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Objection of the Physician's Conscience. Legal or Ethical Category?

Keywords: human rights and freedoms, freedom of conscience, conscience clause, legal norm, ethical norm

Słowa kluczowe: prawa i wolności człowieka, wolność sumienia, klauzula sumienia, norma prawna, norma etyczna

Abstract

Freedom of conscience is the basis of a democratic state and a pluralistic society. It has been formed slowly in the course of long-lasting historical processes and philosophical discourse. Although intuitively understood, this concept is still not clearly defined. This freedom is guaranteed by the normative acts in force in the UN system, as well as in the Council of Europe and the European Union and in the basic laws of individual states. Its protection is the conscience clause, which is not regulated by the basic law. The aim of this research is to answer a question whether the conscience clause is a legal or purely ethical category. In view of the broad scope with regard to this issue, the paper is devoted to the question of determining the legal nature of the physician's conscience clause.

Streszczenie

Sprzeciw sumienia lekarza. Kategoria prawna czy etyczna?

Wolność sumienia stanowi podstawę demokratycznego państwa i pluralistycznego społeczeństwa. Kształtowała się ona powoli w toku długotrwałych procesów historycznych

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i dyskursu filozoficznego. Pojęcie to choć intuicyjnie zrozumiałe, to wciąż nie jest jednoznacznie zdefiniowane. Wolność ta gwarantowana zarówno przez akty normatywne obowiązujące w systemie ONZ, jak i Rady Europy i Unii Europejskiej oraz w ustawach zasadniczych poszczególnych państw. Jej gwarancją jest klauzula sumienia, która nie została uregulowana u ustawie zasadniczej. Celem badań prowadzonych przez autora jest udzielenie odpowiedzi na pytanie czy klauzula sumienia jest kategorią prawną czy wyłącznie etyczną. Ze względu na obszerność zagadnienia niniejsze opracowanie poświęcono kwestii określenia charakteru prawnego klauzuli sumienia lekarza.

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Freedom of conscience is the basis of a democratic state and a pluralistic society. It has been formed slowly in the course of long-lasting historical processes and philosophical discourse. Although intuitively understood, this concept is still not clearly defined. It is guaranteed by the normative acts of the UN system, as well as by the Council of Europe and the European Union and by the fundamental laws of individual states. According to the constitutional regulation in force in Poland, the freedom of conscience is a subjective right, meaning it is entitled to every human being regardless of their citizenship, place of residence, stay, gender, race, education and age². It includes both believers and non-believers³. This freedom is protected by a conscience clause, which is not regulated by the basic law. The aim of this research is to answer a question whether the conscience clause is a legal or purely ethical category. In view of the broad scope with regard to this issue, the paper is devoted to the question of determining the legal nature of the physician's conscience clause.

I.

The freedom of thought, conscience and religion of every member of a pluralistic society is, in the modern world and especially in Europe, a fundamental

² Art. 53 The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78 item 483).

³ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2004, p. 113.

principle – and at the same time a determinant – of a democratic state and society⁴. But before determining what this freedom is, it is necessary to try to clarify the very term “conscience”⁵. The law does not define this concept, but the legal literature on the subject is extensive⁶. It is assumed that “conscience is an imperative to act according to values such as “good” and “bad”, “truth” or “falsehood”, the choice of which is perceived as binding and unconditional, and which allows for the true development of the personality of a human being, while at the same time being the basic construction of his psychosocial personality⁷. This is the judgment of reason by which the person recognizes the moral quality of a concrete act⁸. It is “the ability to evaluate intellectually its own acts as good or bad. The basis of this ability is reason, which allows the distinction between good and bad at the level of concrete actions”⁹.

In this understanding of the term, it can be assumed that freedom of conscience “is the first and indispensable right of the human being, and moreover, it can be stated that to the extent that it touches the most intimate side of the spirit, it maintains the *raison d'être* of other freedoms deeply anchored in each person¹⁰”. This freedom can be considered on two

⁴ P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2000, p. 73.

⁵ In theological terms, conscience is “that moment in the experience of freedom by a person, in which she realizes his responsibility” (K. Rahner, H. Vorgrimler, *Sumienie*, [in:] *Mały słownik teologiczny*, Warsaw 1987, p. 439).

