Legal aspects of reproductive health of teenagers

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Abstract

The article is an overview of the current legal standards associated with reproductive health of sexually active young patients. In most countries of the world – also in Poland – the age of sexual initiation is falling continuously, which currently ranges between 15 and 18. Sexual activity at such a young age is often associated with the lack of, or slightly effective, contraceptives and the consequent increase in the risk of unplanned pregnancies and STDs (Sexually-Transmitted Diseases). The law does not regulate the issue of conducting a gynecological examination on a minor. The result is that in this respect rules that establish the general principles for conducting medical examinations on minors are used, contained in the Act on Physician and Dentist Professions. Procedures take into account the fact that, till 18, the minors are under parental authority or legal guardian, and that

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they have right to protection and care in the scope necessary for their well-being, can freely express their views, their opinion should (and must) be taken into account in matters relating to them in an appropriate manner, taking into account age and degree of maturity.
In Poland, there is no clear position on the medical and legal proceedings in procedures with a minor patient who has had a sexual intercourse and expects a gynecologist advice, diagnosis or prescription of hormonal contraception. However, being familiar with the Polish law and with medical procedures in dealing with a female minor would allow medical workers to provide health-care in accordance with regulations.

Protection of human life and health is currently treated on the one hand as one of the main human rights and, on the other, as an obligation of public authorities. They are considered to be the so-called fundamental rights, derived from the inherent and inalienable dignity of the human being. It is reflected in the provisions of constitutional law [1]. This adjustment is derived from the art. 38 of the Constitution, which guarantees the protection of life for every person and art. 30 of the Polish Constitution, according to which human dignity is the source of freedom and human and civil rights, including the right to healthcare [1]. It is assumed that health is linked to the protection of life, and the right to life stems from the dignity of man. Recognizing that these rights have the highest value, the Polish legislator prescribes to protect them, no matter who is the carrier of these rights. It is therefore not permissible to limit this protection, e.g. due to personal characteristics of human, his or her origin, state of health, age, etc. [1, 2]. In accordance with art. 47 of the Constitution, any person – child included – has the right to the protection of privacy, family life, honor and good reputation and to make decisions about his or her personal life [1]. By this we mean that every person has the right to the respect of privacy, reproduction and the freedom to make decisions about having or not having offspring [2, 3]. Government administration and the local self-government are obliged to provide free access to methods and means for conscious procreation and appropriate professional medical services aimed at procreation health and education in this field [1, 4].

Given the above, one should ask about the real, free access to contraceptives, which is highly debatable in the legal and the medical professions [2, 5]. It should be noted that the only contraceptive that is available without restriction is the male condom (sold also outside the pharmacies), vaginal globules, spermicidal foams and creams are sold exclusively in pharmacies, but without presenting a prescription [5]. IUDs are not free of charge, but the service of their placing or removal is reimbursed [5]. All means of hormonal contraception are available only on prescription, and only two preparations are partially reimbursed, others are at full price, and their prices are inaccessible for part of the population [5, 6, 7]. There is also a refund for the so-called minipills, which are single-hormone pills (containing only progestin hormones from the progestagen group) that can be consumed also by breastfeeding women [5, 7]. Furthermore, the problem for many patients is getting a prescription for emergency contraception, during which the time of application is the crucial factor [5]. The reason is that most often the doctors cite the "Conscience clause" which is mentioned in art. 39 of the Act on Physician and Dentist Professions [8]. According to its content, the doctor may stop performing healthcare services incompatible with his or her conscience, excluding art. 30, but is required to indicate real possibilities of obtaining the service from another doctor or a therapeutic entity, justify and write down this fact in the medical documentation [8, 9]. Unfortunately, the procedure to indicate real possibility of obtaining the service

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is often omitted. According to Zielińska and Wojciechowska-Nowak, the obligation is too strict and therefore unrealistic, especially against the individual doctor, who privately may be a religious practitioner. Pawlikowski even reports that the obligation to indicate another doctor who will perform the specified service is in clear contradiction with the principle of freedom of conscience and its protection [9]. On the other hand, the patient is entitled, and their good and interest, to health care [1]. Hence, it is not without significance that a refusal on the part of the doctor is tantamount to leaving patients to themselves, thus urging them to look for other sources to obtain the service, not always in accordance with the law.

