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DOCTOR'S CONSCIENCE CLAUSE AND PREGNANCY TERMINATION. THE CASE OF POLAND

Abstract. The obligation to make women's rights to health services a reality rests with the state authorities. However, in Poland, women wishing to carry out a legal termination of pregnancy are often confronted with institutional abuse on the part of health care providers who deny women the possibility of carrying out the procedure because gynaecologists invoke the institution of the conscience clause. The aim of this article is to show the mutual normative complexity of the research problem, i.e. the possibility for a doctor to invoke the conscience clause in the case of a patient's right to an abortion. The paper verifies the research hypothesis that in the field of the conscientious objection clause, systemic solutions are necessary, but not only consisting in specifying the legal provisions but also in enforcing the respect of the law by its addressees. The hypothesis is to be verified using the dogmatic method.

Keywords: conscience clause, abortion law, reproductive rights, Poland.

Introduction

The topic of abortion is one of the most controversial issues in modern society. Sexual and reproductive rights are inherent components of the human rights system and their effective protection is one of the primary responsibilities of the state (Grabowski 2021). Freedom of thought, conscience and religion, too, as inherent and inalienable rights of every human being, are constitutionally protected and the need for the existence of a conscience clause in a democratic state is not controversial (Kubicki 1999, 5–12; Czekajewska, Walkowiak, & Domaradzki 2023).

The current standards in Poland for the protection of women's sexual and reproductive rights are widely opposed not only by women but also by activists, scientific societies, and international organizations (Radlińska,

Kotwitz 2018). The protection of the life and health of pregnant women is called for by the Committee on Bioethics of the Polish Academy of Sciences, which in its position paper, Position of the Committee on Bioethics of the Polish Academy of Sciences No 1/2023, argues that Polish law, Act of January 7 1993 on family planning, protection of the human fetus, and the conditions for permissibility of pregnancy termination, referred as Anti-Abortion Act, allowing legal abortion only in two cases – when the pregnancy poses a risk to the life or health of the pregnant woman and when there is a reasonable suspicion that the pregnancy is the result of a prohibited act – is one of the most restrictive laws in Europe. In the Committee's opinion: " Even within this narrow scope, access to legal abortion in Poland is very difficult, and the fundamental rights of pregnant women, including the right to life and health, and the right to healthcare services, are very often violated." (Committee on Bioethics, 2023). According to the Committee, one reason for this is the lack of sufficient awareness among physicians of their ethical and legal obligations (Czekajewska, 2018).

The infamous practice of (not)applying the law on legal abortion is often combined with doctors invoking the conscience clause, also known as conscientious objection (Pawlikowski, 2009, 29). For many years, this clause was used to avoid compulsory military service. With the development of medicine and the legalization of medical procedures that some find ethically questionable or in conflict with religious beliefs, the discussion of the availability and scope of a doctor's right to conscientious objection has returned in Poland precisely in the context of reproductive procedures: in vitro fertilization, prenatal testing, day-after contraception, and the subject matter of this paper – pregnancy termination procedures.

It should be recalled that the restriction (Kużelewska, Michalczuk-Wlizło & Kużelewski 2022; Bucholc 2022; Gutowski, Kardas 2020; Młynarska-Sobaczewska 2021) of the already strict abortion law in Poland has caused a significant reduction in the level of medical knowledge and popular culture regarding women's health. Polish women get their knowledge about aid organizations or the abortion hotline they run from the Internet (Michalczuk-Wlizło, Dziemidok-Olszewska & Siewierska 2024). However, over the past few years, knowledge about safe abortion, but also abortion itself, its standards and procedures, has been transformed. Unfortunately, the actual ban on abortion in Poland has left gynecologists unfamiliar with modern methods used to perform the procedure. From a public health perspective, reproductive health should be looked at holistically, and negligence and knowledge deficiencies in one area, such as abortion, also

have negative consequences when treating miscarriages, perinatal complications, or pregnancy pathology. Abortion is also stigmatized among health professionals. The lack of reliable knowledge about modern abortion methods and the accompanying doctors' fear of police surveillance and potential legal liability is a very harmful combination, the effects of which are most often felt by women. Doctors who decide to save the life or health of a pregnant woman at the expense of the life or health of the fetus must often face misinformation about their professional rights and responsibilities (Committee on Bioethtic 2023). Hence, perhaps, such a frequent invocation of conscientious objection by doctors and their refusal to perform, in cases permitted by current law, pregnancy terminations (Zaręba, La Rosa & Kołb-Sielecka 2020).

