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## **The Administrative Court System in the Face of Non-Vaccination of Children. Challenges and Prospects for the (Still) Emerging Line of Jurisprudence**

### **ABSTRACT**

In recent years, there has been a heated public debate about mandatory vaccination of children. The COVID-19 pandemic further underscored the importance of vaccination and the desirability of vaccination for the protection of public health and the health (as well as life) of the individual. Nevertheless, the rise in activity and popularity of anti-vaccination movements has clearly contributed to the upward trend in the number of non-vaccinated children that we have seen since 2010. Statutory representatives of children who oppose their mandatory vaccination cite a variety of reasons, taking advantage of the imperfect legal system. The fines imposed to compel mandatory vaccination, as well as the conduct of administrative enforcement proceedings in this regard, are often challenged in administrative courts. It is of great importance that administrative courts are increasingly referring to the constitutionally protected values, as well as to the axiological justifications for the functioning obligation to vaccinate children. Given the nature of the obligation, this seems understandable, but nevertheless somewhat intrusive into the constitutional sphere, which is reserved for the Constitutional Tribunal. The purpose of the paper is to reconstruct the formation of the line of jurisprudence of administrative courts in cases involving the mandatory vaccination of children. The course of discussion will lead to a full analysis of the grounds of the grounds for the cited judgments and their consistency with the emerging line of jurisprudence on the issue. Particular attention was paid to the references made by the adjudicating panels to the legally protected

values of an individual and universal nature. For this purpose the Author used the historical-legal method and the method of analysis of court jurisprudence.

**Key words:** legal interest, mandatory vaccination, public health, administrative courts, health

## Introduction

Administrative law affects the daily life of every citizen to the greatest extent. It regulates the citizen's ability to act in the society and the relationship between the citizen and the state authorities in various ways, and also shapes the catalog of the citizen's public-life rights and obligations. As it is aptly pointed out in the literature, the administrative court system is the 'bonding link' for the proper functioning of administrative law.<sup>1</sup> The administrative court system is therefore closely correlated with the essence of administrative law and with the review of proper administration. Since the public administration has been given sovereign powers over citizens, the establishment and functioning of the administrative court system should be considered a step toward protecting the citizen from possible abuses. The control exercised by the administrative court system is also intended to give an answer to citizens and state bodies as to whether the functioning of certain institutions of administrative law is working properly.

The establishment and development of Poland's administrative court system over the years demonstrates the consolidation of the democratic law-abiding state. This was especially needed in the last century, when public administration used to be called a "punitive administration."<sup>2</sup> The administrative court system in the second half of the twentieth century became increasingly distinct from the general justice system.<sup>3</sup> We should recall the Act of January 31, 1980 on the Supreme Administrative Court,<sup>4</sup> under which the Supreme Administrative Court, with its headquarters in Warsaw, was established, along with its branches. According to Article 2a of that act, the Supreme Administrative Court's competence involved the adoption of resolutions resolving legal questions on issues that raise serious doubt in particular cases, presented in the form of legal questions by local government appeals boards. However, with

<sup>1</sup> J. Zimmermann, *Aksjomaty sądownictwa administracyjnego*, Warsaw 2020, p. 9.

<sup>2</sup> For more information, see: D. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Zakamycze 2004.

<sup>3</sup> For more information, see: Z. Janowicz, *Sądownictwo administracyjne lat dziewięćdziesiątych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1991, no. 3, pp. 1-3.

<sup>4</sup> The Journal of Laws 1980 no. 4, item 8.

the enactment of the Act of July 25, 2002 on the organization of administrative courts, a certain breakthrough has taken place in the formation and division of the justice system in Poland. The literature emphasizes that at that time a certain important stage of the discussion on the final shape of the bodies of judicial review of administration ended.<sup>5</sup> This also represented a certain uniqueness of these courts, because they did not decide cases *in meriti*, but constituted, in a way, another administration body overseeing the legality and correctness of the exercise of sovereign powers by the public administration.

The legal creation of the administrative court system led to its rapid development and, consequently, to its well-established position. Nowadays, it is difficult not to acknowledge the essential role of the administrative court system in the shaping of the proper functioning of public administration. Over the years, the administrative court system has repeatedly dealt with cases of fundamental importance. This is because many legal obligations are of momentous social significance. One of them is compulsory vaccination of children, which has been a significant social problem for many years.

The operation of mandatory vaccination of children is based on administrative law. It follows that the courts competent to hear cases arising from the above-mentioned provisions are administrative courts. This is because, according to Article 1 (1) (1) of the Act of July 25, 2002 – Law on the organization of administrative courts,<sup>6</sup> administrative courts administer justice by controlling the activities of public administration and resolving disputes related to competence and jurisdiction between bodies of local and regional government units and local government appeals boards, as well as between those bodies and government administration bodies. However, it should be noted that the sanctions for refusal to undergo mandatory vaccination are contained in Article 115 of the Code of Misdemeanors.<sup>7</sup>

The jurisprudence of administrative courts concerns many aspects of the operation of mandatory vaccination of children in Poland. First and foremost, it focuses on adjudicating cases concerning the legal nature of the obligation to vaccinate, but also the legitimacy of imposing administrative fines. Administrative courts have also addressed the problem of the competence of public administration to supervise the proper implementation of mandatory vaccination. Interestingly, there are rulings in which the constitutional test of proportionality is explicitly made when “weighing” the legal interest that are in conflict in the performance of the obligation mentioned in the title.

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5 D. Malec, *Koncepcje organizacji sądownictwa administracyjnego w Polsce w latach 1918–2002. Uwagi historyka prawa*, “Krakowskie Studia z Historii Państwa i Prawa” 2004, vol. 1, pp. 281-295.

6 Consolidated text: the Journal of Laws 2022, item 329, as amended.

7 The Act of May 20, 1971 – the Code of Misdemeanors (consolidated text: the Journal of Laws 2021, item 2008, as amended).

