit.*,

executive authority should take into account the relevant directive, i.e. a purpose of executive proceedings, that is involuntary fulfilment of the obligation⁵⁷. Insofar as the application of direct coercion envisaged in Art. 36 of Epidemic Act⁵⁸ is excluded in the discussed case, the executive authority may enforce compulsory appearance of both the person responsible for the fulfilment of the obligation as well as the minor at the facility providing medical service⁵⁹.

Nevertheless, there are no *de lege lata* legal possibilities of applying direct coercion to the act of performing preventive vaccination itself. Hence, it is particularly desirable to search alternative and conciliatory forms of persuading the obliged person to voluntarily obey the norm of substantive administrative law. The obligation to admonish the obliged individual, which is mentioned in Art. 15 of the Executive Act, is the only necessary formal element allowing to proceed to the next stage of the proceedings. Notifying the obliged individual⁶⁰, which is a peculiar normative *novum*, does not seem to be an optimal formula assuring conceivably prompt achievement of the purpose in the form of the fulfilment of the obligation mentioned in Art. 17 of Epidemic Act. For this reason, we may postulate the introduction of a mediatory⁶¹

p. 26. Thus, they exclude *prima facie* the use of coercive measures available in the enforcement proceedings. It seems that in this case the difference between the application of the two different ways of coercion is not taken into account. It is something else, because bringing the obligation to coercion into force, and something else, for example, bringing the parent and the child to the place of fulfillment of duty. See. also general considerations regarding "compelling for research" through the use of direct coercion M. Świdorska, *Zgoda Pacjenta...*, *op. cit.*, p. 289. T. Dukiet-Nagórska also emphasizes this difference and indicates that the administrative enforcer has the legal right to bring the obligee to the place of examination or treatment; see: T. Dukiet-Nagórska, *op. cit.*, p. 26-27. Although the author excludes the admissibility of the use of coercive measures in the event of enforcement of the order to undergo preventive vaccination; *por. ibidem*, p. 29.

57 Compare: M. Król, *Szukanie złotego środka – o zasadzie stosowania egzekucji najmniej uciążliwej dla zobowiązanego*, "Przegląd Podatkowy" 2015, No. 8, p. 42.

58 See: A. Augustynowicz, I. Wrześniewska-Wal, *Aspekty prawne obowiązkowych szczepień ochronnych u dzieci*, "Pediatria Polska" 2013, No. 88, p. 124. Although the authors exclude *in genere* the use of coercion in the discussed area both from the epidemiological act, as well as coercion as a means of enforcing the duties by the enforcer; *ibidem*, p. 125.

59 The use of coercion against a minor is possible taking into account the content of art. 152 of the enforcement act. It should be borne in mind that parents (statutory representatives) are obliged in the enforcement proceedings, whereas the executive entity is a minor. Hence, it is also possible to bring parents to the place where the qualifying examination is carried out together with the child. The last thesis is justified with the assumption of complementarity of the vaccination obligation and qualifying tests – as well as above.

60 See: art. 6 § 1b of the act on enforcement. Only the prior uselessness of this mode is marked, taking into account the location and systemic links to the enforcement of financial obligations.

61 The issues of the so-called administrative mediation belongs to the contentious issues in the Polish literature; see. on this topic: A. Szpor, *Mediacja w prawie administracyjnym*, (in:) E. Gmurzyńska, R. Morek (współred.), *Mediacje. Teoria i praktyka*, Warszawa 2014, p. 397 and following.; J. Wegner-Kowalska, *Idea mediacji w postępowaniu administracyjnym*, "Przegląd Prawa Publicznego" 2016, No. 10, p. 90-92. Nevertheless, the recent modification of the procedural

