

Compulsive medical acts and duty to inform: the Portuguese perspective

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ABSTRACT: In principle, informed consent is a condition of practising medical acts. However, it is arguable if this concept should be applied to persons in an emergency state and persons with infectious diseases under Portuguese law. This article gives a positive answer. In particular cases, the Portuguese legal framework allows situations where consent is not needed when applying compulsive medical acts to specific groups of persons. Nonetheless, this article defends the necessity of the duty to inform before or after compulsive medical actions. This point of view is based on the reasoning that such a duty is not intended to obtain consent and respect patients' autonomy but to respect other fundamental rights regulated in the Portuguese Constitution, such as access to personal data or the right to information.

KEYWORDS: Compulsive medical act; informed consent; duty to inform; right to information; Portugal

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1. Introduction

Medical acts have a broad scope under Portuguese law, especially according to article 9 of the Decree-Law n. 176/2009¹ and Decree-Law n. 177/2009.² It is a common understanding that, in principle, informed consent should be applied before medical acts, except in situations where informed consent is not required, like urgent situations, therapeutic privilege and exercise of the right

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¹ The Decree-Law n. 176/2009, 4 august, at <https://dre.pt/dre/detalhe/decreto-lei/176-2009-493009> (last visited 18/12/2022).

² The Decree-Law n. 177/2009, 4 august, at <https://dre.pt/dre/detalhe/decreto-lei/177-2009-493010> (last visited 18/12/2022). Regarding the definition, see also article 6 of Regulation n. 698/2019, 5 September, at <https://dre.tretas.org/dre/3842145/regulamento-698-2019-de-5-de-setembro> (last visited 18/12/2022).

not to know. Informed consent, whose compliance requires duties to inform, clarify and obtain consent,³ protects patients' autonomy, resulting from a multidimensional fundamental right that refers to personality, regulated in the Constitution of the Portuguese Republic (CPR).⁴

As applying informed consent can be arguable to specific groups of persons in Portugal, such as persons in an emergency state and persons with infectious diseases, this article will clarify why informed consent should be applied to these persons. Another issue on which this article will focus refers to other groups of persons to whom compulsive medical acts can be used, like persons with psychic anomalies, prisoners and workers in activities with life, health, integrity and safety at risk, to emphasise that healthcare professionals have no duty to obtain consent from them. Finally, even though consent is not required when applying compulsive medical acts, this article will defend the necessity of the duty to inform, not based on the doctrine of informed consent, but on other reasoning, especially on protecting other fundamental rights, such as the right of access to personal data or the right to information.

2. Medical acts and informed consent

In principle, obtaining informed consent before medical acts is an ethical or legal duty of healthcare professionals, except occurring exceptional situations. Such a duty is required in most countries, either in the Common Law legal system or the Civil Law legal system. In Portugal, this is the case as well.⁵ Nonetheless, applying informed consent to specific persons can be questionable in this country, like persons in a declared emergency state and persons with infectious diseases. It is essential to clarify the (un)necessity of applying informed consent in these situations.

2.1. Persons in an emergency state

In Portugal, states of exception include siege state and emergency state (article 1, Law n. 44/86)⁶ and can suspend the exercise of certain fundamental rights (article 19, CPR). The emergency state can be declared only in less difficult situations, namely in public calamity (article 9/n1, Law 44/86), in which the exercise of certain rights, freedoms and guarantees can be suspended (article 19/n1, CPR; article 9/n2, Law n. 44/86). Portuguese law expressly defines the rights and freedoms that cannot be suspended in a siege or emergency state. They refer to «the rights to life, to personal integrity, to personal

³ Regarding the requirement of these duties, see Entidade Reguladora da Saúde, *Consentimento Informado – Relatório Final*, 2009, 3, at https://www.ers.pt/uploads/writer_file/document/73/Estudo-CI.pdf (last visited 13/12/2022); M. J. ESTORNINHO, T. MACIEIRINHA, *Direito da Saúde*, Lisbon, 273-274; V. R. RAPOSO, *Do ato médico ao problema jurídico: breves notas sobre o acolhimento da responsabilidade médica civil e criminal na jurisprudência nacional*, 2014, Coimbra, 220.