⁶ M. Jastrzębski, *Wolność myśli, sumienia i religii*, [in:] *Prawa człowieka. Wybrane zagadnienia i problemy*, eds. L. Koba, W. Waclawczyk, Warsaw 2009; J. Krukowski, *Konstytucyjna ochrona wolności sumienia i religii*, [in:] *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, eds. L. Garlicki, A. Szmyt, Warsaw 2003; Z. Łyko, *Wolność sumienia i wyznania w relacji: człowiek – kościoły – państwo*, [in:] *Podstawowe prawa jednostki i ich ochrona*, ed. L. Wiśniewski, Warsaw 1997; K. Pyclik, *Wolność sumienia i wyznania w Rzeczypospolitej Polskiej (założenia filozoficznoprawne)*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, A. Preisner, Warsaw 2002; P. Sarnecki, *Komentarz do art. 53 Konstytucji*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, ed. L. Garlicki, Warsaw 2003.

⁷ Judgment of the Constitutional Tribunal dated October 7, 2015, file ref. act of K 12/14, OTK-A 2015/9/143.

⁸ *Katechizm Kościoła Katolickiego*, No. 1778, 1796; W.J. Bóbr, *Sumienie*, [in:] *Słownik filozofii*, ed. J. Hartman, Kraków 2004, p. 213.

⁹ Judgment CT..., pt. III.4.2.2.

¹⁰ Jan Paweł II, *Dokument Stolicy Apostolskiej o wolności religijnej [z 1 września 1980 r.]*, “E Osservatore Romano” 1980, No. 10, p. 8.

levels, internal and external¹¹. The inner level (*forum internum*) includes the spiritual freedom, i.e. the possibility to formulate own hierarchy of values, to create own worldview and, finally, the freedom to define the meaning and purpose of own life, which means the freedom to form own views and morals¹². This “spiritual freedom” represents, in particular, the right to define what is good and bad and the right to follow the former freely. This sphere of the internal autonomy of an individual must not be subject to any limitation, it has an absolute dimension¹³. Freedom of conscience in the external aspect (*forum externum*) indicates the freedom to act in conformity with own conscience and the freedom not to act against own conscience (freedom to make moral choices). This aspect of freedom is related to the external exposition of own convictions, and thus may be subject to certain limitations¹⁴. In a democratic society, they may even be necessary to reconcile the interests of different groups and to ensure respect for the convictions of each person.

Freedom of conscience is a value directly derived from human dignity. Although it is accepted that the right to act according to own conscience does not require a clear legal basis¹⁵, it is confirmed by numerous normative acts. It is directly expressed in the Article 18(1) of the International Covenant on Political and Civil Rights¹⁶, the Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950¹⁷ and the Article 10 of the Charter of Fundamental Rights

¹¹ W. Janyga, *Wolność sumienia i wyznania wobec wyzwań pluralizmu religijnego (na tle wyroku Federalnego Sądu Konstytucyjnego Niemiec z 24 IX 2003r.)*, “Państwo i Prawo” 2004, No. 10, p. 84.

¹² O. Nawrot, *Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy*, “Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu” 2012, No. 3, pp. 11–29.

¹³ M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2013, p. 740.

¹⁴ *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Komentarz do artykułów 1–18*, vol. I, ed. L. Garlicki, Warsaw 2010, p. 557; M.A. Nowicki, op.cit., p. 740.

¹⁵ K. Orzeszyna, *Klauzula sumienia jako gwarancja realizacji prawa do wolności sumienia*, “Medyczna Wokanda” 2017, No. 9, p. 18.

¹⁶ The International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966 (Dz.U. 1977, No. 38, item 167).

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 (Dz.U. 1993, No. 61, item 284).

of the European Union¹⁸. In the Polish legal system, the principle of freedom of conscience and religion is expressed in the Article 53 of the Polish Constitution. According to some representatives of the doctrine, “from the point of view of human rights, freedom of conscience and religion is chronologically the first, even rudimentary freedom, crucial for the whole system of rights and freedoms¹⁹”. Others directly associate it with the human dignity, which is statuted in the Article 30 of the Constitution of the Republic of Poland, and which is the source of freedom and rights²⁰. The Constitutional Court explains that “freedom of conscience does not only mean the right to represent a particular worldview, but above all the right to act according to own conscience²¹”. Thus, “freedom of conscience” is the possibility of having and shaping a set of opinions and views, subject to a certain system of values²². Its substantive scope is defined in the Article 53(2) of the Basic Law, and then in the Article 1 of the Law on the Guarantees of Freedom of Conscience and Religion²³. This freedom, like others, is not absolute. However, it can be very difficult and delicate to define its limits²⁴. According to Prof. A. Zoll, this is the place for the so-called conscience clause²⁵, which should be understood precisely. Moreover, it should always be an exception in law, not a rule.

