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Conflict between the doctor's conscience and the patient's right to obtain medical services after the judgment of the Constitutional Tribunal of 7 October 2015[1]

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Abstract: The physician's conscience clause, contained in Article 39 of the Act on the Medical and Dental Professions, gives the possibility of refusing to provide a health service by invoking religious or moral beliefs. In the original version of the provision, the possibility of using the conscience clause was subject to numerous restrictions, but the greatest opposition from the medical community was aroused by the obligation to indicate real possibilities of obtaining a service inconsistent with conscience from another physician or in another medical facility. In connection with the above, as a result of an application of the Supreme Medical Council, on 7 October 2015 the Constitutional Tribunal issued a judgment stating the inconsistency of the aforementioned restriction with the Constitution, due to the need to ensure freedom of conscience and religion to everyone in a democratic state of law. Under the said judgment, the doctor no longer has to indicate real possibilities of obtaining a service that is against his conscience from another doctor or in another medical facility; however, the issue of who is to do this has not been properly regulated by the legislator after the judgment of the Tribunal. This omission was to be filled in the draft act amending the Act on the Medical and Dental Professions, and certain other acts, adopted by the Council of Ministers on 7 January 2020, which proposed that the medical facility which, within the scope of its activities, refused to provide a health service, should be obliged to refer the patient to another physician. However, this solution was met with criticism from many groups and was in conflict with the position of the Constitutional Tribunal, according to which this obligation should not rest with medical facilities, but with public authorities, e.g. the National Health Service. Ultimately, Article 39 of the Act on the Medical and Dental Professions still does not contain a provision specifying an entity that could indicate a real possibility for a patient to obtain a service that is contrary to a doctor's conscience, which may give rise to many misunderstandings in the public sphere and serve inappropriate interpretations of the law harmful for the patient-doctor relationship.

Keywords: conscience clause, health service, Constitutional Tribunal, doctor

Introduction

The solution to some ethical dilemmas in the medical profession is the conscience clause, which is a legally guaranteed possibility of refusing to perform an obligation imposed by law by invoking religious or moral beliefs. The possibility of using the clause applies to all doctors, but in Poland it is most often used when faced with the requirement to perform an abortion, refer a patient for a prenatal test, or prescribe contraceptives. In connection with the above, the right to the conscience clause is mainly invoked by gynecologists. The change made by the Constitutional Tribunal on 7 October 2015, which somewhat extended the freedom of conscience of doctors, has indeed satisfied the claims of doctors, but has not fully resolved all the procedural issues in this respect, especially those concerning the treatment of patients. The issue of the conscience clause in Poland is therefore still a lively and widely discussed issue, and resolving any misunderstandings or problems resulting from its functioning still requires thorough analysis and specific legislative actions.

1 Article in polish language: https://www.stowarzyszeniefidesetratio.pl/fer/60P_Chud.pdf

1. Conscience clause before the Constitutional Tribunal's judgment of 2015

In its original form, the provision of the physician's conscience clause, contained in the Act of 5 December 1996 on the medical profession, and subsequently in the Act on the Professions of Doctor and Dentist (APDD) read as follows: "A physician may refrain from providing health care services that are contrary to his conscience, subject to Art. 30 (i.e. except for situations where a delay in providing assistance could result in the risk of loss of life, serious bodily injury or serious health disorder, and in other urgent cases), but that he/she is obliged to indicate real possibilities of obtaining this service from another doctor or medical entity and to justify and record this fact in the medical documentation. A doctor performing his/her profession on the basis of an employment relationship or as part of the health service is also obliged to notify his/her superior in writing in advance" (Act on Medical Professions...). Although some of the restrictions contained in the provision raised doubts, according to our own research conducted in 2012–2013 in the area of activity of the Bydgoszcz Medical Chamber in Bydgoszcz and the Kuyavian-Pomeranian Regional Medical Chamber in Toruń, among 210 doctors (84 specialists in gynecology and obstetrics, and 126 doctors of other specializations), 82% of them expressed support for the functioning of the conscience clause in Poland (Chudzińska, Grzanka-Tykwińska, 2015).

As a result of the above-mentioned doubts, the Supreme Medical Council (SMC) submitted a motion to the Constitutional Tribunal to declare as unconstitutional certain parts of the provision of Article 39 of the APDD, which in its opinion violated the freedom of conscience of physicians. This primarily concerned "the part defined by the words 'subject to art. 30', in the scope in which it imposes on the physician the obligation to perform a health service contrary to his/her conscience, despite the fact that a delay in providing this service would not result in a risk of loss of life, serious bodily injury or serious health disorder", and "the part defined by the words 'but that he/she is obliged to indicate real possibilities of obtaining this service from another physician or in a medical entity', by imposing on the physician refraining from performing health services contrary to his/her conscience the burden of guaranteeing the obtaining of these services from another physician or in a medical entity, which makes the right to freedom of conscience illusory" (Constitutional Tribunal Judgment, 2015). The SMC stressed that the "other urgent cases" included in the provision should not take precedence over the physician's right to exercise freedom of conscience, among other reasons because this term applies to both therapeutic and non-therapeutic services. Due to the fact that the latter do not serve to preserve, save, restore or improve the patient's health, the doctor should retain the right to refuse to perform them, unless of course it poses a threat to the patient's life, or causes serious damage to his/her body or a serious health disorder. As regards the second objection, the SMC argued that "the obligation imposed on a doctor using the conscience clause to indicate a real possibility of obtaining a service from another doctor or in another medical entity is in fact a legal obligation to assist in the provision of a service considered by that doctor to be wrong. This provision forces the doctor to provide active, specific and real assistance in obtaining a service that is against his/her conscience" (Constitutional Tribunal Judgment, 2015). Moreover, the SMC found that such an obligation is also impossible to implement in practice, because a doctor refusing to provide a health service that is against his/her conscience does not know the worldview of other doctors to whom he/she would refer the patient (Constitutional Tribunal Judgment, 2015).

