European Research Studies Journal
Volume XXVII, Issue 2, 2024

pp. 531-545

Enhancing Human Security: Balancing Medical Confidentiality and Criminal Justice

Submitted 18/04/24, 1st revision 16/05/24, 2nd revision 28/05/24, accepted 30/06/24

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Abstract:

Purpose: *Information covered by medical confidentiality is important in a criminal trial and ensure patient safety. They belong to the evidence prohibitions that make it difficult or impossible to obtain information about the patient. The legislator, being aware of the limitations in determining material truth, tried to reconcile the implementation of tasks under the penal procedure with the patient's interest.*
Design/Methodology/Approach: *In this article, we take note that respecting medical confidentialy is one of the fundamental rights for patients and physician.*
Findings: *The implementation of Human Security Framework argument relates to the centrality of rhetoric in implementic human rights prism in legal order. In that much of the "reality" surrounding human rights is fundamentally interpretive, human security rhetorical framework plays a key role presenting that a rights ideal can secure legal orders in a culture predisposed to reject that ideal.*
Practical Implications: *A correct analysis of medial confidential in the prism of Human Security Framework put, the argument here is that concern for how particular individuals advocate for human rights causes adds significant value to understanding the fundamental meaning in protection this institution and its role in criminal trial.*
Originality/Value: *The publication systematizes the most important issues of human security framework in legal order, particulary in criman trial.*

Keywords: *Fundamental rights, human rights, human security framework, medical confidentiality, patient, criminal procedure, ban on evidence, patient's rights and freedoms, medical law, penal code.*

JEL Clasification: *I1, K4, K33.*
Paper Type: *Research article.*

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1. Introduction

Kofi Anan said that "Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her potential. Every step in this direction is also a step towards reducingpoverty, achieving economic growth and preventing conflict.

Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human and therefore national security"[6]. In that meaning *Human Security Framework* will draw on key principles including the respect of human rights, justice, equity and transparency.

They will aim to deliver protection and empowerment legal norms to implementing human rights standards in legal orders. Human security focuses on the most fundamental rights – to life, to privacy, basic needs and dignity, and attaches particular importance to the local context in which threats to these fundamental rights exist (Gasper 2014, p. 35-38). These fundamental rights become particularly important in the context of medical law and securing the institution of medical confidentiality.

Medical confidentiality plays an important role in social life. This confidentiality obligation is fundamental to pursuing the profession of physician, which is a profession of public trust (Kardas, 2014; Szewczyk, 2000). Its special treatment in legislation stems from the need to ensure special protection for the doctor-patient relationship based on boundless trust.

Medical confidentiality applies to all information related to the patient, obtained in connection with the pursuit of the profession of physician – Article 40 (1) of the Medical Profession Act[7]. Disclosure of such information constitutes an offence under Article 266§1 of the Penal Code, irrespective of the organisational framework in which the physician pursues their profession, i.e. whether the disclosure took place within private practice or within a public or non-public health care institution (Dukiet-Nagórska, 2002, p. 4-5).

Including medical confidentiality as a mechanism protecting the constitutional

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[6]*K. Annan, UN Secretary-General, Kofi Annan. "Secretary-General Salutes International Workshop on Human Security in Mongolia." Two-Day Session in Ulaanbaatar, May 8-10, 2000. Press Release SG/SM/7382. http://www.un.org/News/Press/docs/2000/20000508. sgsm7382.doc.html [accessed 1 October 2023].*

[7]*The Medical and Dental Professions Act of 5 December 1996 (consolidated text, Journal of Laws of 2021, item 159).*

principle of the use of patient data does not mean absolute protection. As it is the case with other rights and freedoms, it may be restricted when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons (Article 31 (3) of the Constitution of the Republic of Poland).

Those restrictions must be included in a legal act of statutory rank and absolutely must not violate the essence of individual rights and freedoms. Article 40 (2) of the Medical Profession Act provides for a number of such exceptions whereby medical confidentiality does not apply, e.g., where it is stipulated by the provision of an act.

One such restriction is stipulated in the criminal procedure legislation[8], where, following the fulfilment of certain premises, the interest in prosecuting and combating crime may outweigh the interest in protecting patient's medical data.