The examples given are in contradiction with the internationally established principle of the protection of human rights saying that access to family planning measures should include easy accessibility (including financial) of contraceptives that are appropriate (acceptable) for a given person and of good quality [10]. According to the World Health Organization, men and women have an unconditional right to receive information on the safe, effective, affordable and acceptable methods of fertility control according to their own choice, the right of access to such methods and the right of access to such healthcare services which allow women to safely go through pregnancy and childbirth and maximize the chances that the children are born healthy [10].

The issue concerns not only adults, but also juveniles. In most countries of the world, Poland included, the age of sexual initiation is falling continuously, which currently ranges between 15 and 18 [3, 6, 11, 12]. Sexual activity at such a young age is often associated with the lack of, or slightly effective, contraceptives and the consequent increase in the risk of unplanned pregnancies and STDs (Sexually-Transmitted Diseases). The law does not regulate the issue of conducting a gynecological examination on a minor. The result is that in this respect rules that establish the general principles for conducting medical examinations on minors are used, contained in the Act on Physician and Dentist Professions [8]. Procedures take into account the fact that, till age of 18, the minors are under parental or legal guardian authority. In the case of minor children, the decision on their treatment is usually made by their legal representative (who is usually a parent) in accordance with Art. 32 and 34 of the aforementioned Act. However, in the case of minors who turn 16, the so-called cumulative consent is required, which is both the patient's and his or her legal representative's consent. Exceptionally, in the case of the so-called simple treatments, posing no increased risk (Art. 32), the Act allows consent for the examination of a minor by his or her actual guardian, within the meaning of Art. 31, par. 8 of the Act [8]. It should be stressed that the gynecological examination of minors – in general – is not a routine and basic test. This means that the examination cannot be conducted on the basis of current guardian's consent, in which case the legal guardian does not have to be present during the healthcare service pursuant to Art. 20, par. 1 of the Act on Patient Rights and Patient Ombudsman; the patient has the right to the respect of his or her privacy and dignity, particularly at the time of providing the healthcare service [14, 15].

Bearing in mind that the use of contraceptives is to influence the state of health, we would have to conclude that the prescription of such measures is the provision of a healthcare service, whose granting is subject to the rules described in the Act on Physician and Dentist Professions, and thus requires cumulative consent [8]. Its absence makes the treatment illegal [16, 17]. Treatment illegality should not be identified with a medical error and violation of the lege artis principle. The unlawfulness concerns acting contrary to any norm sanctioned, not only in contravention of legislation to protect life and health. Non-compliance with the law is determined by reference to all the standards in the legal system and not only isolated provisions. Hence, the need to obtain patient consent cannot be omitted. It is also an important requirement as violation of other rules of conduct in connection with therapeutic activity [18]. The provision of the legally effective consent is to prior-inform the decision-maker on the circumstances of the therapy. The scope of information that should be

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conveyed to the patient (and his legal representative) has been indicated in Art. 31, par. 1 of the Act on Physician and Dentist Professions [8]. Therefore, the physician should inform, among others, the proposed and possible diagnostic and therapeutic methods and foreseeable consequences of their use or omissions. Nesterowicz [17] clearly states that the failure of performing informative duty by the physician, i.e. failure to inform the patient (consciousness) by presenting incomplete unreliable, inaccessible (unintelligible) information makes his or her consent invalid. Therefore, if the doctor is going to prescribe a contraceptive, he or she should explain to the minor patient and her legal representative, among others, the effects of the drug. The use of such treatment methods will then be subject to consent by these entities.