⁴ CPR, at https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=4&tabela=leis (last visited 22/03/2022).

⁵ Regarding the doctrine of informed consent in Portugal, see, for instance, Entidade Reguladora da Saúde, *Consentimento Informado – Relatório Final*, *op. cit.*; V. R. RAPOSO, *Do ato médico ao problema jurídico: breves notas sobre o acolhimento da responsabilidade médica civil e criminal na jurisprudência nacional*, *op. cit.*, 213-248; M. J. ESTORNINHO, T. MACIEIRINHA, *Direito da Saúde*, *op. cit.*, 269-276; A. G. D. PEREIRA, *Direitos dos Pacientes e Responsabilidade Médica*, Coimbra, 2015, 397-599.

⁶ The Law n. 44/86, 30 September, at <https://bit.ly/3K3bBf0> (last visited at 09/04/2022).

identity, to civil capacity and citizenship, the non-retroactivity of criminal law, the defendant's right to defence and the freedom of conscience and religion» (article 19/n6, CRP; article 2/n1, Law n. 44/86). Considering that a compulsive hospitalisation implies a restriction of a constitutional right that can be suspended, namely a limitation of the right to freedom, it can be imposed in public calamity based on which an emergency state is declared. This was the case when the Portuguese President declared an emergency between 19 March 2020 and 2 April 2020, facing the COVID-19 disease seriously affecting the territory, based on the Decree of the Republic President n. 14-A/2020, 18 march.⁷ According to this legal document, one of the constitutional rights that can be suspended refers to the "right to move and settle in any part of the national territory", including, among others, "compulsory confinement at home or in a health facility" [article 4/a), Decree of Republic President n. 14-A/2020]. The Decree n. 2-A/2020, 20 march,⁸ a legal document with a lower level under the hierarchy of laws, regulates in detail the execution of such a declaration of emergency state. In line with article 3/n1 of this Decree, compulsory confinement in a health establishment or at home can be imposed on patients with COVID-19, persons infected with SARS-Cov2 and citizens under active surveillance. Consequently, the legal interest of public health prevails over the individual right to liberty in public calamity.

However, compulsory confinement at home or in a health establishment does not mean the application of compulsive medical acts. Patients with COVID-19 or persons infected with SARS-Cov2 have no duty to be subject to medical acts under compulsory confinement. In this regard, informed consent should be applied⁹ to protect their auto-decision in healthcare issues. This idea is reasonable and corresponds to the principles of proportionality and adequacy regulated by article 3/n1¹⁰ of the Law n. 44/86, 30 September. Compulsive medical treatments should not be imposed if the legal interest of public health can be protected by compulsory confinement, namely by limitation of the right to freedom. It means compulsive medical treatments, as a restriction or suspension of autonomy, are not a proportional, adequate or even necessary measure to protect public health. That is to say, patients with COVID-19 or persons infected with SARS-Cov2 can reject any treatment under compulsory confinement.

Accordingly, even though compulsory confinement at home or in a health establishment can be applied in an emergency state when facing an infectious disease that can cause public calamity, informed consent should always be applied before the intervention of medical acts.

2.2. Persons with infectious diseases

Another questionable situation refers to persons with infectious diseases (such as COVID-19 and SARS-Cov2) but not in an emergency state. Regarding the mentioned persons, it is essential to know if they should be subject to compulsive hospitalisation or/and compulsive medical treatments.

⁷ The Decree of Republic President n. 14-A/2020, 18 march, at <https://bit.ly/3FQcHIF> (last visited at 11/04/2022).

⁸ The Decree n. 2-A/2020, 20 march, at <https://dre.pt/dre/detalhe/decreto/2-a-2020-130473161> (last visited 11/04/2022).

⁹ A. G. D. PEREIRA, *Sida, Txicodependência e Esquizofrenia: Estudo Jurídico sobre o Internamento Compulsivo*, in *Internamento Compulsivo*, 2016, 141.