Under the criminal procedure, medical confidentiality is covered by inadmissibility of evidence which prohibits the taking of evidence or creates restrictions in the obtaining of evidence. This limits the potential to make factual findings and reach the substantive truth, which are the objectives of criminal proceedings (Woźniewski· 2009, p. 360; Cieślak, 1955, p. 264; Waltoś, 2005, p. 353).

However, reaching these objectives cannot justify every case of encroaching on individual rights and freedoms guaranteed by the Polish Constitution. Seeking the truth '(...) must take place within the conditions of respect for the general legal principles of rule of law, democratism, humanism and respect for human rights standards, especially for human dignity.

These principles and standards constitute a border that shall not be crossed (violated) in the process of making factual findings in criminal proceedings' (Skorupka, 2017, p. 187; Bieńkowska *et al.*, 2019; Bieńkowska *et al.*, 2023).

Physicians and the medical records that they create are an exceptionally valuable source of information on criminal offences and are of considerable importance for criminal proceedings, especially in the case of offences against life and health. Therefore, the legislator has provided for the possibility of disclosing confidential medical information in certain situations and under specific conditions.

On the other hand, in other cases, it must be absolutely protected and under no circumstances may be disclosed. The article aims to present medical confidentiality as an absolute and relative basis for inadmissibility of evidence in respect of the testimony given by physicians serving as witnesses and the possibility of using medical records in criminal proceedings.

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[8] *The Act of 6 June 1997 The Code of Criminal Procedure (consolidated text, Journal of Laws of 2020, item 30, as amended).*

2. The Term and Scope of Medical Confidentiality

The concepts of professional confidentiality or secrecy are not defined in the Polish legal system. As indicated in dictionaries, a secret means non-disclosure of information, a message or fact which should not be made public, a fact known only to the select individuals, requiring discretion, and undisclosed (Szymczyk, 1995).

The essence of the definition of a secret lies in its non-disclosure, which should be understood as a restriction to access to information. It determines two fundamental elements. These are restricting access to information to select individuals and prohibiting its disclosure. These characteristics make it possible to define secrecy in the legal sense as an obligation to keep information, which is known only to a specific persons, confidential (Rusinek, 2017; p. 17).

The specificity of a professional secret is determined by its relation to the pursuit of a given profession. In the doctrine, it is defined as a secret obtained in relation to the pursuit of a profession (Cieślak· 1955, p. 271; Jackowski, 2011, p. 76). This includes all knowledge acquired in pursuit of the profession, which is to be regarded as confidential, in accordance with the internal regulations governing the specific profession (Gruszecka, 2020, p. 421).

Medical confidentiality is a kind of professional secrecy. Information obtained in connection with the pursuit of the profession of physicians and other medical practitioners is an inherent element of broadly defined human privacy, which is protected by Article 47 of the Polish Constitution.

Under this article, everyone shall have the right to legal protection of their private and family life, of honour and good reputation, and to make decisions about their personal life. It is particularised in Article 51 of the Polish Constitution which gives every individual the right to access official documents and data collections which concern this person, and to demand the correction or deletion of untrue or incomplete information, or information acquired by means in breach of the law.

Those rights can be restricted only by means of a legal act. Also, the provision in question obliges the legislator to introduce appropriate legislative solutions that would be sufficient to ensure that individual rights are observed (Wild, 2016, p. 1174).

The right to privacy is also guaranteed by a number of provisions of international law[9]. The judgments passed by the European Court of Human Rights follow the

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[9]*Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, made in Rome on 4 November 1950 and amended by protocols No. 3, 5, and 8 and supplemented by protocol No. 2, Journal of Laws of 1993 No. 61, item 284; Article 17 of the International Covenant on Civil and Political Rights opened for signature in New York on 19*

position that 'Respecting the confidentiality of health data is crucial not only for the protection of a patient's privacy but also for the maintenance of that person's confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health.

Nevertheless, the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest of investigating and prosecuting crime (…)'[10].

The provisions which regulate the professional secrecy of physicians are included in the aforementioned Medical and Dental Professions Act[11] (hereinafter: MPA), as well as in the act on Act on Patients' Rights[12], on the Protection of Mental Health[13], on Medical Activity[14], and in the Code of Medical Ethics (hereinafter: CME)[15].