## 1. The legal aspects of the operation of mandatory vaccination

The obligation of vaccinations is currently regulated by the Act of December 5, 2008 on the prevention and control of infections and infectious diseases in humans (hereinafter: Act).<sup>8</sup> The Act requires certain persons to take vaccinations against certain infectious diseases. In accordance with the regulation of the Minister of Health (hereinafter: Regulation) issued pursuant to the Act,<sup>9</sup> mandatory vaccinations against certain infectious diseases cover children and adolescents up to the age of 19, as well as adults in certain cases.<sup>10</sup> Mandatory vaccination covers a significant number of known infectious diseases.<sup>11</sup> For example, mandatory vaccination against diphtheria must be administered to children and adolescents from the age of 7 weeks to the age of 19, as well as to those having contact with diphtheria patients. Vaccination against tuberculosis, on the other hand, must be administered to children and adolescents from the day of birth until the age of 15.<sup>12</sup>

It should be added that a detailed vaccination schedule is issued by means of an announcement from the Chief Sanitary Inspector. As emphasized by the Supreme Administrative Court, *the determination of a detailed vaccination schedule, subject to medical considerations and epidemiological conditions, is not statutory matter, which justifies preserving in this field regulations adapted to medical needs in the form of an announcement promulgated by a specialized public administration body.*<sup>13</sup> Although the form of the announcement is not specified in the list of sources of generally applicable law, it should be noted that the direct legal basis for mandatory vaccination is found in the Act and the Regulation issued on its basis. In this regard, the reasoning of the Supreme Administrative Court should be accepted, all the more so because issues related

<sup>8</sup> Consolidated text: Journal of Laws 2021, item 2069, as amended.

<sup>9</sup> The Regulation of the Minister of Health of August 18, 2011 on the Compulsory Vaccination (consolidated text: the Journal of Laws 2018, item 753).

<sup>10</sup> The Regulation provides for mandatory hepatitis B vaccination for students of secondary medical schools and medical universities, among other persons. Mandatory vaccination against rabies is administered to persons who come into contact with an animal with rabies or suspected of being infected with the rabies virus, regardless of their age.

<sup>11</sup> According to sec. 2 of the Regulation, the following infectious diseases require mandatory vaccination: diphtheria tuberculosis, invasive infection with *Haemophilus influenzae* type b, invasive infection with *Streptococcus pneumoniae*, whooping cough (pertussis), parotitis (mumps), measles, chickenpox, acute poliomyelitis, rubella, tetanus, hepatitis B, and rabies.

<sup>12</sup> The full list of people obliged to take mandatory vaccination is contained in sec. 3 of the Regulation (subject to sec. 4 and 8 of the Regulation).

<sup>13</sup> The Judgment of the Supreme Administrative Court of November 21, 2019, file no. II OSK 43/18, LEX no. 2774685.

to the protection of the population from the spread of infectious diseases should be adapted to possible epidemic threats.<sup>14</sup>

Mandatory vaccination consists of two components: a medical qualifying examination and a vaccination. The two activities are closely related. Indeed, it is impossible to perform a vaccination without at first performing a medical qualifying examination for the person to be vaccinated, because, according to Article 17 (2) of the Act, the performance of a mandatory vaccination must be preceded by a medical qualifying examination to exclude contraindications to the mandatory vaccination.

The legal framework of mandatory vaccination seems clear and consistent at first glance. However, this system has numerous flaws, which are exploited by statutory representatives of children who object to their mandatory vaccination. They also benefit from the lengthy enforcement and judicial-administrative procedure related to the vaccination obligation with the goal of extending the time until the child is vaccinated (until a final administrative court decision is issued). This leads to an increasing trend of evasion of mandatory vaccination of children.<sup>15</sup>

## 2. Mandatory vaccination of children in the legal system

In administrative law, numerous obligations are imposed on obligated entities through administrative decisions. However, the authoritative creation of a citizen's situation by a public administration body does not have to be individual – specific. There are laws that establish certain obligations. This means that those obligations derive directly from the law and there is no need

<sup>14</sup> The literature points to the epidemiological effectiveness of vaccination when mass vaccinations are performed. (see: W. Magdzik, [in:] *Szczepienia ochronne*, eds. B. Dębiec, W. Magdzik, Warszawa 1991, p. 64.) It is extremely important to maintain the so-called herd immunity by constantly maintaining the highest possible vaccination rate against specific infectious diseases (for more information, see: J.T. Marcinkowski, Z. Konopielko, *Szczepienia ochronne*, [in:] *Przewodnik po rozległych obszarach higieny i epidemiologii. Kompendium*, eds. J.T. Marcinkowski, Z. Konopielko, Zielona Góra 2021, p. 135; E. Krawczyk, *Dlaczego się szczepimy? Wirusy, bakterie i epidemie*, Warszawa 2021, pp. 25-26).

<sup>15</sup> The alarming increase in the percentage of non-vaccinated children is presented in the statistics from the National Institute of Public Health – National Institute of Hygiene, Statistics Poland, and the Chief Sanitary Inspector. Comparing 2010 and 2020, the number of non-vaccinated children increased more than 14 times (from 3,437 cases of evasion in 2010 to 50,575 such cases in 2020). See: <https://stat.gov.pl/obszary-tematyczne/zdrowie/zdrowie/szczepienia-ochronne-dzieci-i-mlodziezy,19,1.html>, (20.06.2022); <https://www.gov.pl/web/gis/raport-stan-sanitarny-kraju>, (20.06.2022); <https://szczepienia.pzh.gov.pl/faq/jaka-jest-liczba-uchylen-szczepienobowiazkowych>, (20.06.2022).

to concretize them in the form of an administrative decision. This is because it would be pointless. Following the Supreme Administrative Court, it is appropriate to point out the pertinent statement that *the phrase “derive directly from a provision of the law” contained in Article 3 (1) of the Act on administrative enforcement proceedings must be understood to mean that the law defines all the essential features of a specific obligation, i.e. the entity on whom the obligation is imposed, the circumstances in which it is updated, and its scope. Thus, in such cases the legislator abstains from the introduction of a decision as a legal form of administrative action. In order for the obligation to pay a fine to be enforced, it is necessary to verify that the legal act contains the elements indicated above.*<sup>16</sup>

The obligations arising directly from the provisions of law include mandatory vaccinations. According to Article 17 (1) of the Act, the persons specified in the Regulation are required to be vaccinated against certain infectious diseases. Pursuant to Article 17 (1a) of the Act, persons residing in the territory of the Republic of Poland for less than three months are also exempt from mandatory vaccination, with the exception of post-exposure vaccinations.