¹⁰ article 3/n1 of the Law 44/86, 30 September provides that "The suspension or restriction of rights, freedoms and guarantees [...] must be limited to what is strictly necessary for the prompt restoration of normality, especially in terms of its extension, duration and means used".

Compulsive hospitalisation implies a limitation of the right to freedom. In Portugal, this measure only can be applied to persons with psychic anomalies according to the Portuguese Constitution [article 27/n3/h), CPR]. However, this point can be criticised. Suppose compulsive hospitalisation is intended to protect the personal or patrimonial legal interests of hospitalised persons or others. It should be applied when the same or relevant legal interests must be protected in other situations, like the public health or personal legal interest of persons with infectious diseases.¹¹ In other words, the Portuguese Constitution should have included more cases in which compulsive hospitalisation can be applied.

Regarding compulsive medical treatments for persons with infectious diseases, we are facing a classical divergence: should we apply compulsive medical treatments to them to protect their physical integrity or allow them to decide the application of medical treatments? This is a question of human dignity. Should we understand human dignity as protection or as autonomy? In this regard, two fundamental rights conflict: (1) physical integrity or life; (2) auto-determination.¹² Following the position of European legal systems, Portugal considers human dignity as autonomy.¹³ It is to say that informed consent should be applied before the intervention of medical treatments for persons with infectious diseases.

3. Compulsive medical acts

Even though obtaining consent before medical acts is a common understanding, there are some situations in which medical acts can be compulsively applied without consent, such as for persons with psychic anomalies (article 11/n3 and article 33/n1 and n2, Law n. 36/98, 24 July), prisoners (article 35/n2 and n3, Law n. 115/2009, 12 October) and workers in activities with life, health, integrity or safety at risk (article 19/n1/second part, Law n. 7/2009, 12 February).

3.1. Persons with psychic anomalies

The first situation that involves compulsive medical acts refers to the one in which persons with psychic anomalies are involved. The Mental Health Law (Law n. 36/98, 24 July)¹⁴ “establishes the general principles of mental health policy and regulates the compulsive hospitalisation of people with mental disorders, namely people with mental illness” (article 1, Law n. 36/98). It determines the conditions of applying compulsive hospitalisation and treatments.

¹¹ Exceptionally follow this position, applying compulsive hospitalisation to persons with pulmonary tuberculosis, see Judgment of the Porto Court of Appeal of 6 February 2002, Process n. 0110232 (Marques Salgueiro), 06/02/2002, at <http://www.dgsi.pt/jtrp.nsf/0/bb2d8a8cb57b4d9380256bc800396446> (last visited 14/12/2022); Judgement of the Porto Court of Appeal of 12 December 2022, Process n. 0514697 (Élia São Pedro), at <http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/c4c0347dfa5f1a2f80257103003c591b> (last visited 14/12/2022).

¹² Regarding this point, M. T. LONG, *Directivas Antecipadas de Vontade: um regime existente em Macau?*, Macao, 2017, 15.

¹³ V. L. RAPOSO, *Directivas Antecipadas de Vontade: em busca da lei perdida*, in *Revista do Ministério Público*, janeiro/março, 2011, 208; V. L. RAPOSO, *The right to say yes and the right to say no*, 2014, Conference paper, 8.

¹⁴ Law n. 36/98, 24 July, at <https://bit.ly/3TJ7MyP> (last visited 22/03/2022).

Before it entered into force, Law n. 2118, 3 March 1963,¹⁵ had been regulating the Portuguese mental health system for over three decades and playing an essential role in promoting mental health in this country. According to this Law, an authorisation of the direction of mental health centres was enough to restrict the right to freedom through compulsive hospitalisation of patients and their subjection to compulsive outpatient treatments (Base X/d, Law n. 2118). However, with the implementation of the Portuguese Constitution on 25 April 1976, the right to freedom, as a fundamental right, can be restricted only after a court decision and in the exceptional situations expressly mentioned by the CPR (article 27/n3, CPR). In this context, the judicial intervention has been a necessary element for the compulsive hospitalisation of a person with a psychic anomaly. Therefore, Law n. 2118, 3 March 1963, was considered inappropriate due to a conflict with the mentioned fundamental right when applying compulsive hospitalisation.¹⁶