¹⁸ Charter of Fundamental Rights of the European Union (Dz.Urz.UE C No. 83, item 389).

¹⁹ J. Szymanek, *Wolność sumienia i wyznania w Konstytucji RP*, “Przegląd Sejmowy” 2006, No. 2, p. 39.

²⁰ P. Sarnecki, op.cit., pt. 4, p. 2.

²¹ Judgment of the Constitutional Tribunal of January 15, 1991, U 8/90; the judgment of the Constitutional Tribunal of 7 October 2015, K 12/14.

²² L. Garlicki, *Wolność myśli, sumienia i wyznania*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz...*, pp. 556–557.

²³ Original sound: “Art. 1. 1. Rzeczpospolita Polska zapewnia każdemu obywatelowi wolność sumienia i wyznania. 2. Wolność sumienia i wyznania obejmuje swobodę wyboru religii lub przekonań oraz wyrażania ich indywidualnie i zbiorowo, prywatnie i publicznie”. Act of May 17, 1989 on guarantees of freedom of conscience and religion (Dz.U. 2017, item 1153).

²⁴ M. Pietrzak, *Przełom w polskim ustawodawstwie wyznaniowym*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1990, vol. LXX, No. 2, p. 19.

²⁵ A. Zoll, *Klauzula sumienia*, [in:] *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, eds. P. Stanisławski, J. Pawlikowski, M. Ordon, Lublin 2014, p. 80.

II.

The doctrine notes that the right to refuse to fulfill an obligation imposed by law due to conscientious objection (the so-called conscience clause)²⁶ belongs to the material scope of freedom of conscience. “As freedom of conscience is a fundamental value directly derived from human dignity, the so-called conscience clause of the law should not be understood as a legal basis for such freedom. Freedom of conscience and the right to act according to own conscience do not require an explicit statutory basis. The limitation of the right to act according with own conscience requires such a basis. The so-called conscience clauses in Polish legislation should be understood in this way. It is not the freedom to act according with own conscience that can be controlled from the point of view of its compliance with the Constitution. The restrictions on the right to act according with own conscience resulting from a norm containing a conscience clause should be subject to such control²⁷”. In this perspective, the actions of states restricting the freedom of conscience are subject to an evaluation from the point of view of legality, necessity and purpose²⁸.

Undoubtedly, conscientious objection is of the greatest practical importance in the medical sphere. From the legal point of view, it is the resolution by the legislator of conflict between the freedom to act according with own conscience, the physician’s value system and the right of another person to require a certain medical behavior. The caution exercised by the public authorities in making limit decisions in case of medical personnel, especially physicians, should be of particular importance because it involves, on the one hand, actions aimed at protecting human life or health and, on the other hand, the development of medical sciences and techniques.

In the Polish normative system, physicians’ conscientious objection is regulated in the Art. 39 of the Act on the Professions of Physician and Dentist²⁹.

²⁶ J. Sobczak, M. Gołda-Sobczak, *Wolność sumienia i wyznania jako prawo człowieka*, “Annales Universitatis Mariae Curie-Skłodowska, Sec. K” 2012, vol. 19, No. 1, p. 48.

²⁷ A. Zoll, *op.cit.*, p. 81.

²⁸ O. Nawrot, *op.cit.*, p. 11.

²⁹ The Act of December 5, 1996 on the Professions of Physician and Dentist (Dz.U. 2020, item 514, 567).

According to this regulation, physicians may refrain from providing medical services that are inconsistent with their conscience, but they are obliged to indicate the real possibilities of obtaining this service from another physician or therapeutic entity and to justify and record this fact in medical records. The exception is the Art. 30 of the mentioned Act, according to which a physician is obliged to provide medical assistance in every case when a delay in its provision could result in the risk of loss of life, serious bodily injury or serious health disorder. In this way, the legislator tries to reconcile the physician's beliefs with the patient's rights, who often has different views from the physician³⁰.