Administrative courts have commented on this issue on several occasions and indicated a uniform interpretation of the legal nature of the obligation to get vaccinated. As early as in 2011, the Supreme Administrative Court aptly stated that due to the current shape of the legislation on mandatory vaccination, which gives rise by law to obligations to be vaccinated, the law does not provide a basis for issuing administrative decisions on the subject. It was also pointed out that the Act, *by imposing an obligation by law to undergo mandatory vaccination, does not introduce grounds for the State Sanitary Inspectorate to issue decisions in this regard.*<sup>17</sup> This implies the direct enforceability of the obligation in question.<sup>18</sup> This opinion has been repeatedly recognized in subsequent rulings by administrative courts.<sup>19</sup> These interpretations deserve to be approved, because there is no legal justification for the requirement to issue an administrative decision each time stating the existence of an obligation that follows directly from the provisions of the Act and the Regulation.

<sup>16</sup> The Judgment of the Supreme Administrative Court of January 29, 2010, file no. II FSK 1494/08, LEX no. 595803.

<sup>17</sup> The Judgment of the Supreme Administrative Court of April 6, 2011, file no. II OSK 32/11, LEX no. 852219.

<sup>18</sup> The Judgment of the Supreme Administrative Court of August 1, 2013, file no. II OSK 745/12, LEX no. 1360426.

<sup>19</sup> See for example: the Judgment of the Voivodeship Administrative Court in Bydgoszcz of November 4, 2015, file no. II SA/Bd 871/15, LEX no. 1948739; the Judgment of the Voivodeship Administrative Court in Warsaw of December 20, 2018, file no. II SA/Wa 1631/18, LEX no. 3074848; the Judgment of the Voivodeship Administrative Court in Warsaw of April 2, 2019, file no. VII SA/Wa 2073/18, LEX no. 3079831.

### 3. Elements of the vaccination obligation – still a current problem

A major problem that has arisen in the practice of application of regulations on mandatory vaccination is the structure of that obligation. According to Article 17 (2 and 3) of the Act, mandatory vaccination consists of two elements: a medical qualifying examination and a vaccination.<sup>20</sup> On more than one occasion, in order to avoid (in their mind) liability for a failure to vaccinate, statutory representatives who opposed mandatory vaccination have refused to allow a child to undergo a medical qualifying examination. This resulted in the inability to vaccinate the child due to the lack of a certificate issued after a medical qualifying examination. Complaints about the fines imposed on statutory representatives of children for failing to submit them to medical qualifying examinations have begun to be filed in administrative courts. According to statutory representatives, this examination is not part of the vaccination obligation.

In its judgment dated June 6, 2017, the Supreme Administrative Court indicated that the qualifying examination is the immanent part of the entire procedure for performing mandatory vaccination. This is because, according to Article 17 (2 and 3) of the Act, a mandatory vaccination must be preceded by a medical qualifying examination to rule out any contraindications to that mandatory vaccination, and a mandatory vaccination may not be performed if 24 hours have elapsed between the medical qualifying examination conducted to rule out any contraindications to the vaccination and that vaccination from the date and time indicated in the certificate of the qualifying examination. This means that the obligation to undergo mandatory vaccination includes not only the obligation to undergo the act of administration of the vaccine itself, but also all the other activities immanently linked to that act, including a qualifying examination.<sup>21</sup> The conclusion of the ruling is that such provisions of the Act and the Ordinance imply the interpretation that the obligation to undergo mandatory vaccination also implies the obligation to undergo a medical qualifying examination to exclude any contraindications to the mandatory vaccination pursuant to Article 17 (2) of the Act. At the same time, it should be emphasized that due to the need for such an examination immediately prior to a vaccination, the vaccination may not be performed in case of a refusal to undergo such an examination. The Supreme Administrative Court has also

<sup>20</sup> The issue of the medical qualifying examination is presented in more detail in: S. Czechowicz, *Lekarskie badanie kwalifikacyjne a realizacja obowiązkowych szczepień ochronnych dzieci w perspektywie odpowiedzialności z art. 115 Kodeksu wykroczeń*, "Zeszyty Prawnicze" 2021, vol. 21, no. 1, pp. 195-214.

<sup>21</sup> The Judgment of the Supreme Administrative Court of June 6, 2017, file no. II GSK 2398/15, LEX no. 2347675.

rightly pointed out that an objection to a medical qualifying examination of a child is in fact a refusal to undergo mandatory vaccination.

A similar opinion was expressed by the Regional Administrative Court in Warsaw, which stated that the performance of mandatory vaccination is to be preceded by a medical qualifying examination to exclude any contraindications to mandatory immunization. It follows from Article 17 (3 and 4) of the aforementioned act that the medical qualifying examination immediately precedes a vaccination. At the same time, the content of the aforementioned provisions cannot be interpreted the way as the the plaintiff does, namely, that the qualifying examination and its results regarding possible contraindications are the premise on which the obligation to undergo vaccination depends.<sup>22</sup> In another ruling, the Voivodeship (Provincial) Administrative Court in Warsaw further indicated that it cannot be successfully argued that the obligation to undergo mandatory vaccinations does not apply by pointing to a lack of a qualifying examination that arises solely from the failure to appear at the medical facility.<sup>23</sup> Thus, the medical qualifying examination is an element of the obligation to be vaccinated and not a prerequisite for that obligation. It should be noted that the prerequisites for the obligation to be vaccinated are age, contracted diseases or medical history, as well as contact with an infected person or infected animal.<sup>24</sup>