Medical confidentiality is defined in Article 40 (1) of MPA. It obliges physicians to keep confidential patient-related information obtained in connection with the pursuit of their profession. Physicians' obligation to maintain medical confidentiality is defined similarly in Article 23 of CME. It covers information about the patient and their environment obtained by the physician in the pursuit of professional activities. The death of the patient does not release the physician from the obligation to

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December 1966; Article 7 of the Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1; See L. Garlicki, (in:) Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18, t. I., L. Garlicki (ed.), Warszawa 2010, pp. 479–550; Międzynarodowy Pakt Praw Obywatelskich (osobistych i politycznych), R. Wieruszewski (ed.), Warszawa 2012, pp. 371–418; J. Sobczak, (in:) Karta Praw Podstawowych Unii Europejskiej. Komentarz, A. Wróbel (ed.), Warszawa 2013, pp. 217–258; D. Bieńkowska, Korelacje praw człowieka, etyki i medycyny, (in:) Wyzwania dla powszechnego systemu ochrony praw człowieka u progu trzeciej dekady XXI wieku, J. Jaskiernia, K. Spryszak (eds.), Toruń 2021.

[10]*ECHR Judgement of 27 August 1997 in the case of M.S. v. Sweden, application No. 20837/92, Lex No. 79643; ECHR Judgement of 17 July 2008 in the case of I. v. Finland, application No. 20511/03, Lex No. 411529; ECHR Judgement of 25 November 2008 in the case of Biriuk v. Lithuania, application No. 23373/03, Lex No. 465153; ECHR Judgement of 6 June 2013 in the case of Avilkina and others v. Russia, application No. 1585/09, Lex No. 1318065.*

[11]*The Medical and Dental Professions Act of 5 December 1996 (consolidated text, Journal of Laws of 2021, item 159).*

[12]*The Act on Patients' Rights and Patients Ombudsman of 6 November 2008 (consolidated text, Journal of Laws of 2020, item 849).*

[13]*The Act on the Protection of Mental Health of 19 August 1994 (consolidated text, Journal of Laws of 2020, item 685).*

[14]*The Act on Medical Activity of 15 April 2011 (consolidated text, Journal of Laws of 2020, item 295, as amended).*

[15]*On the normative nature of the Code of Medical Ethics see the judgement of the Constitutional Tribunal of 23 April 2008, file ref. No. SK 16/07, OTK ZU 3/A/2008, item 45.*

maintain medical confidentiality. It concerns all information that the physician may acquire in the course of their professional activity, i.e., details related to the treatment and the patient, as well as other unrelated information, e.g., concerning family property or professional relations, sexual contacts and preferences, patient's infertility, etc.).

This also includes statements and observations made by the physician, the patient or other individuals from their environment, as well as data included in medical records, such as medical history records and patient computer data (Ogiegło, 2015; Kubiak, 2015, p. 33-36).

The issue of medical confidentiality regulated in Articles 13 and 14 of the Act on Patients' Rights is discussed from the perspective of protecting patients' rights. Based on these, patients have the right to have information which relates to them maintained confidential by health professionals who have acquired information about them in the course of their medical practice, including by those providing them with health services.

This provision applies to physicians as well as to other health professionals, e.g. nurses, laboratory diagnosticians, paramedics[16]. It is worth noting that physicians are obliged to ensure that individuals who assist them in the performance of their duties maintain professional confidentiality, which in their case should be limited to a scope necessary for the correct exercise of their functions (Article 25 CME).

The Act on the Protection of Mental Health[17] provides for a special type of medical confidentiality. It obliges all persons performing activities under the referenced Act to maintain confidential all information obtained in relation to such activities (Article 50 (1) of the Act).

The cases whereby physicians can be released from the confidentiality obligation are indicated in Article 40 (2) MPA. These are: when provided for by Acts; when a medical examination has been conducted at the request of authorised bodies and institutions; when maintaining confidentiality may endanger the life or health of the patient or other persons; when the patient or his/her legal representative consents to disclosure after having been informed of the adverse consequences for the patient of its disclosure, and in the case of a need to provide necessary information on the patient to a court-appointed physician or another physician, or authorised persons participating in the provision of health services. These releases are worded in a similar way in Article 25 CME.