It should be noted that the current practice of applying the law in force in Poland clearly indicates that the institution of conscientious objection concerns practically only the unavailability of the abortion procedure, and therefore appears on the occasion of social, political, worldview, and legal discussions about abortion (Berro Pizzarossa, Sosa 2021; Grabowski 2021; Michalczuk-Wlizło 2022; Rak 2022).

The institution of conscientious objection, as a legally guaranteed possibility to refuse to perform an obligation imposed by law, on the basis of religious or moral convictions, in Poland is established only for a few professional groups. The possibility to invoke the conscience clause is available to doctors, dentists and nurses and midwives. The special role played by the conscience clause in the health professions is due to the specific nature of this field: its direct impact on issues of health, life and death.

Scope of the conscience clause

Freedom of conscience and religion is one of the inherent and inalienable rights of every human being, which as an immanent value are regulated and protected in the constitution, and the need for the existence of a conscience clause in a democratic state is not controversial (Bosek 2014; Nawrot 2015, 34–35; Paprzycki 2015). One of the features of a democratic system is pluralism. In Poland, the constitutional norm ensuring pluralism of worldviews, faiths, values is the principle of freedom of conscience and religion formulated in Article 53(1) of the Constitution (53(1) "Everyone shall be guaranteed freedom of conscience and religion."). These freedoms derive from human dignity, which is intrinsically inherent and inalienable, and is the source of individual rights and freedoms, according to Article 30

of the Constitution. From dignity is derived a set of basic human rights (Szyszkowska 2008). Thus, every individual has the right to his or her own worldview, derived from human dignity.

Poland is also obligated by acts of international law, which formulate the recognized universal standard of legal protection of the right to freedom of thought, conscience and religion. The formula, which is universally applicable, makes it possible to cover the widest possible subjective scope of an individual's activity in the sphere of worldview. It should be clearly noted that the category formulated in this way (freedom of thought, conscience and religion) includes not only the religious sphere, but also the non-religious sphere, relating to political, ideological or moral views. (Hołda, Hołda, Ostrowska & Rybczynska 2004; Skwarzyński). Among the acts of international law regulating the right to freedom of thought, conscience and religion, the following should be mentioned first of all: the UN Universal Declaration of Human Rights of 1948 (Article 18), the International Covenant on Civil and Political Rights of 1966 (Article 18), the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 9). In addition, the Charter of Fundamental Rights of the European Union in Article 10 (2) explicitly refers (as the only one) to conscientious objection as a legal institution guaranteeing the realization of the right to freedom of thought, conscience and religion: "The right to refuse to act contrary to one's conscience is recognized, in accordance with national laws governing the exercise of this right." Thus, the legislator does not decide on the obligation to introduce a conscience clause or the possible scope of regulation, but leaves the decision to the national legislature of the EU member state (Charter of Fundamental Rights).

The terms "freedom of thought, conscience and religion" and "freedom of conscience and religion" are often used interchangeably (Łopatka 1995). Indeed, freedom of religion should be understood as a canon of professed norms, values or ideas and thus given a broad conceptual meaning, liberating it from being defined solely in religious terms (Szymanek 2007). Both the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms use the category "freedom of thought, conscience and religion," while the Polish Basic Law omits the concept of thought in the text of Article 53, referring only to conscience and religion. However, it is thought that is always primary and conditioning because the state's assurance of freedom of thought, i.e., freedom to hold any opinion, conditions freedom of conscience and religion (Rozner 2002)). *Ratio legis* of the provision of Article 53 of the

Constitution undoubtedly allows for a broad meaningful interpretation of freedom of conscience and religion, in the spirit of international universal standards.

The existence in the legal system of the institution of the conscience clause results in the ability of an individual to refuse to perform an obligation imposed by generally applicable law by citing a conflict between a religious or moral norm and a legal norm. The clause allows this conflict to be resolved in favor of conscience and thus protects the individual from coercion and acting against conscience or religion (Gałązka 2013; Mróz, Drozdowska 2015, 87–104).

The legal basis for a doctor's conscience clause is the Law of December 5, 1996 on the profession of physician and dentist, which in Article 39 provides that: "A physician may refrain from performing healthcare services that are inconsistent with his or her conscience, subject to Article 30, except that he or she is required to note this fact in the medical record. A physician practicing under an employment contract or as part of a service is also required to notify his or her supervisor in advance in writing" (Law 1996).