This is the reason why the current Mental Health Law replaced it and defines compulsive hospitalisation as “hospitalisation by judicial decision of the patient with severe psychic anomaly” [article 7/a), Law n. 36/98]. This replacement is intended to fulfil article 27/n3/h) of the CPR, which refers to one of the exceptional situations that allow deprivation of liberty, namely a “Hospitalisation of a person with a psychic anomaly in an appropriate therapeutic establishment, decreed or confirmed by the competent judicial authority”.¹⁷ In other words, nowadays, a court decision is necessary to restrict the right to freedom via compulsive hospitalisation,¹⁸ unlike the previous situation where the said restriction could result from a mere decision of the direction of mental health centres. Even though the Portuguese Parliament is currently discussing a new draft proposal for a mental health law (Draft Law No. 24/XV/1, presented on 22 July 2022),¹⁹ this draft law does not change the relevant principle that requires court intervention.

To apply compulsive hospitalisation, certain conditions should be met according to article 12/n1 of Law 36/98. The first condition refers to a severe psychic anomaly. Although doctors are exclusively responsible for diagnosing the disease or disorder that can be part of the concept of psychic anomaly,²⁰ the assessment of its severity arises from a court decision.²¹ The second condition alludes to a causal link between the disabling psychic state and the situation of danger for the personal or patrimonial

¹⁵ Law n. 2118, 3 March 1963, at <https://dre.tretas.org/dre/94657/lei-2118-de-3-de-abril> (last visited 22/03/2022).

¹⁶ M. XAVIER, A. CARVALHO, *Internamento Compulsivo em Portugal – Contexto e Procedimentos*, 1, at https://www.dgs.pt/accao-de-saude-para-criancas-e-jovens-em-risco/ficheiros-externos/anexo_07_internamento_compulsivo-pdf.aspx (last visited 20/03/2022).

¹⁷ This exception was introduced in 1997 by Constitutional Law n. 1/97, 20th September.

¹⁸ However, the court decision should be consistent with medical opinion. If a medical opinion is against it, the court cannot decide to apply compulsive hospitalisation. Regarding this point, see Judgment of the Lisbon Court of Appeal, Process n. 4908/18.9TBOER.L1-3 (Cristina de Almeida e Sousa), 23/09/2020, at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/fbd143e2d05f3b6380258606002d56fb?OpenDocument> (last visited 23/03/2022).

¹⁹ Draft Law No 24/XV/1, at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=141788> (last visited 21/03/2023).

²⁰ M. S. ALMEIDA, *Internamento compulsivo de doentes portadores de anomalia psíquica grave: dificuldades e constrangimentos do tribunal*, in *Internamento Compulsivo*, Centro de Estudos Judiciários, Lisbon, 2016, 31.

²¹ Judgment of the Lisbon Court of Appeal, Process n. 4908/18.9TBOER.L1-3 (Cristina de Almeida e Sousa), 23/09/2020, *op. cit.*

legal interests of a hospitalised person or others. The danger mentioned here must be concrete, current and imminent in case of urgent hospitalisation.²² The last condition involves a refusal to undergo necessary medical treatment. Once the mentioned conditions have been met, the hospitalised person has a special duty to undergo medically proposed treatments, except for psychosurgical intervention²³ (article 11/n3 and article 5/n2, Law n. 36/98). Nevertheless, all restrictions on fundamental rights arising from compulsive hospitalisation, such as a restriction on the right to freedom, are those strictly necessary and adequate for the effectiveness of treatments, in addition to the safety and normality of hospital (article 8/n4, Law n. 36/98). Besides, hospitalisation ends when the conditions that gave rise to it disappear (article 34/n1, Law n. 36/98).