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[16]*See Article 2 (1)(2) of the Act on Medical Activity of 15 April 2011 (consolidated text, Journal of Laws of 2020, item 295, as amended).*

[17]*The Act on the Protection of Mental Health of 19 August 1994 (consolidated text, Journal of Laws of 2020, item 685).*

3. Medical Confidentiality as Grounds for Inadmissibility of Evidence

As highlighted in the introductory part, information covered by medical confidentiality are subject to inadmissibility of evidence in criminal proceedings. While certain cases of inadmissibility can be rebutted (relative) other are nonrebuttable (absolute). Relative inadmissibility covers evidence taken from the testimony of a physician appearing as a witness. The matters related to examining as witnesses persons obligated to preserve a professional or official secret are regulated in Article 180 of the Code of Criminal Procedure.

Pursuant to this article, a physician may refuse to testify as to the facts to which this obligation extends. The literature generally agrees that a holder of a secret may not disclose it by word, gesture or any other kind of sign that would make it possible to make any conclusions as to that knowledge (Payen, 1938, p. 160). When it is necessary for the benefit of the administration of justice, and the facts cannot be established based on other evidence, the legislator allows the examination of witnesses as to the facts regarded as secrets (Article 180§2 of the Code of Criminal Procedure).

Such approval is issued by the court, which shall issue a decision within 7 days from receiving the prosecutor's request. This decision can be appealed against. Given, however, the structure of Article 180 of the Code of Criminal Procedure one can ask if the provisions of Article 180§2 extend the right to refuse to testify, which is conditional on the will of the witness, or if it is a separate prohibition in respect of specific types of secrets. How should one treat evidence from testimony given by a physician who does not exercise their right to refuse to testify and decides to testify?

Considering the wording of §2, it appears that without a court decision approving the disclosure of a medical secret, such testimony shall not constitute evidence. The vast majority of legal scholars (Sowiński, 2004, p. 156; Gostyński, 1997, p. 113; Zabłocki, 2000, p. 5; Rusinek, 2007, p. 107) share similar views, indicating that the legislator wanted to separate inadmissibility of evidence from the right to refuse to testify. The phrasing '(...) may be examined as to the facts covered by these secrets, only when (...)' points to the will of the witness being excluded (Szumiło-Kulczycka, 2005, p. 126).

It can, therefore, be assumed that this provision is addressed exclusively to the procedural body, which should ensure *ex officio* that this standard is observed. It is worth underlining that this provision does not provide for instructing the witness on the text of Article 180§2 of the Code of Criminal Procedure, but is rather based on the presumption that the witness – a physician – will themselves point to the confidential nature of circumstances about which they would give testimony, aware of the obligation to maintain medical confidentiality (Rusinek, 2007, p. 110).

The court procedure of releasing individuals from the obligation to maintain medical

confidentiality can be unnecessary in situations covered by Article 40 (2)(4) of the Medical Profession Act. This provision allows physicians to disclose medical secrets should the patient or their legal representative give their consent to do so. Nevertheless, it should be highlighted that the patient should be informed in advance of the adverse consequences of disclosure.

Furthermore, the patient's consent must be free and informed. The provisions of Article 40 (2)(4) is *lex specialis* to Article 180§1 and §2 of the Code of Criminal Procedure. In such a situation, the patient's statement precedes the actions of the court, thus making it unnecessary to issue decisions in this respect. It should be underlined that the patient's statement should identify precisely and personally the persons and circumstances to be disclosed.

The disclosure of medical secrets under conditions specified in Article 40 (2) MPA can take place only in the required scope, unless the patient or their legal representative decide otherwise. For the record, it should be noted that the procedure of releasing physicians from the obligation to maintain professional secrecy, provided for in Article 180§2 of the Code of Criminal Procedure in conjunction with Article 40 (1) MPA shall apply when the physician refuses to disclose secrets or the patient does not give their consent (statement), or when no exceptions other than those specified in Article 40 (2) MPA apply[18].

As a side note, one should remember that the prosecutor, before applying for exemption from professional secrecy, must summon the physician to be questioned as a witness. Only when the physician invokes medical confidentiality is the application to the court is updated.

On the other hand, absolute inadmissibility of evidence applies to medical secrets covered in Article 199 of the Code of Criminal Procedure. Under this article, statements of the accused, regarding the alleged act, made to an expert or a physician providing medical aid, may not be regarded as evidence.