Determining the scope of the subject matter of conscientious objection requires establishing the conceptual scope of the phrase "healthcare services." The Act on the profession of physician and dentist does not contain a statutory definition, and only in Article 2(1) provides that the practice of the medical profession consists of providing healthcare services, in particular examination of the state of health, diagnosis and prevention of diseases, treatment and rehabilitation of patients, providing medical advice, as well as issuing medical opinions and certificates. The standard, formulated in this way, does not exhaust the conceptual scope of "healthcare services," but only provides examples of activities that fall into the category in question. In the Polish legal system, the statutory (legal) definition of healthcare services is contained in Article 2(2)(10) of the Act of April 15, 2011 on medical activity, under which healthcare services are activities aimed at preserving, saving, restoring, or improving health, and other medical activities resulting from the treatment process or separate regulations governing the principles of their performance. There is no doubt that the pregnancy termination procedure falls within the definition of a healthcare service.

The legislator specified the requirements set forth in Article 39 of the Act on the profession of physician and dentist, to place an appropriate note in the patient's medical record and to notify the supervisor (if the service is provided as part of a service or under an employment contract) for evidentiary purposes. They are purely technical and serve the purpose of reporting. It should be mentioned that currently many physicians also provide services

under civil law contracts and, as a result, they are not obliged to inform their supervisor of their intention to take advantage of the conscience clause in cases of pregnancy termination, which can hinder the organization of work in healthcare facilities. Indeed, in view of the provisions of Article 46 (1) of the Act on medical activity, the head of the medical entity is responsible for managing the entity and thus performing the contracts concluded with the National Health Fund for the provision of services, including, if the entity has a contract for procedures in the field of gynecology and obstetrics, employing appropriate physicians so that female patients can benefit from legal abortions.

When defining the scope of conscientious objection, it is important to remember that it refers only to healthcare services that comply with applicable law. In Poland, abortion can be performed in the event of occurrence of one of two statutory grounds:

1. when the pregnancy poses a threat to the life or health of the pregnant woman or
2. when there is a justified suspicion that the pregnancy resulted from a prohibited act (art. 4a Family Planning Act)

The legislature has also clarified that abortion for reasons associated with the mother's health is not limited by the fetal age, while for criminal indications, it is permitted up to the 12th week of pregnancy. While the "criminal premise" does not, in principle, raise interpretive questions, the "health premise" requires a brief explanation, The indication of pregnancy as a factor threatening the health or life of a woman does not limit this threat to specific diseases occurring in the course of pregnancy, or pregnancy-induced conditions. The 1993 Family Planning Act does not specify a closed catalog of medical indications for termination of pregnancy, according to Article 4a (1) (1), they use the general category of health. This should be understood to mean that a risk can affect any area of health, both physical and mental. It is up to the medical specialist to assess, in accordance with current medical knowledge, the state of threat to life or health. Moreover, in formulating the content of the regulation of the article in question in the current wording, the legislator did not specify whether this danger is to be sudden or immediate. Abortion of a pregnancy, the continuation of which would lead to the occurrence or aggravation of a serious illness of the pregnant woman, should be considered permissible. The occurrence of the circumstance that the pregnancy threatens the life or health of the woman must be confirmed by a physician with a degree of specialty in the field of medicine appropriate to the nature of the woman's illness. The law, however, obliges that this must be a doctor other than the

one performing the abortion (Article 4a, paragraph 5 of the Law on Family Planning). However, it should be borne in mind that the threat to the woman's mental health as a premise for abortion should be treated carefully so that there is no abuse in the interpretation of the applicable law. The state of threat to mental health must be realistically identified by the doctor and result from the pregnancy Given that abortion in Poland, with the exception of two statutory exceptions, is not allowed, it seems that the threat to the life or health of the woman should be a real, direct threat and impossible to effectively abrogate by means other than termination of pregnancy. Then both the rights of the pregnant woman and the fetus are guaranteed.

Termination of pregnancy is legal in two exceptional circumstances that abrogate the unlawfulness of the act due to the collision of legally protected goods. This is because abortion, as an act that causes the death of a child in the prenatal stage, is an unlawful act, an attack on constitutional values, including the legal protection of life regulated by Article 38 of the Constitution (Łącki, Wróblewski 2023), In a situation where, in the doctor's opinion, even an erroneous one, the statutory prerequisites have not been met and the pregnancy termination procedure would not be legally permissible, the physician may not find a conflict between the religious or moral norm he adheres to and the norm of positive law. Then refusal to perform an abortion is not subject to the provision of Art. 39 (Nawrot 2014, 105–116).