In the Act on Physician and Dentist Professions, it has been noted that the consent of the patient or his or her legal representative may be expressed orally or even through their behavior, which would clearly indicate an intention to subject to medical operations proposed by the doctor (Art. 32 par. 7) [8]. The exception to the above situations is when a doctor performs surgery or uses a method of treatment or diagnosis posing an increased risk to the patient – then he or she is obliged to obtain the written consent from the patient or his or her legal representative – according to art. 34, par. 1 of the Act and art. 18, par. 1 of the Act on Patient Rights and Patient Ombudsman [8, 14]. However, Jarząbek-Bielecka et al. [11] in the proposed rules of procedure in juvenile patients of Child and Young Girl Gynecology Clinic (having sexual intercourse) suggests to document the mother's consent with a written signature when prescribing hormonal contraception.

Numerous authors [11, 13, 16, 17, 19, 20] point out the importance of the debated issue from the viewpoint of everyday medical practice. How far the knowledge of legal regulations allows to perform medical activities in relation to underaged patients without qualifying them as unlawful, which is made on the basis of a legally ineffective permission. It is important to ask what to do in a situation when the parent-child relationships are distorted and the minor patient cannot count on the support from parents and thus obtain approval for a consultation with gynecologist? According to the Convention on the Rights of the Child, minors are entitled to protection and care in the scope necessary for their well-being, can freely express their views, their opinion should (and must) be taken into consideration on matters which concern them in an appropriate manner, taking into account age and degree of maturity [11, 19, 21]. This is also ensured by Art. 72 of the Constitution of the Republic of Poland, which is addressed to public authorities and people responsible for children [1]. In addition, on the basis of Art. 4 par. 1 of the Act on family planning, human fetus protection and conditions of permissibility of abortion, the following are introduced into schools: knowledge about human sexuality, principles of conscious and responsible parenthood, family values, life in the prenatal phase and methods and means of conscious procreation [4]. Do these regulations provide actual protection of these rights of minor patients? It is difficult to provide a clear answer, though some studies have indicated an ever increasing percentage of unplanned pregnancies as well as sexually transmitted infections in teenagers and young women, which should lead to reflection in the context of changes in the Polish legislation in this regard [3, 6, 13].

In the literature, on the discussed issues of cumulative consent, the legal solutions have been recognized to be problematic. In particular, it highlighted the systemic inconsistencies of the legislator and questioned the very idea of using age criterion in determining capacity to consent to medical interventions. Dukiet-Nagórska and Dudzińska emphasize that the present legal 13-year-old is the decision-maker on the donation of bone marrow or performing an abortion, but does not have the power to co-decide on tooth extraction or being tested with a stethoscope [22, 23]. Such diversity of the legal situation is perceived not only as inconsistent by the authors, but, above all, irrational. Michałek-Janiczek believes that the age limit associated with obtaining the capacity to consent to treatment should be lowered to 13 [22]. On the other hand,

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Świderska claims that both the obligation of information and obtaining approval for medical interventions should not be limited only to censure age, but to degree of maturity of the minor and his or her ability to shape own views, which would have to be assessed case by case [22]. In turn, opponents point to the institution of parental authority that is not an independent right conferred to parents, but above all, their duty to care for the children, who, due to the psycho-physical immaturity, are not able to meet their needs [24]. They indicate that the right of parents to educate their child, although the natural right should contain *"certain reactions to new situations"* [25]. The "new situations" may be those associated with signs of body improvement, the acquisition of biological maturity, as well as the socio-emotional improvement, as in every human being is an individual feature [26]. Constitutional Court's judgment on the proposal of the Ombudsman, the issue of discretionary powers of minor patients clearly emphasizes that in this case the decisions taken are accompanied by strong emotions, with typical young age prone to risky behaviors in the background. This justifies special consideration in determining the margin of discretionary powers of minor patients, much higher than, for example, in determining the effectiveness of the agreements concluded by minors in small, current affairs of everyday life. Hence, the higher age limit (16 years) adopted in the provisions at issue is a decisive turning point of the acquisition of the power to consent to medical procedures [27]. It should be emphasized that the performance of parental authority shall be subject to the control and in cases of doubt, as far as the validity of decisions of parents or lack thereof to carry out certain medical interventions is concerned, the guardianship court becomes the decision-maker (art. 32, par. 6, and art. 34 section. 6 of the Act on Physician and Dentist Professions) [8].