Despite that, compulsive treatments can be applied not only in compulsive hospitalisation but also in situations where a person with a psychic anomaly is not hospitalised. In principle, outpatient compulsive treatments, whenever possible, must replace compulsive hospitalisation (article 8/n3, Law n. 36/98). The Portuguese law clearly states that outpatient compulsive treatments should be the first choice for persons with a psychic anomaly. The Portuguese courts have understood that the fact that a hospitalised person is discharged from the hospital only means that there is no need for the treatments to take place on an inpatient basis, not that medical treatments are no longer necessary.²⁴ An inpatient basis refers to a concrete and current danger to the personal or patrimonial legal interests of hospitalised persons or others. If the mentioned danger disappears, outpatient compulsive treatments should be applied rather than compulsive hospitalisation. In this regard, the replacement depends on an express acceptance of the hospitalised person and conditions set by the attending psychiatrist for outpatient treatment (article 33/n1 and n2, Law n. 36/98). In case of incompliance with the established requirements, the attending psychiatrist communicates to the competent court to resume the compulsive hospitalisation (article 33/n4, Law n. 36/98). This mechanism has two purposes: curing the person with mental illness and protecting society.²⁵

Mental health care, either inpatient or outpatient compulsive treatment, is provided by institutions of the National Health Services and by private or social sector entities (article 3/n1, Decree-Law n. 113/2021, 14 December).²⁶ This means that according to the organization and operation of mental health services, a person with a psychic anomaly can receive mental health care not only in hospitals or psychiatric hospital centres but also in local or regional health services (article 14 and its following

²² *Ibidem*.

²³ In this exception, the medical intervention always requires the prior written consent of the hospitalised person and a favourable written opinion of two psychiatrists appointed by the National Mental Health Council (article 5/n2, Law n. 36/98).

²⁴ Judgment of the Coimbra Court of Appeal, Process n. 5712/15.1T8CBR-A.C1 (Fernando Chaves), 02/12/2015, at <https://bit.ly/3TELD4L> (last visited 24/03/2022).

²⁵ Judgment of the Coimbra Court of Appeal, Process n. 122/17.9T8TND.C1 (Inácio Monteiro), 11/10/2017, at <http://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/43bbb4548c0eb382802581bb00524da8?OpenDocument> (last visited 24/03/2022).

²⁶ The Decree-Law n. 113/2021, 14 December, at https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=&nid=3486&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo (last visited 21/03/2023). The legal document establishes the general principles and rules for the organisation and operation of mental health services, embracing some innovative aspects, compared with the revoked Decree-Law n. 35/99, 5 February (the antecedent of the Decree-Law n. 113/2021).

dispositions, Decree-Law n. 113/2021). This is an advantage for mental disorder patients who want to receive mental health care near their home or the place that facilitates relatives' visiting.

From what has been exposed, in certain situations, patients with mental illness have a special duty to undergo inpatient or outpatient compulsive treatments following the Mental Health Law. In other words, healthcare professionals are not obligated to obtain their consent in these situations.

3.2. Prisoners

Compulsive medical acts can be applied under the Code of Implementation of Penalties and Measures regarding Deprivation of Liberty (Law n. 115/2009, 12 October).²⁷ In principle, medical interventions or treatments cannot be coercively imposed on a prisoner except in situations regulated by article 35 of the Law n. 115/2009 or according to law. It means compulsive medical interventions or treatments exist in exceptional cases expressly handled by the referred article or other legal documents.

It should be emphasised that, contrary to the situations of persons with psychic anomalies where compulsive hospitalisation or compulsive medical treatments require the intervention of a court decision, this requirement does not exist when applying compulsive medical acts to prisoners, given that the prisoners' freedom has been limited. The application of compulsive medical acts to prisoners is not the reason for affecting the right to freedom regulated in article 27/n3 of the CPR.

Therefore, prisoners have to undergo compulsive medical treatments in situations with danger to the life or the body and health of the prisoner, who does not have the necessary judgement to access the meaning and scope of refusal of treatments or other people (article 35/n2 and n3, Law n. 115/2009). It is clear that the application of compulsive medical treatments guarantees prison security and protects prisoners if they lack the necessary judgement to make a reasonable decision regarding medical treatments.