One must agree with the statement of the Voivodeship Administrative Court in Warsaw, which equated the failure of a child to undergo a medical qualifying examination with the evasion of the obligation to be vaccinated: *due to the requirement to undergo a medical qualifying examination to exclude any contraindications to mandatory vaccination immediately prior to the vaccination, the refusal to take part in it makes it impossible to perform the vaccination. It is therefore, in essence, a refusal to undergo the mandatory vaccination in the broad*

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<sup>22</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of March 18, 2020, file no. VII SA/Wa 2636/19, LEX no. 3078698. Also cf.: the Judgment of the Voivodeship Administrative Court in Warsaw of June 22, 2018, file no. VII SA/Wa 2734/17, LEX no. 2553306; the Judgment of the Voivodeship Administrative Court in Warsaw of February 10, 2017, file no. VII SA/Wa 819/16, LEX no. 2252052.

<sup>23</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of June 5, 2019, file no. VII SA/Wa 3100/18, LEX no. 2690434.

<sup>24</sup> The aforementioned Regulation of the Minister of Health on mandatory vaccination contains a catalog of the circumstances that determine the update of the vaccination obligation. The most common circumstance is the turning of a certain age, but there are other prerequisites. For example, the obligation to vaccinate against chickenpox covers children under 12 years of age with immunodeficiency with a high risk of severe disease, with acute lymphoblastic leukemia in remission, infected with HIV, prior to immunosuppressive treatment or chemotherapy, as well as children under 12 years of age from the surroundings of the persons specified in letter (a), who have not been ill with chickenpox, and children up to the age of 12, other than those listed in letters (a) and (b), residing in nursing and care facilities, among others.

sense.<sup>25</sup> This line of jurisprudence continues to apply.<sup>26</sup> In one of the most recent rulings on cases involving mandatory vaccination of children, the Supreme Administrative Court indicated that *a proper interpretation of Article 17 of the Act leads to the conclusion that the medical qualifying examination referred to in Article 17 (2) of the Act is an integral part of the procedure for conducting a mandatory vaccination. This is because this examination is an essential part of vaccination, without which the vaccination cannot be carried out. Its purpose is to determine whether a person's health allows him or her to be vaccinated. Consequently, enforcement of the obligation to be vaccinated also includes enforcement of the obligation to undergo a medical qualifying examination, which is inextricably linked to the child.*<sup>27</sup> The ruling also demonstrates the continuing relevance of the problem related to the correct understanding of the form of the obligation to be vaccinated. The line of jurisprudence in this regard reflects the arguments of statutory representatives who do not vaccinate their children, who file complaints with administrative courts based on similar arguments, despite the relatively clear statutory disposition in this regard.

It should also be emphasized that the implementation of the obligation to be vaccinated through a qualification of a child for vaccination is decided each time by the physician, after the medical qualification examination, *and not by the parent, who, due to his or her beliefs, opposes the vaccination during medically and epidemiologically justified periods.*<sup>28</sup> The cited ruling also addresses the frequent arguments of opponents of vaccination, such as the claims that they are “deprived” of their right to raise their children according to their own beliefs and that their right to personal freedom is restricted. These arguments are, of course, devoid of any legal grounds, but are used quite often.<sup>29</sup>

<sup>25</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of September 21, 2018, file no. VII SA/Wa 2874/17, LEX no. 2571952.

<sup>26</sup> This view was upheld, among others, in the Judgment of the Regional Administrative Court in Warsaw dated March 18, 2020, in which it was indicated that *the mere failure to appear for a qualifying examination should be treated as tantamount to a failure to comply with the obligation to undergo mandatory vaccination, providing grounds for administrative enforcement actions and the application of an enforcement measure in the form of a coercive fine.* (see: Judgment of the Voivodeship Administrative Court in Warsaw of March 18, 2020, file no. VII SA/Wa 2411/19, LEX no. 3072321).

<sup>27</sup> The Judgment of the Supreme Administrative Court of April 21, 2021, file no. II OSK 1986/18, LEX no. 3195276.

<sup>28</sup> The Judgment of the Supreme Administrative Court of April 21, 2021, file no. II OSK 1986/18, LEX no. 3195376.

<sup>29</sup> These arguments were raised, among others, in the citizens' bill aimed to amend the Act on the prevention and control of infections and infectious diseases in humans, which called for the abandonment of mandatory vaccinations in favor of voluntary ones. It was been pointed out that the reason for the bill was that the existing regulations harm the right to privacy and violate the principle of individual autonomy. According to the authors of the bill, mandatory vaccination also violates dignity, as, in their view, *dignity is taken away from both children and adults by forcibly subjecting*

#### 4. The nature of the administrative sanctions imposed in cases of evasion of mandatory vaccination of children

An issue that has repeatedly been resolved in administrative court proceedings is the nature of administrative sanctions imposed in the course of enforcement proceedings conducted after evasion of a mandatory vaccination of a child. One should bear in mind that in addition to administrative-law sanctions, there are also sanctions under the misdemeanors law.<sup>30</sup> The issue concerns the fundamental question of whether or not administrative sanctions are penalties for not vaccinating a child and, as such, end a certain stage of administrative proceedings.

Considering the already established aspects of the operation of mandatory vaccination of children, it should be noted that this is a directly enforceable obligation of a non-monetary nature. Importantly, the Act does not indicate administrative or criminal sanctions for non-vaccination. When mandatory vaccination is evaded, the obligation on the part of the public administration to initiate enforcement proceedings is updated. Thus, it is Article 119 (1) of the Act of June 17, 1966 on enforcement proceedings in administration<sup>31</sup> that specifies the sanctions that can be imposed in the event of evasion of an obligation of a non-monetary nature.<sup>32</sup> This provision stipulates that a coercive fine is imposed when the enforcement concerns the fulfillment by the obligee of an obligation to endure or omit, or the obligation to perform an action, and in particular an action that, due to its nature, cannot be performed by another person for the obligee. There is also a second group of sanctions provided for a failure to vaccinate a child. They are contained in Article 115 of the Code of Misdemeanors (hereinafter: CM). However, these sanctions can be imposed only after the application of administrative enforcement measures, when the subject continues to evade the mandatory vaccination of a child (Article 115 (2) of the CM).