pre-executive⁶² way of resolving the dispute. Undoubtedly, the obliged individual is many a time informed about the need to fulfil the statutory obligation, among others by a doctor⁶³. Yet, perhaps only the participation of the third person (a mediator) will cause voluntary fulfilment of the obligation⁶⁴. The need to introduce efficient and flexible procedural measures is particularly desirable because of restricted efficiency of administrative execution and the special sphere of impact exerted by administrative authorities, which is patient's autonomy. Mediation appears as an informal and flexible procedure, which is not subject to detailed regulatory power⁶⁵. Thus, it creates appropriate conditions for a settlement⁶⁶. Obviously, specificity of administrative law norms (*ius cogens*) and explicitly jurisdictional, or relatively unilateral, nature of interference in the sphere of the rights and freedoms seem not to adjust to the procedure involving negotiating and persuading the order's addressee to voluntary performance thereof⁶⁷. Hence, the above invoked peculiarities *prima facie* exclude admissibility of informal "persuasions" within this scope⁶⁸.

framework of administrative jurisdiction seems to close this chapter of scientific discourse. The legislator, driven by the need to make public administration more flexible and to provide a client friendly and informal approach to external entities (individuals), introduced in art. 96a and n. k.p.a. institution of mediation for administrative proceedings. Parallel, the review of the general administrative procedure enacted in art. 13 k.p.a. making the body conducting the administrative proceedings responsible not only (as it was in the legal system until 1 June 2017) for seeking an amicable resolution of the case, but first of all creating an appropriate framework for dialogue between the individual and the public administration.

- 62 Some doubts may be attributed to the proper legal basis for authorizing the executive to mediate. It seems – with some precaution – that in the present case, art. 18 of the Act on Enforcement containing a clause of subsidiary application of the provisions of the code of At the same time, it should be emphasized that the mutative application of the provisions regulating the administrative mediation procedure allows for the necessary modifications to be introduced. Above all, it is desirable to limit the formalism of this incident mode to speed up the procedure.
- 63 Regarding the doctor's information duties and binding the providers of medical services with a communication on a preventive vaccination program compare: I. Jaworska, *op. cit.*, p. 63.
- 64 See. arguments for the need to incorporate the mediation institution into general administrative proceedings: J. Wegner-Kowalska, *Mediacja* (art. 13, art. 96a-96g), in: *Raport...*, pp. 96-97.
- 65 See: Z. Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym*, Kraków 2004, p. 56.
- 66 The basic function of the mediator as an impartial participant in the dialogue of entities participating in the proceedings aimed at removing the actual dispute is inter alia the facilitation and improvement of bilateral communication, see: C.H. Moore, *Mediacje. Praktyczne strategie rozwiązywania konfliktów*, Warszawa 2012, p. 33-34.
- 67 Although the administrative procedure was not based on the construction of a legal dispute, and thus does not have an adversarial character, its adversarial character does not raise fundamental doubts. The dependence seems to be perceived by foreign literature, in particular those related to American administrative practice; see: E. Rubin, *It's time to Make the Administrative Procedure Act Administrative*, "Cornell Law Review" 2003, vol. 89, pp. 102-103.
- 68 See. critical remarks about the institution of mediation in court-administrative proceedings: T. Woś, *Postępowanie mediacyjne w ustawie – Prawo o postępowaniu przed sądami administracyjnymi*, (in:) *Podmioty administracji publicznej i prawne formy ich działania*, Toruń 2005.

Nevertheless, due to restricted efficiency of available measures *de lege lata* without the need to evoke *contra legem* interpretation⁶⁹ and concurrent respect for the right of self-determination, it is necessary to search alternative forms of enforcing statutory obligations. What is more, a dialogue between the addressee of the statutory order and administrative authority responsible for its performance is conducted solely in formalized internal administrative monitoring proceedings, i.e. complaint proceedings and charges procedure. These incidental proceedings cannot be treated as forms of hearing the addressee of jurisdictional administrative actions⁷⁰.