3.3. Workers in activities with life, health, integrity or safety at risk

The compulsive medical acts that the Labour Code (Law n. 7/2009, 12 February)²⁸ regulates refer to medical tests or examinations. Article 19/n1 of the Labour Code clearly states that, in principle, employers cannot require job applicants or workers to carry out or submit medical tests or examinations proving physical or psychological conditions for admission or permanence in the job. This protects two fundamental rights, namely the right to moral or physical integrity (article 25, CPR) and the right to reserve the privacy of private life (article 26/n1, CRP) of job applicants or workers.²⁹

Nonetheless, this is not an absolute rule, and exceptional situations are acceptable if three conditions are fulfilled (article 19/n1/second part, Labour Code). The limits to the general principle aim to protect the public interest or other fundamental rights protected by the CPR, such as the physical integrity of

²⁷ The Law n. 115/2009, 12 October, at <https://bit.ly/3LNGkhg> (last visited 24/03/2022).

²⁸ The Labour Code (Law n. 7/2009, 12 February), at https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=1&artigo_id=&nid=1047&pagina=1&tabela=leis&nversao=&so_miolo= (last visited 30/03/2022).

²⁹ P. R. MARTINEZ, L. M. MONTEIRO, J. VASCONCELOS, P. M. BRITO, G. DRAY, L. G. SILVA, *Código do Trabalho Anotado*, Lisbon, 2017, 160. Regarding the second fundamental right, D. V. Marecos, *Código do Trabalho Comentado*, Lisbon, 2017, 130.

the workers or others.³⁰ The first condition refers to the protection and safety of workers or others that the medical tests or examinations are intended for or to particular requirements inherent to the activity.³¹ The activity can involve, among others, the one in which control of alcoholism or psychotropic substances is necessary, especially regarding the workers that may put their own life, health, integrity or safety at risk or that of others (for instance, regarding the workers that drive vehicles, operate machinery or equipment, handle explosives or engage in hazardous activities).³² Secondly, employers should provide in writing to job applicants or workers the reasons for carrying out or submitting medical tests or examinations.³³ Finally, an intervention of a doctor is required.³⁴

In this regard, especially concerning the promotion of safety and health at work, the Labour Code, in its article 284, requires specific legislation that refers to the Legal Regime for the Promotion of Safety and Health at Work (Law n. 102/2009, 10 September). According to this law, there are three types of medical examinations (article 108/n3/, Law n. 102/2009). The first one is an admission examination, which should be carried out before starting work or, in case of a justification of urgent admission, within 15 days after beginning employment. The second type refers to a periodic examination, which should be done annually for minors or elderly workers over 50 and every two years for other workers. The third one involves a non-periodic examination in case of substantial changes in the material components of work or returns to work after 30 days due to illness or accident.

In summary, a worker engaging in activities that can put life, health, integrity or safety at risk must be subject to compulsive medical acts like medical tests or examinations. It should be emphasised that even though healthcare professionals still ask for workers' consent to execute medical tests or examinations, the compulsive nature of these medical acts comes from labour law requiring workers the duty to be subject to medical tests or examinations to protect the public interest, not exempting them, now as patients, the rights to be informed, clarified and consent.

4. The necessity of a duty to inform before or after compulsive medical acts

Even though healthcare professionals have no duty to obtain patient consent before applying compulsive medical acts, the question is whether they must communicate relevant information to their patients. This is a question of the necessity of a duty to inform for compulsive medical acts.

³⁰ D. V. MARECOS, *Código do Trabalho Comentado*, *op. cit.*, 130.

³¹ P. R. MARTINEZ, L. M. MONTEIRO, J. VASCONCELOS, P. M. BRITO, G. DRAY, L. G. SILVA, *op. cit.*, 160. QUINTAS, H. QUINTAS, *Código do Trabalho Anotado e Comentado*, Lisbon, 2016, 105.

³² These examples stem from A. NETO, *Novo Código do Trabalho e Legislação Complementar Anotados*, Lisbon, 2009, 148.

³³ P. R. MARTINEZ, L. M. MONTEIRO, J. VASCONCELOS, P. M. BRITO, G. DRAY, L. G. SILVA, *Código do Trabalho Anotado e Comentado*, *op. cit.*, 160-161. P. QUINTAS, H. QUINTAS, *op. cit.*, 105.