Another subject of protection is the sexual freedom of a minor. Sexual abuse of children is a form of abuse, which is most difficult to diagnose, and consequently assess its scope [28]. The World Health Organization defines this phenomenon as the inclusion of a child in sexual activity in which the child is not able to fully understand and give conscious consent and / or to which is not mature in terms of development and cannot agree in a legally valid manner and / or which is inconsistent with legal or moral norms of the given society. We are dealing with sexual abuse when such activity occurs between a minor and an adult or a child with another child, if these people because of their age or stage of development remain in the relationship of care, dependence, power [28]. The law states that anyone who has sex with a minor under the age of 15, or such a person commits other sexual act, or forces the person to subject to such activities, or to perform them, shall be punishable by imprisonment from 2 to 12 years (art. 200 §1 of the Criminal Code) [29]. The set age limit is the consequence of adopted allegation by the legislator that, due to the degree of their development, a person under 15 years of age is not able to make a decision having social and legal decisions allowing to perform specified sexual acts, nor is the person able to duly recognize all the realities and implications. As a result, the person performing such acts with a minor violates his or her sexual freedom, not because it infringes their will, but because a person under the age of 15 is not able to express legally-relevant decision of will [15, 30]. Opinions of the lawyers on the application of art. 200 of the Penal Code are at issue in the regard of sexual intercourse of two people under 15. According to Rodzynkiewicz, in the event when participants are under 15 and the sexual act took place after mutual consent, partners commit crime based on art. 200, par. 1 of the Penal Code towards each other, for which both should be held responsible on terms arising from the Act on Juvenile Delinquency Proceedings. On the other hand, it is assumed that, in relation to this criminal act, minors under the age of 15 act as victims, even if they actively seek to make advances towards the minor or provoke them. In view of the above, both sides show lack of any responsibility in such a case, despite the fact that such an event can attest to their demoralization, which is a prerequisite to initiate proceedings against minors. The same view is shared by Gardocka who believes that the sex of young people in circumstances which do not indicate any

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elements used by one of the sides, such as ignorance, dependence, unconsciousness of the other person, does not constitute an offense described in Art. 200, par. 1 of the Penal Code [30]. Gardocki says that since the provision protecting children from sexual abuse against them is being discussed, sexual intercourse between two 14-year-olds is not an offense [31]. Mozgawa thinks differently and indicates that not only an adult may commit sexual abuse on a child. At the same time, bearing in mind that early sexual contacts are a threat to mental and physical development of children, such harm occurs both in the case of a minor contact with an adult, as well as in the situation of sexual intercourse between minors (e.g. 14-year-old with a 13-year-old). However, in this situation, the responsibility will take place under the Act on Proceedings in Juvenile Cases [30]. In the Polish legal system, the determining of the fact by the doctor on the commencement of sexual life should not be concealed from the legal guardian of the minor. Furthermore, the physician is obliged to inform the relevant authorities on the fact of sexual intercourse, in the case of minors under 15 in accordance with art. 200 of the Penal Code and art. 304 of the Code of Criminal Procedure [29].

In Poland, there is no clear position on the medical and legal proceedings in procedures with a minor patient who has taken intercourse and expects a gynecologist advice, diagnosis or prescription of hormonal contraception. Recommendations of the expert group on the Polish Gynecological Society concerning gynecological examination and treatment of minors constitute undoubtedly one of the main directions of conduct standards based on current medical knowledge and must be taken into account in assessing the maintenance of the rules of prudence and diligence when performing the profession of physician [32]. Although not of regulatory nature, and thus not mandatory, they, however, take into account applicable regulations. It should be noted that any deviation from the applicable procedures for the examination of minor patients by gynecologists can result in holding the physician criminally or civilly liable. In this regard, physicians should demonstrate exceptional vigilance, caution and delicacy during the examination of this group of patients [15, 28, 32].

In summary, we can draw the following conclusions:

- the obligation to adapt national legislation to the international and EU law;
- adoption of legislative solutions with respect for fundamental values, including the protection of human dignity and fundamental rights and freedoms, such as: the right to life, the right to self-determination (autonomy), the right to privacy, the right to integrity.

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