In addition, it seems that the scope of the conscience clause does not include services that are intrinsically "ethically indifferent," for example, making a diagnosis (determining the actual state of the patient's health and any contraindications to the performance of specific medical procedures) or issuing a referral for a diagnostic test so that the doctor can obtain information about the patient's health. This is because information is a source of knowledge, and for this reason it cannot "be in conflict" with a doctor's conscience. Consequently, after diagnostics, a doctor may not cite conscientious objection to refuse to issue a medical certificate regarding the determination of circumstances legitimizing the termination of pregnancy.

The current wording of the article that establishes the conscience clause is the result of the judgment of the Constitutional Tribunal of October 7, 2015, ref. K 12/14, which declared unconstitutional the norm of the first sentence of Art. 39 of the Act of December 5, 1996 on the profession of physician and dentist, to the extent that it imposed an obligation on a physician who refrains from performing a healthcare service that is inconsistent with his or her conscience to indicate viable options for obtaining such a service from another physician or treatment facility. Thus, the Constitutional Tribunal

strengthened the position of the doctor invoking conscientious objection, because while exempting him or her from the obligation to indicate another doctor, it did not indicate who would be required to do so and thus who would be responsible for the patient's access to the healthcare service guaranteed by law.

Since the entry into force of the judgment of the Constitutional Tribunal of October 7, 2015, ref. K 12/14, there has been no entity obliged to provide the patient with information about the place where a service not provided to her due to an invocation of the conscience clause can be performed. Healthcare facilities providing healthcare services are not required to obtain information from doctors in advance about whether and in what cases they will invoke conscientious objection. In addition, the fact that a facility has a contract with the National Health Fund for the provision of guaranteed medical services in the field of gynecology and obstetrics, which includes abortion procedures, does not mean that the facility will perform those services. It seems that the conscience clause cannot be invoked by health care facilities. Firstly, concepts such as conscience or worldview belong to individuals and not to organizational units. Secondly, the health care facility, is obliged to implement state policy in the health care system (Nestorowicz 2005). In the literature, a different position is also presented. The authors who represent them argue that hospitals are not just the sum of medical personnel, but have their own identity, missions and goals, which are implemented regardless of personnel changes. Thus, hospitals can benefit from conscientious objection (Sulmasy D. 2008). Proponents refer to Council of Europe Parliamentary Assembly Resolution 1763 of 2010 – The right to conscientious objection in lawful medical care, which states in the first point; "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason." (Resolution 1763. 2010). The resolution affirms the right to the conscience clause in a broad subjective scope but at the same time points out in paragraph 4 the state's responsibility to ensure that patients have access to lawful medical care in a timely manner (Pawlikowski 2011). The Parliamentary Assembly emphasizes that each state has a dual obligation; to health care workers, ensuring the right to protect elementary values (freedom of thought, conscience and religion) and to patients, ensuring the right to legitimate medical care. Due to the legal nature of the resolution, it is only postulatory and does not constitute a source of law.

The cited limitation of the conscience clause arising from Article 30 of the Act on the profession of physician and dentist specifies: "The doctor is obliged to provide medical assistance in any case where delay in its provision could cause a risk of loss of life, grievous bodily harm, or serious disorder of health, and in other cases of urgency." Therefore, from the reference of Art. 39 of the Act on the profession of physician and dentist to Art. 30 cited above, one should draw the conclusion that the conscience clause may never apply in a situation where the life of a pregnant woman is in danger, regardless of the age of the fetus. The exclusion contained in the cited regulation stems from the legislature's recognition of the hierarchy of values. Human life (the life of a pregnant woman) is the highest value and its protection takes precedence over the value of a doctor's freedom of conscience. In other cases involving risks to health, the conscience clause may be applied provided that a delay in a medical intervention does not result in a deterioration of the pregnant woman's health (Szczucki 2009, 167).

In addition, it appears that under Art. 39 of the Act, in conjunction with Art. 30 of the Act on the profession of physician and dentist, a doctor may not take advantage of conscientious objection in relation to "other urgent cases," which include the expiration of the 12-week period allowing abortion of a pregnancy that has resulted from a criminal act.