The praxeological and purposeful directive of withdrawing from the application of a certain means of execution is a separate issue. In the discussed case, although an administrative executive body is normatively allowed to apply a concrete executive measure, social values may justify a negative assessment of the fulfilment of the obligation carried out in a certain manner, i.e. using a specific executive measure. Nevertheless, these considerations regard the sphere of withdrawing from (selecting) an executive measure by the authority rather than legality of its application. Hence, they refer to the sphere of facts rather than the law. The literature often depicts a wrong approach thereto grounded on the improper presumption where those two above-mentioned levels, i.e. axiological evaluation and legal admissibility, overlap⁷¹.

4. Searching the standard of due process in administrative proceedings affecting the sphere of the patient's rights – comments *de lege ferenda*

The above-mentioned shortcomings ensuing from the adopted model enforcement of the obligation under Art. 17 of Epidemic Act imply the need to consider its change. Most of all, the very manner of "specifying" the addressee and partially the content of the obligation may evoke doubts⁷². The adopted method of

69 See: A. Augustynowicz, A. Czerw, *op. cit.*, p. 45, 48.

70 Wysłuchanie adresata działań administracji publicznej traktowane jest, jako minimalny standard, jaki powinno zapewniać postępowanie administracyjne; see: Z. Kmiecik, *Zarys systemu...*, p. 86.

71 It seems that the part of the literature eludes the circumstance that there is no clear legal basis that creates a negative condition for applying a given method of execution to the obligee-patient. Regardless of the doubts caused above all by the purposeful level of evaluations, it cannot be regarded as a correct approach according to which the negative assessment of the application of the enforcement measure – eg taking into account the aspect of non-purpose application – has the whole system-wide effect of its inadmissibility by law.

72 In the literature, it was pointed out that there were shortcomings in the specification of the content of the order to undergo obligatory vaccinations. This issue also shows the connection with the issue of the rank of a legal act containing a subsidiary element co-shaping the content of the obligation forming the basis for the use of administrative coercion; see: A. Augustynowicz, I. Wrzeńska-Wal, *Aspekty prawne...*, p. 121. In the light of the requirement of a high degree of precision of the obligation arising from *ex lege*, and subject to enforcement, this issue seems to be highly disputable, see: D.R. Kijowski, in: D.R. Kijowski (ed.), *op. cit.*, p. 163 where it was pointed

regulation does not appear appropriate. Hence, we should consider a possibility of entrusting State Sanitary Inspection bodies with the powers to impose⁷³ any obligations interfering in the sphere of the patient's rights through the issue of an administrative decision. There are no sufficient arguments to justify the abandonment of a *stricte* legal administrative form limiting patient's rights. In particular, taking into account the directives optimizing the length of proceedings with the participation of an individual, handing over *stricte* police powers to common courts appears useless⁷⁴.

Apart from the need to unify legal forms of administrative authorities' operation, it is necessary to carry out statutory adaptive measures within the scope of the course of proceedings. It seems that the form of general administrative proceedings in this case is considerably inappropriate. Therefore, it is necessary to implement the idea of hybrid proceedings into the Epidemic Act⁷⁵. This formula allows to correlate *stricte* public law issues (care for public health) with those whose provenance resembles private law⁷⁶. Moreover, the proposed solution would be a rational compromise between a desirable standard of protection of individuals participating in proceedings before sanitary police bodies and the need to assure effective measures of enforcing obligations imposed upon individuals⁷⁷ (optimization of individual interest and valid public interest).