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*them to the risk of loss of health and life as a result of vaccination.* See: Citizens' bill to amend the Act on the prevention and control of infections and infectious diseases in humans, Parliamentary Print no. 2796.

<sup>30</sup> The issue of the multiplicity of repressive sanctions for non-vaccination is discussed more broadly in: S. Czechowicz, *Problem wielości sankcji represyjnych za nieszczenie dziecka w perspektywie skutecznego wykonania obowiązku szczepień*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2021, vol. 81, no. 1, pp. 37-46. Also, see: R. Kubiak, *Konsekwencje administracyjne i karne stosowane wobec rodziców sprzeciwiających się obowiązkowym szczepieniom ochronnym*, [in:] *Zagadnienia prawa medycznego*, eds. A. Górski, E. Sarnacka, Warsaw 2018, pp. 95-107.

<sup>31</sup> Consolidated text: the Journal of Laws of 2022, item 479, as amended.

<sup>32</sup> The Supreme Administrative Court, among others, has ruled on the possibility of using this provision. See: the Judgment of the Supreme Administrative Court of November 21, 2019, file no. II OSK 3322/17, LEX no. 2774545.

The legal nature of administrative-law sanctions has been commented on in the jurisprudence of administrative courts. In 2016, the Voivodeship Administrative Court in Warsaw stated that an imposed fine does not constitute a penalty, but a form of coercion of the obliged entity to fulfill its obligation.<sup>33</sup> Thus, the penalties for non-vaccination are only a reprimand or a fine of up to PLN 1,500, imposed pursuant to Article 115 of the CM. Therefore, it is unfounded to claim that the sanctions enforced under the Act on enforcement proceedings in administration bear the characteristics of a penalty for not vaccinating a child. They are merely an economic form of coercing the obligated entity to perform an obligation of a legal nature.

## 5. Protection of the public health and the health of a child

The protection of life and health in individual and universal terms is a value that is most protected by law. This is strongly motivated constitutionally, first and foremost by Article 38 of the Constitution of the Republic of Poland,<sup>34</sup> which establishes the right to life. The provision of Article 68 (1) of the Constitution introduces the right to health care. It is understood as both a social right<sup>35</sup> and a subjective right.<sup>36</sup> Importantly, Article 68 (4) of the Constitution imposes an obligation on public authorities to combat epidemic diseases and prevent the negative health effects of environmental degradation. Mandatory vaccination is widely regarded as the most effective method of protection against the spread of infectious diseases. They are considered to play a key role in significantly reducing the incidence of many known infectious diseases.<sup>37</sup>

Administrative courts adjudicating in cases involving mandatory vaccination of children have repeatedly referred to these constitutionally protected values.

33 The Judgment of the Voivodeship Administrative Court in Warsaw of February 19, 2016, file no. VII SA/Wa 2537/15, LEX no. 2090334.

34 The Journal of Laws of 1997, no. 78, item 483.

35 For more information, see: A. Wołoszyn-Cichočka, *Konstytucyjny obowiązek zapewnienia szczególnej opieki zdrowotnej dzieciom, kobietom ciężarnym, osobom niepełnosprawnym i osobom w podeszłym wieku przez władze publiczne*, "Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia. Sectio G" 2017, vol. 64, no. 1, pp. 227-228; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 412.

36 In the jurisprudence of the Constitutional Tribunal, one can find the opinion that Article 68 of the Constitution grants every citizen the right to healthcare, and this right involves the obligation of public authorities to ensure equal access to publicly funded healthcare services. See: Judgment of the Constitutional Tribunal of December 7, 2005, file no. Kp 3/05, LEX no. 181609.

37 See for example: W.S. Zgliczyński, M. Jankowski, J. Pinkas, *Vaccine hesitancy i budowa zaufania do szczepień*, [in:] *Współczesne wyzwania zdrowia publicznego*, ed. J. Pinkas, Warsaw 2021, p. 135; R. Richards-Kortum, *Biomedical Engineering for Global Health*, Cambridge 2009, pp. 186ff; J. Wysocki, H. Czajka, *Szczepienia w pytaniach i odpowiedziach*, 6th ed., Cracow 2018, p. 49.

For example, we can cite the ruling of the Voivodeship Administrative Court in Warsaw, which clearly stated that *human freedom and the right to decide on one's personal life, protected by the Constitution of the Republic of Poland, are not of an absolute nature and are subject to relevant restrictions for reasons including the protection of health (Article 31 (3) of the Constitution of the Republic of Poland). According to Article 68 (1) of the Constitution, everyone has the right to healthcare and public authorities are obliged to provide special healthcare to children (Article 68 (3) of the Constitution). It requires no in-depth explanation that the obligation to vaccinate a child implements the above duties of the state to the individual and the society in general.*<sup>38</sup> The protection of human life and health from the spread of infectious diseases is of particular importance at the present time. Therefore, it is worth outlining the line of jurisprudence of administrative courts on this manner.

The Voivodeship Administrative Court in Lublin, in its judgment dated April 30, 2015, pointed to a very important aspect of the operation of the obligation to vaccinate children. In the ruling, the court emphasized that the obligation to vaccinate is regulated by law and is closely related to the prevention of the spread of infectious diseases among the people residing in the territory of the Republic of Poland. It was also pointed out that the prevention of epidemic diseases carried out in the form of vaccination is a constitutional obligation of public authorities pursuant to Article 68 (4) of the Constitution.<sup>39</sup> In this dimension, it is the protection of the public health of the society. In the individual dimension, on the other hand, it is the health of the child to be vaccinated. This is an equally important issue, as the legislature has been charged with the obligation to take special care of children's health (Article 68 (3) of the Polish Constitution). The protection of a child's health in the performance of mandatory vaccinations has been commented on by the Voivodeship Administrative Court in Gorzów Wielkopolski, which indicated that the provision on the requirement to perform a medical qualifying examination imposes a clear obligation on the medical facility to safeguard the child's health.<sup>40</sup>

<sup>38</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of March 21, 2019, file no. VII SA/Wa 2675/18, LEX no. 2657622.