This prohibition absolutely precludes the possibility of using a source of evidence – an expert or a physician in this case[19]. 'Article 199 introduces absolute inadmissibility of evidence to protect the relationship between the physician and the patient, which must be that of mutual trust. Evidently, this is to facilitate the best

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[18]*Order of the Court of Appeals in Katowice of 21 December 2016 II AKz 688/16; Order of the Court of Appeals in Katowice of 13 December 2017, II AKz 796/17.*

[19]*Judgment of the Supreme Court of 24 January 2008, V KK 230/07, Prok. i Pr. 2008, No. 6, item 17, p. 12; Judgement of the Court of Appeals in Kraków of 29 March 2006, II AKa 45/06, KZS 2006, No. 4, item 34; Judgement of the Court of Appeals in Kraków of 14 August 2003, II AKa 179/03, KZS 2003, No. 9, item 23; Judgement of the Court of Appeals in Warsaw of 28 September 2012, II AKa 241/12, Legalis; Judgement of the Court of Appeals in Łódź of 5 December 2013, II AKa 242/13, Legalis; Judgement of the Court of Appeals in Gdańsk of 15 May 2013, II AKa 130/13, Legalis.*

possible treatment results, since medical care can be most effective if the patient can be completely honest with the physician who provides medical care'[20]. According to the Supreme Court, the provision in question constitutes *lex specialis* to Article 180§2 of the Code of Criminal Procedure, which means that it is impossible for the court to exempt a physician from medical confidentiality for them to disclose statements made by the accused when receiving medical care from the physician, even if the accused wished these to be disclosed[21].

The provision serves as a guarantee that protects the trust underlying the doctor-patient relationship (Hofmański *et al.*, 2011, p. 1129)[22]. It is, therefore, not possible both to examine the physician about the content of the accused's statement and to use expert opinion including those statements[23]. This prohibition also covers medical records within the scope of the statements made by the accused concerning the alleged act[24]. The accused's statement referred to in Article 199 of the Code of Criminal Procedure is to be received by an expert or the physician providing the accused with medical aid.

Therefore, the discussed provision does not apply to situations where the accused makes a statement to a physician who is not providing them with aid or to a physician providing aid to a person other than the accused. According to the Supreme Court, an alternative view would be unwarranted and would constitute a broad interpretation of inadmissibility of evidence, expressed clearly and precisely in Article 199 of the Code of Criminal Procedure[25].

On the other hand, there is no obstacle to examine as a witness a physician who has provided the accused with aid, if the accused made a statement against another accused who did not receive medical aid. This should not have any adverse effect on the procedural situation of the accused who received medical aid[26]. According to the judiciary and legal scholars, this prohibition also extends to persons assisting

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[20]*Judgement of the Court of Appeals in Warsaw of 15 March 2017, II AKa 447/16, Legalis; See also A. Huk, Tajemnica zawodowa lekarza, p. 82).*
[21]*Judgment of the Supreme Court of 24 January 2008, V KK 230/077, OSN w SK 2008, No. 1, item 207; J. Witkowska, Obowiązek zachowania tajemnicy rzez biegłego opiniującego w przedmiocie zdrowia psychicznego, "Nowa kodyfikacja Prawa Karnego", 2004, vol. 15, p. 310; Judgement of the Court of Appeals in Kraków of 14 August 2003, II AKa 179/03, KZS 2003, No. 9, item 23; Z. Kwiatkowski, Zakazy dowodowe w procesie karnym, Kraków 2005, p. 347.*
[22]*Judgement of the Court of Appeals in Warsaw of 15 March 2017, II AKa 447/16, Legalis.*
[23]*Judgement of the Court of Appeals in Kraków of 17 August 1999, II AKa 113/99, KZS 1999, No. 6–7, item 67.*
[24]*Judgement of the Court of Appeals in Warsaw of 15 March 2017, II AKa 447/16, (Legalis).*
[25]*Order of the Supreme Court of 28 June 2012, III KK 366/11, OSNKW 2012, No. 10, item 110, p. 63.*
[26]*Differently: Judgement of the Court of Appeals in Katowice of 6 March 2014, II AKa 33/14, OSAK 2014, No. 2, item 7.*

physicians (Gruszecka, 2020, p. 498; Waltoś, 2009, p. 363; Grzegorczyk *et al.*, 2014, p. 707; Urbaniak, 2012, pp. 133–134; Rusinek, 2007, p. 83)[27].