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- out that there was a need for unquestionable determination based on the provision creating the order of the addressee as well as the content of the obligation itself. Therefore, even the very existence of a duty, ie issuing a declaratory decision, would eliminate the doubts mentioned above.
- 73 n this way, there is no transformation of the nature of the obligation to undergo obligatory vaccinations. We should bear in mind that the legal form of the administrative decision may appear to be optimal also in the event of confirmation of the order, i.e. the need to demonstrate the obedience to the administrative legal obligation. In such a case, the body only states that a given obligation binds the entity while creating it. J. Zimmermann, *Polska jurysdykcja administracyjna*, Warszawa 1996, p. 141; J. Jendrońska, *op. cit.*, p. 30.
- 74 The formula of coercion adopted in the epidemiological act does not require such far-reaching procedural guarantees of a systemic nature. Cf. regarding the necessity of introducing a judicial review of the legality of coercion of psychiatric treatment; J. Nelken, *op. cit.*, p. 74-75. As it seems in this case, the danger of abuse by sanitary police authorities is not updated.
- 75 Compare in terms of the idea and model of this process formula: Z. Kmiecik, *Zarys systemu...*, *op. cit.*, p. 78.
- 76 Dyskutowane zagadnienia odnoszą się do braku zgody względnie wyrażenia sprzeciwu dla wykonania świadczenia medycznego. Nie sposób nie dostrzec dyskutowanej w orzecznictwie i literaturze złożonej i na poły mieszanej naturze tego uprawnienia pacjenta; por. rozważania na ten temat. J. Ciechorski, Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 15 stycznia 2014 r., I ACa 922/13, "Orzecznictwo Sądów Polskich" 2016, No. 6, p. 781-784. The reference to the voted judicature is not accidental. The court, as it inter alia indicates a special and unconditional legal character of the patient's consent. Therefore, with the postulated change of the formula of conduct, one should bear in mind the specificity of the sphere in which public administration intends to interfere with its activities.
- 77 The normative method of modifying the course of proceedings (so-called special administrative proceedings) before the public administration authority does not always take into account the

This result may be achieved by introducing changes⁷⁸ to several aspects. Firstly, the legislator should prescribe possibly short terms to resolve matters. The category of legal interests considered in the proceedings requires the principle of prompt proceedings to be fulfilled as fully as possible⁷⁹. Secondly, statutory law should specify the manner of initiating proceedings for involuntary treatment more precisely. It appears *de lege lata* that proceedings in result of which an administrative decision mentioned in Art. 33 par. 1 of Epidemic Act may be issued are initiated upon a request⁸⁰. However, contrary arguments may also be applied here. The literature points out that as far as initiation of administrative proceedings is concerned, contrary to the literal meaning of Art. 61 § 1 of the Code of Administrative Procedure, there is no normative alternation. In other words, the provisions of substantive law should specify the manner of launching proceedings (upon a request or *ex officio*)⁸¹. In particular, the issue of binding the authority by a report made by a doctor remains *explicite* unresolved in the Act. Fourthly, since general administrative proceedings lack the right of assistance for the needs of such proceedings, it is necessary to assure the participation of a professional attorney *ex officio* therein⁸². It is justified

interests of the recipients of state interference in the sphere of individual rights and freedoms in a holistic way. Let us note, for the order of reflection, that the justification for innovative process solutions is the need to improve and operationalize the operation of public administration bodies; see e.g. H. Knysiak-Sudyka, L. Klat-Wertelecka, Model administracyjnego postępowania uproszczonego, "Państwo i Prawo" 2016, No. 7, p. 93. Thus, the legislative directive includes in this case not strictly the interests of the parties to the proceedings, but the need to globally improve the functioning of the state apparatus, which only in the aspect of indirect influence can positively affect the protection of the parties' rights.

78 The demand for appropriate statutory changes as regards the order to undergo obligatory vaccinations has already been publicized in the literature; see: A. Augustynowicz, I. Wrześniewska-Wal, Aspekty prawne..., *op. cit.*, p. 125.

79 On the basis of the psychiatric act, the legislator introduces an instructional 14-day period for conducting the trial. Literature seems to dominate the view of the optimal temporal formula in this respect; see: L.K. Paprzycki, Ochrona praw człowieka w świetle projektu ustawy o ochronie zdrowia psychicznego (część II), "Palestra" 1993, No. 11, p. 27, which indicated that the monthly term is too long. Differently Nelken, *op. cit.*, s. 77. At the same time, the emphasis here must be placed on the fact that in the case of proceedings before public administration bodies, the legislator should prescribe the time limit for settling the matter, rather than taking specific actions in the course of the proceedings.