<sup>39</sup> The Judgment of the Voivodeship Administrative Court in Lublin of April 30, 2015, file no. III SA/Lu 1028/14, LEX no. 1802088.

<sup>40</sup> The Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of December 14, 2011, file no. II SA/Go 773/11, LEX no. 1152630.

## 6. The welfare of a child and the performance of mandatory vaccinations

Administrative courts have also not shied away from invoking child welfare and the public interest in the enforcement of mandatory vaccinations. The Voivodeship Administrative Court in Warsaw correctly pointed out that it is parents are the ones responsible for the mandatory vaccination of their children, which complies with Article 95 (3) of the Family and Guardianship Code, which stipulates that parental authority should be exercised as the child's welfare and the public interest require. In this vein, the adjudicating panel reached the clearly accurate conclusion that *the protection of a child from contracting an infectious disease that can have serious health consequences for the child and the people in contact with the child is in the interest of the child and in the interest of the society*.<sup>41</sup> It should be noted that the welfare of a child is considered to be a certain complex of values of a tangible and intangible nature, which are necessary to ensure the proper physical and spiritual development of the child.<sup>42</sup> The welfare of a child is linked to the public interest. In addition, it is pointed out that the welfare of a child cannot be considered in isolation from the social interest.<sup>43</sup>

The Voivodeship Administrative Court in Warsaw went even further in its 2020 ruling, where the principle of a democratic law-abiding state was invoked: *in the realities of a democratic law-abiding state, both the welfare of a child and the public interest clearly require that the child's parents use the achievements of modern medicine in a manner that is free from ideological bias, and that they voluntarily allow vaccination of the child, among other things to avoid the use of coercion by state authorities for the performance of this obligation mandated by Article 5(1)(1)(b) of the Act on the prevention and control of infections and infectious diseases in humans, and at the same time to protect the rights of the child*.<sup>44</sup>

The aforementioned rulings indicate a special value of mandatory vaccination in the individual dimension. Administrative courts not only point to the need to protect public health and the health of children, but also consider the performance of mandatory vaccinations to be in the public interest and in accordance with the welfare of children. What deserves recognition is the

<sup>41</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of March 18, 2020, file no. VII SA/Wa 2636/19, LEX no. 3078698.

<sup>42</sup> W. Stojanowska, *Rozwód a dobro dziecka*, Warsaw 1979, pp. 11-14.

<sup>43</sup> J. Winiarz, *Rodzina w przepisach polskiego prawa*, [in:] *Rodzina i dziecko*, ed. M. Ziemska, Warsaw 1986, p. 460.

<sup>44</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of May 6, 2020, file no. VII SA/Wa 56/20, LEX no. 3078541. Also cf.: Judgment of the Voivodeship Administrative Court in Warsaw of June 5, 2019, file no. VII SA/Wa 3100/18, LEX no. 2690434.

fact that the rulings “go beyond” the rigid interpretation of the law and show the social background of the problem, which is the phenomenon of evasion of mandatory vaccination of children.

## 7. The right to consent or refuse to consent to a healthcare service

The conflict between the obligation to have a child vaccinated and the patient’s right to consent or refuse to consent to a health service is very controversial. This problem has often been the basis for the initiation of administrative-law proceedings, as children’s statutory representatives, citing Article 16 of the Act on patients’ rights and the Patients’ Ombudsman,<sup>45</sup> did not give their consent for the child to undergo a medical qualifying examination or a vaccination.

The Voivodeship Administrative Court in Lublin, in its judgment dated April 30, 2015, stated that the statutory obligation of vaccination means the inadmissibility of the use of the so-called conscience clause, i.e. the right of a patient to refuse to undergo a healthcare service by invoking Article 16 of the Act on patients’ rights and the Patient’s Ombudsman. This is because the patient’s right to consent to the provision of healthcare services or to refuse to give such consent, pursuant to that Act, is ruled out in cases where separate regulations provide otherwise (Article 15 of the Act) and thus, among other things, with respect to vaccinations that are mandatory pursuant to the Act on the prevention and control of infections and infectious diseases in humans.<sup>46</sup> An identical position was taken by the Voivodeship Administrative Court in Warsaw in 2018, when it considered the lack of consent to a medical qualifying examination and held that this is in fact a refusal to undergo mandatory vaccination that cannot be countered using Article 16 of the Act on patients’ rights.<sup>47</sup> A more categorical statement was made in the July 24, 2018 ruling, which stated that in the case of mandatory vaccinations, the obligation to undergo vaccination arises directly from the statute, so the consent of the vaccinated person, or his or her statutory representative, is unnecessary, and submission to vaccination constitutes the fulfillment of the statutory obligation.<sup>48</sup> In addition, administrative courts have considered the provisions of the Act of December 5, 2008 as a kind of *lex specialis* regarding the possibility of refusing to subject

<sup>45</sup> Consolidated text: the Journal of Laws of 2020, item 849, as amended.

<sup>46</sup> The Judgment of the Voivodeship Administrative Court in Lublin of April 30, 2015, file no. III SA/Lu 1028/14, LEX no. 1802088.

<sup>47</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of September 28, 2018, file no. VII SA/Wa 2983/17, LEX no. 2584268.

<sup>48</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of March 6, 2018, file no. VII SA/Wa 1988/17, LEX no. 2470936.

a child to mandatory vaccination, stating that this rules out the applicability of Article 16 of the Act on patients' rights and the Patients' Ombudsman.<sup>49</sup>

The cited rulings are an important contribution to the formation of the line of jurisprudence on the functioning of mandatory vaccination. It can be said that establishing the inadmissibility of the application of Article 16 of the Act on patients' rights and the Patients' Ombudsman is of key importance to the proper understanding of the relationship between the provisions stipulating the obligation to vaccinate and patients' rights.