³⁴ P. R. MARTINEZ, L. M. MONTEIRO, J. VASCONCELOS, P. M. BRITO, G. DRAY, L. G. SILVA, *Código do Trabalho Anotado e Comentado*, *op. cit.*, 161.

Informed consent is a concept created in *Salgo v. Leland Stanford* of 1957.³⁵ In principle, its application requires the duties to inform, clarify and obtain consent;³⁶ therefore, a lack of one implies an inexistence of informed consent. Compliance with the obligations to inform and explain is a previous process intended to obtain consent; otherwise, consent is made with wrong or non-relevant information or wrong understanding regarding the provided information, and autonomy can be violated in this situation. Based on the doctrine of informed consent, the duty to inform is unnecessary when applying compulsive medical acts because these acts are coercive, and the duty to inform has no reason to be required.

Nonetheless, the duty to inform can be necessary before or after compulsive medical acts³⁷ but based on other reasoning. Compliance with such a duty for compulsive medical acts intends to respect other fundamental rights provided in the CPR, namely the right of access to personal data and the right to information, respectively, regulated in articles 35 and 37 of the Portuguese Constitution. Hence, instead of resulting from one of the components of informed consent to respect patients' autonomy, the duty to inform before or after compulsive medical acts stems from respect for the right of access to personal data and the right to information. Indeed, the duty to inform here in discussion is not a duty from the ambit of informed consent.

In other words, compliance with the duty to inform under the doctrine of informed consent intends to obtain consent and, consequently, to respect the autonomy of patients, whereas compliance with the duty to inform before or after compulsive medical acts aims to respect the right of access to personal data or the right to information. Respect for these fundamental rights implies a necessity of the duty to inform for compulsive medical acts. The reason is that patients should have a right to know what happened or will happen to their health, even though they do not have a right to consent under compulsive medical interventions. On the other hand, there is no conflict between these and other fundamental rights, different to the situation where such a conflict can exist between physical integrity or life and autonomy when applying the duty to inform under the doctrine of informed consent.

³⁵ *Salgo v. Leland Stanford Etc. Bd. Trustees*, 317 P.2d 170 (Cal. Ct. App. 1957), at <https://www.courtlistener.com/opinion/2619445/salgo-v-leland-stanford-etc-bd-trustees/> (visited 17/12/2022). Regarding this case, R. R. FADEN; T. L. BEAUCHAMP; N. M. P. KING, *A History and Theory of Informed Consent*, Oxford University Press, 1986, 125-126.

³⁶ In Portugal, see Entidade Reguladora da Saúde, *Consentimento Informado – Relatório Final*, op. cit., 3; M. J. ESTORNINHO, T. MACIEIRINHA, *Direito da Saúde*, Lisbon, op. cit., 273-274; V. R. RAPOSO, *Do ato médico ao problema jurídico: breves notas sobre o acolhimento da responsabilidade médica civil e criminal na jurisprudência nacional*, op. cit., 220.

³⁷ For instance, workers in activities with life, health, integrity and safety at risk or prisoners should have the right to know what will happen to their body or health before compulsive medical acts, given that they have the necessary physical and mental conditions to understand the information provided by healthcare professionals. The same situation does not occur for persons with psychic anomalies under hospitalisation because they usually do not have the mentioned conditions. Still, after compulsive medical acts, their right to know should be respected if they have the referred conditions.

5. Conclusion

In summary, informed consent is generally applied before medical activities. It should also be used for persons in an emergency state and with infectious diseases, even though its application is questionable and arguable in Portugal. However, consent from particular groups, such as persons with psychic anomalies, prisoners and workers in activities with life, health, integrity and safety at risk, is not necessary before compulsive medical acts. Even so, this article demonstrates the necessity of complying with the duty to inform before or after compulsive medical acts, based on the reasoning of respect for the right of access to personal data and the right to information regulated in the Portuguese Constitution. The duty to inform in discussion is not the one from informed consent intended to respect patients' autonomy. This article emphasises the reasoning behind complying with the duty to inform for compulsive medical acts.