The safeguards for patients' rights pursuant to Art. 30 should be evaluated as positively as possible. This is because if doctors were granted the absolute right to refuse to provide healthcare services that are inconsistent with their conscience, then this could result in patients being completely denied access to a particular type of medical service. Freedom of conscience in the internal sphere of thought (forum internum) is an exclusive personal matter of the doctor and is not subject to any limitation. However, in the external sphere (forum externum), which includes the externalization of these beliefs, it is subject to limitations due to the protection of the patient's rights. Therefore, the right to conscientious objection cannot be absolute (Sztychmiler 2018).

A democratic legal state (Article 2 of the Constitution) recognizes respect for values and worldviews, accepting that there is no single rightful system of religious, moral or philosophical beliefs. Lawmaking, therefore, must involve the development of a compromise between different value systems. A democratic state therefore allows certain behaviors that are considered immoral by part of the community, as well as forbidding such behaviors that are considered morally acceptable by part of the community. Legally imposing a uniform set of values on society would be an attempt to ideologize society.

The scope and legal nature of the conscience clause is the subject of doctrinal debates, primarily concerning the normative nature and source of a doctor's right to refuse to perform a health service on the grounds of conscientious objection. Two main positions are represented. Supporters of the first one argue that the regulation contained in Article 39 in connection with Article 30 of the Law on the Medical Profession is a limitation clause, which sets limits on the exercise by a doctor of the freedom of conscience contained in Article 53 of the Constitution (Nawrot 2016; Zoll 2014). This position was also represented by the Constitutional Court in the justification for the 2015 ruling, stating that the right to conscientious objection derives directly from the constitutional freedom of conscience and religion, the source of which is the inherent dignity of every human being. Therefore, a doctor, like any other person, may refrain from actions contrary to his conscience, even in the absence of statutory regulation of the conscience clause, pointing to Article 53 in conjunction with Article 8 of the Constitution as the legal basis for such action. The normative source of conscientious objection is a constitutional norm and not a statutory norm. and the legal conscience clause under Article 39 in conjunction with Article 30 of the Law on the Medical Profession is a restriction on a doctor's freedom of conscience in the forum externum.

The position of the second, which is adhered to by the author of this article, represents the view that the norm of Article 39 of the Law on the Medical Profession of Physicians and Dentists has a guarantee character. It expresses the doctor's right to behave in accordance with his moral convictions (i.e., to exercise the freedoms contained in Article 53 of the Constitution) despite the fact that he then refrains from fulfilling his duty, which is the realization of the health service guaranteed to the patient by law. It should be emphasized that the patient's right to receive guaranteed health services is an emanation of the constitutional right to health care. According to this position, only the explicitly formulated conscience clause and the conditions for its application provide a doctor who refuses to provide a health service because of his worldview with a guarantee of specific immunity. The conscience clause, which allows medical personnel to refrain from providing legitimate, legitimate health services to patients, requires a statutory regulation that takes into account both the rights of the doctor and the rights of the patient. It should be an exception and not a rule in the legal system (Wyrzykowski 2014; Wróbel 2010; Zielińska 2003).

By the way, it is worth noting that the functioning of the institution of conscientious objection in Poland has been criticized by international institutions. The Committee of Ministers of the Council of Europe, acting

pursuant to Article 46 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in overseeing the implementation of final judgments of the European Court of Human Rights, notoriously urges Poland to implement the judgments by adopting clear and effective procedures (Michalczuk-Wlizło 2023; Gałązka, Wiak 2007) In addition, it calls for the adoption, without further delay, of the necessary reforms to the objection procedure and urges that the obligation of hospitals to refer a patient to an alternative healthcare facility in the event of a refusal to provide medical services on grounds of conscience be included in the applicable legislation (Jankowska-Gilberg 2009)i. Polish authorities have also been obliged to combat gender stereotyping and stigmatization of abortion, as well as monitor and make public the numbers, availability, and location of hospitals performing pregnancy terminations, as well as providers who refuse to provide services due to the conscience clause (Stalmach 2020). It should be emphasized that Poland is also required to provide an assessment of the impact of the Constitutional Tribunal's ruling October 22, 2020 on the availability of prenatal tests, particularly since they are not strictly related to access to legal abortion, but also help in making informed decisions during pregnancy related to prenatal treatment or preparation for childbirth, and to ensure that access to them is not restricted. Recommendations for Poland on the necessary legislative changes to doctors' conscience clause were also made at the UN. The Committee on Economic, Social and Cultural Rights evaluated the alarming number of illegal abortions that are being performed in Poland due to the refusal of doctors invoking the conscience clause to perform legal termination of pregnancy procedures. It also called on Poland to take all effective measures to enable women to exercise their right to sexual and reproductive health (Committee on Economic, Social and Cultural Rights 2009).