## 8. The system of constitutional values and the proportionality test

An analysis of the case law of administrative courts on the mandatory vaccination of children has made it possible to highlight one more area. Namely, administrative courts have repeatedly performed a proportionality test based on the provisions of the Polish Constitution. In addition, the most recent cases concerning mandatory vaccination clearly indicate a deepening of those analyses, which may lead to doubts about the possibility of such in-depth interpretation of the constitutionality of the provisions of the Act.

The Voivodeship Administrative Court in Warsaw was very right to call the problems associated with mandatory vaccination "a clash of two interests: individual and society-wide." This reasonably implies, in the court's view, consideration of the principle of proportionality, which is one of the pillars of a democratic law-abiding state. The court therefore made an analysis that resulted in the conclusion that the existing vaccination obligation does not violate the essence of the rights it limits, and is therefore in compliance with Article 31 (3) of the Constitution of the Republic of Poland.<sup>50</sup> It is impossible to deny the rationality of this position, but it should be borne in mind that it is the Constitutional Tribunal that should rule on the compatibility of laws with the Polish Constitution. A similar conclusion was reached in 2020, when it was indicated that *the introduction of mandatory vaccinations in the Polish legal system meets the criteria for interference provided for by the statute and,*

<sup>49</sup> See: the Judgment of the Voivodeship Administrative Court in Warsaw of October 19, 2016, file no. VII SA/Wa 2542/15, LEX no. 2159952; the Judgment of the Voivodeship Administrative Court in Warsaw of July 24, 2018, file no. VII SA/Wa 2991/17, LEX no. 2572391; the Judgment of the Voivodeship Administrative Court in Warsaw of May 29, 2019, file no. VII SA/Wa 2484/18, LEX no. 3073873; the Judgment of the Voivodeship Administrative Court in Warsaw of February 20, 2020, file no. VII SA/Wa 2252/19, LEX no. 3072377; the Judgment of the Voivodeship Administrative Court in Warsaw of April 22, 2020, file no. VII SA/Wa 2835/19, LEX no. 3025610.

<sup>50</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of June 11, 2019, file no. VII SA/Wa 3092/18, LEX no. 30779590. Also cf.: the Judgment of the Voivodeship Administrative Court in Warsaw of October 23, 2019, file no. VII SA/Wa 1119/19, LEX no. 3073008.

moreover, necessary in a democratic society for the protection of health and of the rights and freedoms of others. The court also found a public interest in the health protection implemented through mandatory vaccination. This is a right claim that fits in with the aforementioned discourse of medical sciences on the effectiveness of and need for vaccinations.<sup>51</sup>

Another ruling stated that mandatory vaccinations violate the right to personal freedom as expressed in the scope regulated by Article 16 of the Act on patients' rights and the Patients' Ombudsman.<sup>52</sup> Administrative courts have also made references to the Convention for the Protection of Human Rights and Fundamental Freedoms, stating that there was no violation of its Article 8 (1). What is more, in the same ruling, the administrative court examined the compatibility of regulations concerning compulsory vaccination of children with Articles 8 (2) and 31 (2) of the Constitution of the Republic of Poland and showed that, in the opinion of this court, there was no violation of those provisions. The question arises again as to whether the administrative court could consider the compatibility of the Act with the Constitution so categorically. Nevertheless, one should consider as reasonable the court's assertion that *the compulsoriness of vaccination concerns the sphere in the dimension of the whole society and is aimed at protecting all those staying in the territory of the Republic of Poland from the existing dangers (internal and external)*. The obligation to vaccinate cannot be challenged by invoking the constitutional principle of citizens' freedom. In accordance with *Article 31 (3) of the Constitution of the Republic of Poland, restrictions on the exercise of constitutional freedoms and rights may be established only by a statute and only if they are necessary in a democratic state for, among other things, the protection of health or the freedoms and rights of others. These restrictions must not affect the essence of freedoms and rights. In the case at hand, it is not disputed, and moreover, in the jurisprudence of administrative courts it has been repeatedly indicated that the obligation to vaccinate arises directly from the statute. In addition, the legislature has provided for an appropriate mechanism prior to the vaccination, i.e. a qualifying examination to determine whether there are any contraindications to vaccination in an individual case. Therefore, it does not appear that this type of solution would lead to a violation of rights and freedoms.*<sup>53</sup>

<sup>51</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of March 18, 2020, file no. VII SA/Wa 2410/19, LEX no. 3072249.

<sup>52</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of April 17, 2018, file no. VII SA/Wa 2274/17, LEX no. 2500697.

<sup>53</sup> The Judgment of the Voivodeship Administrative Court in Warsaw of September 28, 2018, file no. VII SA/Wa 2983/17, LEX no. 2584268. Also cf.: Judgment of the Supreme Administrative Court of April 21, 2021, file no. II OSK 1986/18, LEX no. 3195376.

It is also interesting to note the line of jurisprudence that was forming in the year 2022. Administrative courts place an even stronger emphasis on the constitutionally protected values and carry out a much more extensive examination of the compliance of the provision of the Act with the Constitution. It is worth citing some recent rulings of the Supreme Administrative Court. Chronologically, the first are the rulings issued on February 17, 2022. They pointed out that *from Article 68 (4) of the Constitution of the Republic of Poland arises the obligation of public authorities to combat epidemic diseases and prevent the negative health effects of environmental degradation. This obligation is not in conflict with respect for the private and family life of the individual, and therefore the matter of vaccination is not in any relation with the sphere of privacy of the individual. Moreover, the lack of legal regulation concerning a compensation system does not provide grounds for the allegation of a violation of the above-mentioned constitutional provisions and the Convention.*<sup>54</sup> A similar statement was made in the second ruling, but what is noteworthy is the fact that the Supreme Administrative Court also referred to the ruling of the European Court of Human Rights of April 8, 2021<sup>55</sup> in a case against the Czech Republic, in which the complaint concerned the examination of possible violations of the Convention in the implementation of mandatory vaccination in the Czech Republic.<sup>56</sup>