80 As to the obligation of notification (notification) imposed on the doctor, referred to in art. 27 of the epidemiological act compare: A. Augustynowicz, I. Wrześniewska-Wal, Ograniczenie autonomii pacjenta w diagnozowaniu i leczeniu gruźlicy, "Pneumologia i Alergologia Polska" 2013, No. 81, pp. 131-132.

81 See: H. Knysiak-Molczyk, (in:) T. Woś (ed.), H. Knysiak-Molczyk, A. Krawiec, M. Kamiński, T. Kielkowski, *op. cit.*, p. 245.

82 See: P. Dobosz, Procedury administracyjne, model sądownictwa administracyjnego a "prawo pomocy", (in:) J. Stelmasiak, J. Niczyporuk, S. Fundowicz, Polski model sądownictwa administracyjnego, Lublin 2003, pp. 125-126; see: as to the right to help in proceedings related to psychiatric coercion: M. Sychowicz, *op. cit.*, p. 12.

not only by particular individual interests but also economical reasons. Fifthly, we should consider admissibility of participation of the Patient's Ombudsman in the proceedings as a party thereto.

Of course, changes in the course of proceedings before sanitary police bodies ensue the need to consider a more precise specification of the course of the obligations' enforcement. Restricted admissibility of repeated coercive fines is a highly desirable solution. It is equally important to consider changes in the course of execution of obligations that are *stricte* related to the patient's autonomy. In particular, it is necessary to change the scope of participation of assisting bodies by the extension of the subjective catalogue to encompass a doctor therein⁸³. Then, being an entity actively participating in executive proceedings, a doctor would perform actions within the scope of public administration which would take a form of direct executive measures (*verwaltungsbehördlicher Befehls*), which are applied in the Austrian system practice⁸⁴. Furthermore, taking into account controversies related to the application of direct coercion under administrative law, the legislator should decide about admissibility of taking the obligor to the venue where the obligation is fulfilled in effect of the failure to obey a prior administrative decision.

The authors explicitly intended to propose the optimized model of proceedings before sanitary police authorities including experiences connected with involuntary psychiatric treatment. Judicialization of proceedings⁸⁵ and higher protection for the individual's rights also affect the scope of exercise of the right to a trial⁸⁶ in matters related to involuntary treatment under administrative law. Due to the fact that the legislator abandoned the implementation of the judicial method to impose the

83 And this is due to the lack of legal as well as the actual ability to enforce the order by an administrative enforcer; see: T. Dukiet-Nagórska, *op. cit.*, p. 26; regarding the role of the bodies assisting in the use of direct coercion compare: J. Radwanowicz, *Przymus bezpośredni w egzekucji administracyjnej*, w: J. Niczyporuk, S. Fundowicz, J. Radwanowicz, *System egzekucji administracyjnej*, Warszawa 2004, p. 492-493. As to the division of duties between the police using direct coercion and the doctor see in: Prawne problemy pobrania krwi od osoby podejrzanego o popełnienie przestępstwa lub wykroczenia po użyciu alkoholu, "Prawo i Medycyna" 2003, No. 13, p. 52-53.

84 See: D.R. Kijowski, Austria, (in:) Z. Kmiecik (ed.), *Postępowanie administracyjne w Europie*, Warszawa 2010, p. 70; A. Krawczyk, *Merytoryczne orzekanie przez sądy administracyjne w Austrii w świetle założeń reformy sądownictwa administracyjnego (Verwaltungsgerichtsbarkeits-Novelle 2012)*, (in:) I. Lipowicz, Z. Kmiecik (co-ed.), *Przyszłość sądownictwa administracyjnego w Polsce z uwzględnieniem tendencji europejskich*, Warszawa 2012, p. 265; Z. Kmiecik, P. Florjanowicz-Błachut, *Austria – reforma sądownictwa administracyjnego. Wybór przepisów znolizowanych 51. Ustawą federalną, Verwaltungsgerichtsbarkeits-Novelle 2012*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 4, p. 191.