Given the purpose of inadmissibility of evidence, which is to protect certain interests at the expense of the purpose of criminal proceedings, there is no doubt that when introducing rules for inadmissibility of evidence, the legislator was aware that this solution would make the pursuit of the truth more difficult. Therefore, the rules for inadmissibility of evidence must be interpreted strictly as these rules are exceptional in nature (Urbaniak, 2012, pp. 133–134).

The provision of Article 199 of the Code of Criminal Procedure is to protect the specific relations between the accused and the expert or physician providing medical aid. Where the accused addresses his statement in relation to the alleged act to an expert or physician and, to his knowledge and intent, it is not intended for other persons, inadmissibility of evidence applies even if other medical personnel were present and acquainted with the statement (Krzysztofiuk, 2020).

As regards nurses, this was addressed by the Court of Appeals in Katowice. It acknowledged that 'The possibility of interrogating a nurse as to the circumstances of the statement given by the accused in respect of the alleged act, would undoubtedly constitute a circumvention of absolute inadmissibility of evidence provided for in Article 199 of the Article Code of Criminal Procedure, even though it applies solely to physicians and experts'[28].

The rule for inadmissibility of evidence, as specified in Article 199 of the Article Code of Criminal Procedure, may not be abolished even if the testimony given by the expert of physician can turn out beneficial for the accused.

Article 199 of the Code of Criminal Procedure was reinforced by provisions for inadmissibility of evidence stemming from Articles 50 and 52 of the Act on the Protection of Mental Health[29]. Provisions of Article 50 (1) oblige all persons performing activities under the referenced Act to maintain confidential all information obtained in relation to such activities, in line with separate regulations.

In addition, Article 51 of this Act prohibits the inclusion of statements related to a person's admission of having committed a criminal offence in documents concerning their examination or course of treatment. This prohibition also covers records of examinations carried out at the request of authorised bodies.

[27]*Judgement of the Court of Appeals in Katowice of 21.10.2013, II AKa 334/13, OSAK 2013, No. 4, item 9.*

[28]*Judgement of the Court of Appeals in Katowice of 21 October 2013, II AKa 334/13, OSAK 2013, no. 4, item 9.*

[29]*The Act on the Protection of Mental Health of 19 August 1994 (consolidated text, Journal of Laws of 2020, item 685).*

Furthermore, persons obliged to maintain the secrets of a person subject to activities covered by this Act, shall not be examined as witnesses as to statements in which the individual admits to having committed a criminal offence (Article 52 (1)).

4. Securing Medical Records

Medical records are of substantial importance in criminal proceedings, as they often constitute direct, irrefutable evidence of a committed offence. Securing such records is often the priority of the authority carrying out investigative activities. One way to access this evidence is by means of the provisions regulating seizures and searches.

Pursuant to Article 225§1 of the Code of Criminal Procedure, if the head of a state or local government institution or the person subject to activities, declares that a document surrendered or discovered during the search, contains information covered by medical confidentiality, the authority conducting the search or seizure may not examine its content. They shall immediately transmit such documents to the state prosecutor or the court in a sealed container. The above does not apply to documents in the possession of a person suspected of an offence. The same procedure applies to psychiatric records that have been secured during a search.

When analysing Article 225§1 of the Code of Criminal Procedure, one should pay special attention to its nature. This provision, unlike in the cases discussed above, does not protect confidential information from being used, but limits the circle of persons who can review its contents to the prosecutor or the court.

According to M. Rusinek, this provision resolves the conflict between the obligation to have custody over documents containing information covered by medical confidentiality and the obligation to surrender such documents (Rusinek, 2007, p. 179). It is worth underlining that it is the physician's responsibility (Article 29 CME) to appropriately maintain and prevent the disclosure of the referenced documents.

It is further their responsibility to assure that these contain only information which is necessary for medical care. On the other hand, the manner of maintaining medical records is specified in Articles 23-30 the Act on Patients' Rights[30].

The use of documents which contain confidential medical information as evidence in criminal proceedings is determined in Article 226 of the Code of Criminal Procedure. The legislator indicated that the prohibitions and limitations outlined in Articles 178-181 of the Code shall apply, and authorised the prosecutor to make decisions in this respect, which constitutes an exception from the rule of court waiver of confidentiality.