The currently most recent ruling of the Supreme Administrative Court on mandatory vaccination is in line with the current line of jurisprudence. A very strong emphasis on the evaluation of the constitutionality of the obligation by performing the proportionality test (Article 31(2) of the Constitution) can be seen. It is pointed out explicitly that the obligation to carry out vaccination *is not in conflict with respect for the private and family life of the individual, and therefore the matter of vaccination is not in any relation with the sphere of privacy of the individual.* Also, reference was made to Article 83 of the Constitution, which imposes the obligation to abide by the laws of the Republic of Poland.<sup>57</sup>

A growing focus on the interpretation of mandatory vaccination through the lens of constitutional values is taking shape in recent case law of administrative courts. Of course, this follows indirectly from the arguments of the parties to the litigation, which need to be referred to, but one must bear in mind that administrative courts are not competent to resolve constitutional disputes.

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<sup>54</sup> The Judgment of the Supreme Administrative Court of February 17, 2022, file no. II OSK 1817/19, LEX no. 333934.

<sup>55</sup> The Judgment of the European Court of Human Rights of April 8, 2021, file no. 476221/13.

<sup>56</sup> The Judgment of the Supreme Administrative Court of February 17, 2022, file no. II OSK 1087/19, LEX no. 3333736.

<sup>57</sup> The Judgment of the Supreme Administrative Court of April 26, 2022, file no. II OSK 1761/19, LEX no. 3343266.

Invoking constitutionally protected values is reasonable, since the nature of the obligation to vaccinate implies its social character, and the need to maintain high vaccination rates has been pointed out by representatives of medical sciences. Therefore, the direction of the changes in the line of jurisprudence towards social values that are protected by mandatory vaccination should be considered as desirable. However, this must not take the form of a categorical examination of compliance with the Constitution.

## **Conclusion**

Infectious diseases have been a very serious threat to human life and health for centuries. Advances in medical sciences have made it possible to develop a number of effective vaccines against infectious diseases (e.g., against measles and tuberculosis). Therefore, steps should be taken to effectively implement mandatory vaccination against diseases that are already known. The Polish legal system provides for mandatory and recommended vaccinations. The former have been a social and legal problem for years due to the growing upward trend in terms of the number of children not receiving mandatory vaccinations. As a result, administrative enforcement proceedings are initiated to bring about compliance with the obligation to vaccinate a child, which involve imposing coercive fines. However, the imprecise legal system that governs the operation of mandatory vaccination of children results in the use of numerous arguments and legal loops in administrative court proceedings.

In recent years, the number of cases pending before administrative courts regarding mandatory vaccination of children has significantly increased. Arguments are raised about the need to issue an administrative decision each time, as well as the unconstitutionality of mandatory vaccination. Administrative courts have repeatedly responded to various lines of argument. It was stated that mandatory vaccinations directly result from the principles of law and, therefore, there is no need to concretize the obligation by issuing an administrative decision of an individual-specific nature. It was also pointed out that the obligation to vaccinate is in fact composed of two parts: a medical qualifying examination and the act of vaccination. The two elements are closely related and constitutive. Evasion of the medical qualifying examination for a child is in fact the evasion of the obligation to vaccinate.

In their rulings, administrative courts have also referred to the constitutionally protected values, in particular the legal interests of the highest importance, which are life and health in the individual (the health of a child) and universal (public health) dimensions. Particularly in recent case law, one can see an emerging line directed at examining the compliance of the regulations concerning mandatory vaccination of children with the Constitution. On

the one hand, the rulings of administrative courts should be considered as correct, because mandatory vaccination, by its very nature and due to its social importance, should be considered as holistically as possible. On the other hand, however, it should be noted that administrative courts should not examine the compliance of laws with the Constitution.

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**SUMMARY****The Administrative Court System in the Face of Non-Vaccination of Children. Challenges and Prospects for the (Still) Emerging Line of Jurisprudence**

Mandatory vaccination of children is a lively and current subject of the social and legal discourse. The observed increase in the percentage of non-vaccinated children justifies questions about the proper functioning of the mandatory vaccination system in Poland. The current advances in medical sciences have made it possible to develop effective vaccines against many infectious diseases (e.g., against measles and tuberculosis). Therefore, steps should be taken to effectively implement mandatory vaccination against diseases that are already known. From the legal standpoint, it is a matter of properly shaping the system of mandatory vaccination, as well as granting to state authorities the right to impose appropriate repressive sanctions to ensure the effective fulfillment of this obligation. The evasion of mandatory vaccination of children by their statutory representatives is motivated by many factors and implies the use of multiple legal grounds for not subjecting a child to mandatory vaccination for as long as possible. Many cases are adjudicated by administrative courts, which in recent years have had to answer fundamental legal questions. The course of the discussion presented herein led to creating a list of the rulings of administrative courts, which concerned the determination of whether the obligation to vaccinate arises directly from the law and there is no need to concretize it in an administrative decision. In addition, rulings clarifying the legal nature of the imposed administrative fines which are not penalties for non-vaccination, but an economic measure to compel compliance with the obligation, were analyzed. An analysis was also performed of the most recent case law of administrative courts concerning the operation of mandatory vaccination of children, in which the adjudicating panels pointed to the constitutionally protected values in the performance of that obligation, namely the health of the child and public health. The need to act in accordance with the public

interest and with the principle of the welfare of the child when subjecting children to mandatory vaccinations was also emphasized. The accumulated case law of administrative courts has made it possible to identify the main areas of jurisprudential activity in the operation of mandatory vaccination of children. Most importantly, the doubts arising from the practice of the application of the regulations that shape the said obligation were clarified. In addition, in recent rulings, an increasing emphasis has been made on constitutionally protected values, especially public health, but also the health of children. This is a new element in the line of jurisprudence of administrative courts, which seems to be constantly evolving.