From our research, the opinions of doctors on the above-mentioned issues also indicated the imperfection of the construction of the provision in this respect. Although when asked whether obliging a doctor to indicate another real possibility of obtaining the service violates the conscience of the respondents, 66% of all doctors answered that they did not see such a problem, an interesting phenomenon is the fact that among the doctors asked in this research whether transferring the obligation to indicate another doctor to another entity would better protect their conscience, as many as 82% gave an affirmative

answer. Moreover, this was stated by 85% of the respondents who had previously considered that appointing another doctor would not violate their conscience (Chudzińska, Grzanka-Tykwińska, 2015).

2. Judgment of the Constitutional Tribunal of 7 October 2015

On 7 October 2015, the Constitutional Tribunal, under the chairmanship of Prof. Andrzej Rzepliński, issued a judgment in favour of the SMC's motion regarding "other urgent cases" and "indication of real possibilities of obtaining services from another doctor or medical entity". The Tribunal ruled that "Article 39, first sentence, in connection with Article 30 of the APDD" (Journal of Laws of 2015, item 464), insofar as it obliges a physician to perform a health service contrary to his/her conscience in 'other urgent cases', is inconsistent with the principle of proper legislation derived from Article 2 of the Constitution of the Republic of Poland and Article 53, section 1, in connection with Article 31, section 3 of the Constitution" (Constitutional Tribunal Judgment, 2015), according to which the Republic of Poland is a democratic state ruled by law, implementing the principles of social justice, in which everyone is ensured freedom of conscience and religion, and such restrictions cannot violate the essence of freedoms and rights (Constitution of the Republic of Poland). For the same reasons, the Tribunal ruled that "Article 39, first sentence, of the Act referred to in point 1, in so far as it imposes on a physician who refrains from providing a health service that is contrary to his/her conscience the obligation to indicate real possibilities of obtaining such a service from another physician or in another medical entity, is also inconsistent with the provisions of the Constitution" (Constitutional Tribunal Judgment, 2015).

The current wording of the provision is therefore as follows: "A physician may refrain from providing health care services that are contrary to his/her conscience, subject to Art. 30 (i.e. except for situations where a delay in providing assistance could result in a risk of loss of life, serious bodily injury or serious health disorder), but he/she is obliged to record this fact in the medical documentation. A doctor who exercises his/her profession on the basis of an employment contract or as part of the health service is also obliged to notify his/her superior in writing in advance" (Act on Medical Professions). Pursuant to the judgment of the Constitutional Tribunal, a doctor is no longer obliged to indicate real possibilities of obtaining a service that is contrary to his/her conscience from another doctor or medical entity, nor to provide the service even in urgent cases if a delay in providing the service would not result in a risk of loss of life, serious bodily injury or serious health disorder.

3. The necessity and attempts to regulate the current legal situation

However, the question remains as to who is obliged to indicate real possibilities of obtaining a service from another doctor or in another medical entity, because this issue has not been regulated by the legislator after the Tribunal's judgment. On the one hand, it may affect the patient's right to obtain a guaranteed medical service to which he/she is entitled. Even in the opinion of the surveyed doctors, when the old wording of the provision was still in force, 39% of them noticed the possibility of violating the patient's rights by referring him/her from one doctor to another without indicating another real possibility of providing the service (Chudzińska, Grzanka-Tykwińska, 2015). On the other hand, although the exemption from the obligation to indicate a real possibility of obtaining a service elsewhere is undoubtedly a beneficial solution for doctors, the lack of clearly defined procedures may also ultimately lead to unjust accusations against them. If a medical service is guaranteed by the state, the rules for receiving it must be clear, and leaving loopholes and ambiguities in this regard does not serve the interests of any party. Moreover, the need to create transparent regulations in this area is also indicated by doctors' concerns about legal liability. The vast majority (57%) would fear criminal liability in the event of using the conscience clause due to the lack of clear procedures in the event

of refusing a service. Moreover, the most common eventuality indicated by the survey participants was civil liability (78%), followed by disciplinary liability (43%) and professional liability (41%) (Chudzińska, Grzanka-Tykwińska, 2015).