The first sentence of the mentioned regulation has been declared incompatible with Art. 2, Art. 53(1) in conjunction with the Art. 31(3) of the Constitution to the extent that it imposes an obligation on physicians to provide medical services in "other urgent cases" contrary to their conscience, and to the extent that it imposes an obligation on physicians refraining from providing medical services contrary to their conscience to indicate the real possibilities of obtaining such services from other physicians or other medical entities³¹. The Court decisively rejected the position of the General Prosecutor and the Minister of Health, according to which the possibility for a physician to refuse to provide a health service is his privilege. In the opinion of the Tribunal, the physician's right, like any other person's, to refrain from acts contrary to own conscience directly stems from the freedom guaranteed by the Constitution, and therefore, in the lack of provisions of the Article 39 of the aforementioned Act, the physician could refuse the medical service on the grounds of conscientious objection. However, the physician also has a statutory duty to act according with his conscience; without the Art. 39 of the Act on the Professions of Physician and Dentist, the waiver of this duty would not be obvious³². The constitutional guarantee of freedom of conscience protects the individual not only from being forced to make a direct attack on a protected good, but also from conduct contrary to the individual's conscience that indirectly leads to an ethically unacceptable

³⁰ The conscience clause was also introduced by the Code of Medical Ethics in Art. 7 act.

³¹ Judgment of the Constitutional Tribunal of October 7, 2015, file ref. act of K 12/14 (Dz.U. item 1633).

³² Ibidem.

result, in particular from being forced to cooperate in the achievement of an unjust purpose³³.

It is important to note that the conscience clause only authorizes physicians to refuse such services that are contrary to their conscience and therefore not to treat the patient at all because of a different religion, for example. Moreover, the clause only authorizes the physician to refuse to perform a medical act that presents itself to him as ethically inappropriate by its intrinsic nature, and not to abandon an act that he considers inappropriate in a given situation³⁴.

III.

As has been shown, freedom of conscience is not only a moral norm, but a human freedom, and this is very specific because it concerns worldview activity, which is very different from any other manifestation of human activity. When exercising this freedom, man can demand that others respect his freedom³⁵. Therefore, its guarantees, including the conscience clause, are also not only moral norms; they are both an ethical and legal category³⁶. Therefore, the practical application of this category is not easy, often also because of the far-reaching differences of opinion between physicians and lawyers, as the former want to see the clause as broadly as possible, the latter restrictively³⁷. This is particularly evident in lawsuits when women who have been denied prenatal examinations, extracorporeal insemination, contraceptive pills

³³ Judgment of the Constitutional Tribunal of 7 October 2015, *op.cit.*; the judgment of the Constitutional Tribunal of January 15, 1991, file ref. U 8/90.

³⁴ W. Galewicz, *Jak rozumieć medyczną klauzulę sumienia?*, "Diametros" 2012, No. 34, p. 142.

³⁵ Z. Łyko, *op.cit.*, p. 88.

³⁶ L. Kubicki, *Sumienie lekarza jako kategoria prawna*, "Prawo i Medycyna" 1999, No. 4, p. 5; E. Zielińska, *Klauzula sumienia*, "Prawo i Medycyna" 1999, No. 4; *idem*, [in:] *Ustawa o zawodach lekarza i lekarza dentystry. Komentarz*, ed. E. Zielińska, Warsaw 2008; K. Szczucki, *Klauzula sumienia – uwagi de lege lata i de lege ferenda*, "Studia Iuridica" 2009, No. 50; J. Pawlikowski, *Prawo do wyrażania sprzeciwu sumienia przez personel medyczny – problemy etyczno-prawne*, "Prawo i Medycyna" 2009, No. 3.

³⁷ E. Zielińska, *op.cit.*, *Ustawa o zawodach lekarza i lekarza dentystry...*; K. Szczucki, *op.cit.*, J. Pawlikowski, *op.cit.*

or early abortion are taken to court against hospitals and physicians, often due to wrongful birth. As a result, they demand compensation for mental and physical harm caused by the birth of a child with serious defects, compensation for medical expenses and the increasing cost of living of an often-disabled child, loss of earnings due to the care of a child³⁸. In each such case, the court should consider whether the physician has actually correctly applied the conscience clause, which is nothing more than a legal instrument that allowed the physician, in case of a serious and irreconcilable conflict between the values he professes and a duty that has its origin in positive law, to resolve it in favor of his own convictions³⁹.

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³⁸ K. Więckiewicz, *Czy w Polsce istnieje prawo do badań prenatalnych*, "Prawo i Medycyna" 2011, No. 4, p. 103; K. Szutowaska, *Odpowiedzialność za szkodę z tytułu wrongful conception i wrongful birth w świetle funkcji odpowiedzialności odszkodowawczej w polskim prawie cywilnym – część II*, "Transformacje Prawa Prywatnego" 2008, No. 2, p. 98; judgment of the Supreme Court of June 12, 2008, III CSK 16/08, OSNC No. 3/2008 item. 48.

³⁹ R. Paprzycki, *Prawna ochrona wolności sumienia i wyznania*, Warsaw 2015, p. 64.

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