85 See: Z. Kmiecik, *Zarys systemu...*, p. 101 and following;

86 There is no doubt about the importance of judicial control – at least the legality – of administering lawful and compulsory treatment; see: T. Dukiet-Nagórska, *op. cit.*, p. 28-29; M. Świdorska, *Zgoda Pacjenta...*, p. 279, which determines the use of coercion from judicial control.

obligation interfering in the patient's autonomy upon an individual, it is necessary to correlate both proceedings, i.e. administrative (or executive) proceedings and judicial monitoring (revision) proceedings⁸⁷. *De lege lata*, encompassing shortcomings of the proceedings before sanitary police authorities, the right to a trial is not sufficiently fulfilled in the discussed cases. Due to the limited framework of this study, we may only signal selected aspects of the subject issue. Firstly, judicial monitoring (review) of public administration merely involves verification while judicial adjudicatory capabilities are limited to admissible elimination of an act or action undertaken by public administration from legal transactions⁸⁸. Secondly, the Polish model of administrative justice system is characterized by normatively implied protraction caused by, among others, the complainants abusing their procedural rights⁸⁹. This tendency is particularly apparent in case of an unlimited possibility to question actions undertaken in administrative executive proceedings, which leads to their global protraction and, in consequence, more often than not efficiently prevents the obligation's enforcement⁹⁰.

In the light of the above considerations, it should be underlined that the existing *de lege lata* model of applicable administrative involuntary treatment cannot be retained. Restriction of the right to a trial by the exclusion of a possibility to carry out *de novo* control is justified only if the standard of due process is fully applied in administrative proceedings. Then, in compliance with the nature of a monitoring activity, the role of administrative judicature may be limited merely to the protection

87 There are no fundamental doubts that both legal protection modes remain in close correlation. Thus, it seems legitimate to determine the dependence according to which the greater the scope of the guarantee in the administrative procedure, the lower the possibility of court interference in the sphere of public administration activities; see: M. Bernatt, Konstytucyjne aspekty sądowej kontroli działalności administracji (między efektywnością a powściągliwością), "Państwo i Prawo" 2017, No. 1, p. 34. By slightly modifying the content of the article outlined in the literature, one can assume that the degree of implementation of rights guaranteeing the protection of individual rights in administrative proceedings determines the mode of court proceedings and the way of adjudication by them (e.g. *de novo* control determined by the minimum standard of protection of individual rights in proceedings before a public administration authority)

88 See e.g. T. Woś, Komentarz do art. 1 ustawy – Prawo o postępowaniu przed sądami administracyjnymi, (in:) T. Woś (ed.), H. Knysiak-Sudyka, M. Romańska, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz, Teza 6-8, Lex Omega.

89 See: Judgment of Higher Administrative Court of 16 October 2015, I OSK 1992/14, Lex No. 1975884; H. Knysiak-Molczyk, Czy sądy administracyjne realizują prawo do sądu w aspekcie rozpatrzenia i rozstrzygnięcia sprawy w rozsądnym terminie?, (in:) I. Lipowicz, Z. Kmiecik (co-eds.), *op. cit.*, Warszawa 2012.

90 See: T. Woś, Komentarz do art. 3 ustawy – Prawo o postępowaniu przed sądami administracyjnymi, (in:) T. Woś (ed.), H. Knysiak-Sudyka, M. Romańska, Prawo o postępowaniu..., Teza 41. See also the critique of the effectiveness of compulsory administrative proceedings in the context of the right to court, the judgment of the ECHR of 3 May 2011 in the case of *Apanasewicz v. Poland* (No. 35630/02).

of the objective legal order. The implementation of this approach relies on the assumption that the legislator includes systemic effects of selected legal protection in a specific category of cases. The abandonment of the judicial form of application (confirmation) of involuntary treatment should embrace the need to change the manner of proceedings in cases resolved before public administrative authorities.

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