One of the common solutions to this situation is to create a source of information for patients about the types of services that a given doctor does not perform for reasons of conscience. Among the doctors surveyed, 36% considered such a source useful because it isolates the doctor from services he/she does not accept. In turn, creating a source of information seemed to be a good solution for 47% of all respondents, due to the fact that the patient would know which doctor not to go to. 18% of respondents were skeptical about this idea (Chudzińska, Grzanka-Tykwińska, 2015). The creation of such a database may, however, seem difficult to implement, if only because of the wording of Article 53, section 7 of the Constitution of the Republic of Poland, which states that "no one may be obliged by public authorities to reveal his/her worldview, religious beliefs or denomination" (Constitution of the Republic of Poland).

The only solution seems to be to clearly define the entity which, in the event of invoking the conscience clause and refusing to provide a service, regardless of its type, would indicate a real possibility of obtaining the service elsewhere, in an efficient manner that would not expose the patient to the risk of losing his/her life or health, nor the doctor to unnecessary accusations of failing to provide assistance. Such a solution was assumed in the draft act amending the APDD and certain other acts, adopted by the Council of Ministers on 7 January 2020, which was to, among other things, introduce changes to art. 39 of the APDD, implementing the judgment of the Constitutional Tribunal of 7 October 2015 by deleting from it the wording concerning the indication of another physician that was inconsistent with the Constitution. Art. 1 item 63 of the government bill proposes an amendment to Art. 39 of the APDD to read as follows: "in the event that a physician refrains from providing a health service referred to in par. 1, the medical entity within the scope of whose activities the healthcare service was refrained from being provided shall be obliged to indicate a physician or entity performing medical activities who will ensure the possibility of providing such service." However, the new form of the provision was met with criticism, including from the Supreme Medical Council, and ultimately the Sejm Health Committee decided to delete this change from the draft act. Furthermore, after a negative opinion from the Health Committee, the Sejm also rejected other amendments to Article 39 of the APDD with similar wording (Olszówka, 2020). Although the provision undoubtedly requires regulation, the proposal to place the obligation on the healthcare entity to indicate the real possibility of obtaining the service raised serious doubts in the light of the constitutional guarantee of freedom of conscience, to which the Constitutional Tribunal referred in the justification of its judgment. When finding that the provision of Article 39 of the APDD, in the part requiring the physician to indicate a real possibility of obtaining a health service that raises his/her conscientious objection, was inconsistent with the Constitution, the Tribunal also noted that this obligation should not rest with medical entities, but with public authorities (Olszówka, 2019). According to the justification: "it seems advisable to contract out these services separately and for the National Health Fund to maintain up-to-date knowledge about the entities performing them, because it is the public authorities, and not doctors or even medical entities, which are responsible for ensuring that services financed from public funds are available on equal terms" (Constitutional Tribunal Judgment, 2015). There is also no mechanism in the Polish legal system that would allow one healthcare entity to collect data on other healthcare entities employing physicians who do not raise conscientious objection to selected services (Olszówka, 2019). Moreover, imposing an information obligation on a healthcare entity conflicts with Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 entitled "The right to the conscience clause in legal healthcare." It states that no hospital, institution or individual may be subject to any pressure or discrimination, nor be held liable, if they refuse to perform an abortion, sterilization, in vitro fertilization or euthanasia, or to take part in any of these procedures. The Parlia-

mentary Assembly also stressed the need to establish the right to the conscience clause while maintaining the responsibility of the state, which should guarantee each patient appropriate treatment in due time (PACE Resolution, 2010). Although this resolution has no legal force and is merely a call on the Council of Europe member states to regulate or improve the regulations regarding the conscience clause in their laws, it is undoubtedly a strong argument for defending the conscience of not only doctors, but also managers of medical entities (Olszówka, 2019). Doctors themselves were also asked about an entity that could indicate real possibilities of obtaining medical services, thus replacing a person who does not want to provide it. Our own research shows that the most frequently chosen answer was the National Health Fund (50%), as well as the District Medical Chamber (27%), while the management of the facility was indicated sporadically (12%) (Chudzińska, Grzanka-Tykwińska, 2015).

Summary

Ultimately, the provision of Article 39 of the APDD still does not include a provision specifying the entity that could indicate a real possibility for a patient to obtain a service that is inconsistent with a doctor's conscience, which is why this issue still remains unregulated. This creates many misunderstandings in the public sphere and leads to inappropriate and harmful interpretations of the law for the patient-doctor relationship, especially when there is a political context in the background. Due to the increasing number of media reports on alleged violations of patients' rights, especially women's rights, in the event of refusal to perform a legal termination of pregnancy and the often erroneous interpretations of the current legal status regarding the use of the conscience clause, there is an urgent need for the legislator to regulate the patient's real access to legally guaranteed medical services. The fact remains unchanged, of course, that in the event of a threat to life or the risk of serious bodily injury or a serious health disorder, a doctor is obliged to provide all services, but the situation of uncertainty related to the lack of appropriate regulations in other, especially morally sensitive cases, remains uncomfortable and even dangerous for both the doctor and the patient.

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