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[30]*The Act on Patients' Rights and Patients Ombudsman of 6 November 2008 (consolidated text, Journal of Laws of 2020, item 849).*

Taking into account Article 180§ 2 of the Code of Criminal Procedure, which authorises the court to settle matters of releasing witnesses from medical confidentiality obligation in pre-trial proceedings, one can wonder why a derogation from this rule was introduced. This issue was investigated by the Commissioner for Human Rights. The Commissioner, in letter II.501.2.2017.MM of 13 June 2017, requested the Minister of Justice to take legislative action to amend Article 226 of the Code of Criminal Procedure.

According to the Commissioner, 'The solution provided for by this provision, which does not require an order of an independent court of law, in practice greatly weakens the position of medical confidentiality in legal transactions'. The position held by the Commissioner for Human Rights has been the prevailing viewpoint in the literature for a long time (Kaftal, 1970) and is also shared by medical circles.

The General Assembly of the Supreme Medical Council, in a call of 18 September 2015, supported the use of Article 180§ 2 of the Code of Criminal Procedure in all solutions concerning medical confidentiality, highlighting that 'medical secrets can be revealed only with the consent of a common court of law, when the interest of justice so requires, and when given circumstances cannot be determined otherwise than by this secret being revealed'.

Advocates of the current wording of Article 226 of the Code of Criminal Procedure explain that this diversification stems from the type of evidence. This argument, however, does not have any normative or axiological substantiation. Therefore, it appears justified to indicate that this solution was adopted solely due to practical reasons.

Undoubtedly, medical records serve as a valuable source of evidence for law enforcement authorities, and are commonly used in practice with the tacit consent of some medical circles (Rejman, 1996, 186; Sowiński, 2004, pp. 205-206; Rusinek, 2007, p. 222; Górski, pp. 1587-1600).

However, it still holds true that such records should be protected in the same way as other confidential information. It should be further noted that depriving the prosecutor of the ability to decide on the disclosure and use of confidential information in medical records does not necessarily entail that access to this evidence would be restricted, although it would no longer be obligatory.

The court, pursuant to Article 180§2 of the Code of Criminal Procedure, might determine that the circumstances cannot be established in any other way and that the disclosure of medical secrets is necessary given the interest of justice. Allowing other individuals to familiarise themselves with such confidential information, makes its protection merely an illusion, and contradicts the essence of medical confidentiality provided for in Article 40 of the Medical Profession Act, based on trust between the physician and the patient.

5. Conclusion

In the beginig of this article we notice that using *human security framework* argument relates to the centrality of rhetoric in implementic human rights prism in legal order. In that much of the "reality" surrounding human rights is fundamentally interpretive, human security rhetorical framework plays a key role presenting that a rights ideal can secure legal orders in a culture predisposed to reject that ideal. This approach becomes particularly important from the perspective of the analysed institution of medical confidentiality.

Summing up, we should state that medical confidentiality limits and, in certain situations, completely prevents access to information of substantial importance in criminal proceedings, which can restrict the possibility of reaching the substantive truth. The legislator, aware of the conflict of interests: of patient's rights on the one hand and of the criminal proceedings, on the other hand, attempted to respect professional secrets, including confidential medical information, and not to encroach on the rights and freedoms guaranteed by the Constitution of the Republic of Poland.

Nevertheless, one should not pass over in silence the wording of the provision which allows prosecutors to use documents containing medical secrets in pre-trial proceedings (Article 226, Sentence 2, Code of Criminal Procedure) This results in the court no longer being in charge of the release of medical confidentiality, which finds no normative justification and should be vehemently criticised.

The will to obtain evidence in the form of medical records, common in prosecutor's practice, must not justify undermining medical confidentiality in respect of other confidential information, disclosure of which requires a court order. This controversial provision expands the circle of individuals who can familiarise themselves with patients' private information related to their health and treatment.

It is therefore contradictory to Article 47 of the Constitution and the many provisions of international law on the right to privacy[31]. Leaving it up to the court of law to decide on the disclosure of medical secrets related to the use of medical records in pre-trial proceedings, would undoubtedly minimise the number of entities that could access such secrets. Thiswould return medicalconfidentiality to itsrightfulposition.

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[31]*Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, made in Rome on 4 November 1950 and amended by protocols No. 3, 5, and 8 and supplemented by protocol No. 2, Journal of Laws of 1993 No. 61, item 284; Article 17 of the International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966; Article 7 of the Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.*

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