Attempt at a corrective action

The conscience clause, despite its ethical and moral nature, is subject to legal and political rules. The victory in the 2023 parliamentary elections and formation of the Council of Ministers by the "October 15 Coalition" of political parties, which declared the need for changes in the law on termination of pregnancy during the election campaign, has made it possible to take action to stigmatize the practice of hospitals that use measures that make it difficult or even impossible for women to undergo a legal abortion procedure.

In fact, there were entire regions in Poland where pregnancy terminations were not performed legally and all gynecologists providing services there, in public hospitals, reported that they were unable to perform that medical procedure due to the conscience clause[1]. Such situations were reported by women to NGOs, the media, and the Commissioner for Human Rights, who indicated in a letter dated June 2, 2020 [ref. VII.5001.1.2020.AMB/XI.5001.1.2015.AS] addressed to the Minister of Health: "In letters sent to the Commissioner for Human Rights, the Complainants draw attention to the refusal of doctors to perform a legal abortion procedure by invoking the conscience clause. One of the reasons for this is that some hospitals, despite having a contract with the National Health Fund for hospitalization in the field of gynecology and obstetrics, do not perform abortions due to the invocation of the conscience clause by all physicians." (Commissioner for Human Rights 2020). Such actions, although contrary to the law, also took place at the behest or with the acquiescence of provincial consultants in gynecology and obstetrics (Prus 2017; Gazeta Wyborcza 2014).

In Poland, statistics are kept on abortions performed, but the number of refusals resulting from conscientious objection, for example, is not recorded. Data released annually by the Minister of Health shows that in 2022 as many as nine provinces did not have a single legal termination of pregnancy, while in 2023 this was the case only in two provinces: Podkarpackie and Warmińsko-Mazurskie (Medexpress 2024). In both of the years cited above, the largest number of legal abortions were performed in the Dolnośląskie Province, because in the hospital in Oleśnica, a town located in that province, doctors receive women from all over Poland. The statistics presented by the Minister of Health highlight another fact. If 161 terminations were performed in the Dolnośląskie province in 2023 and only 3 each in the Śląskie or Lubuskie provinces, such a significant disparity in the numbers indicates that abortion is not available locally at a short distance from where women live. Pregnant women often face logistical problems, including significant costs, if they want to gain access to legal abortion, including in a health or life-threatening condition.

By the way, it should be noted that despite the threefold increase in the number of abortions performed in 2023 [425 abortions] compared to 2022 [161 abortions], this is only a small percentage of the total number of abortions actually performed by Polish women (Michalczuk-Wlizło 2023a). According to estimates presented by aid organizations, 80,000 to 200,000 pregnancy terminations are carried out in Poland, as well as abroad, by Polish citizens (Chrzczonowicz 2024). It seems ludicrous that in a country with

a population of 38 million people, in one year doctors had to deal with only 423 cases (2 cases out of the total of 425 were abortions of pregnancies resulting from a criminal act) where there was a risk to the health and life of the pregnant woman. However, the increase in the number of legal abortion procedures reported by hospitals may indicate, a slight "thawing" of doctors' fears, as well as a result of the fact that medical professionals define more broadly the premise of risk to the health or life of a pregnant person.

In an effort to raise the level of women's health security and also to restore the real application of law, in early 2024, when presenting the "Safe, Conscious Me" package[2], which is the Health Ministry's project for women, the Minister of Health announced: "I am not running away from the responsibility of the Minister of Health, who is responsible for the legal and organizational aspect. The National Health Fund must remind all doctors that the conscience clause may not be invoked when patients' lives and health are at risk. This, however, was already in the law and achieved nothing. We will change the provisions of the general terms of the NHF's contracts with gynecological-obstetrical departments." (Kadzikiewicz 2024). The proposed solutions were intended as a reminder that "a medical entity does not have a conscience" (Czerska 2024) and to ensure that women's rights are safe and respected when the mother's life is in danger, while ensuring the safety of doctors (Dlaszpitali.pl 2024).

The changes announced by the Minister of Health found support in the Recommendations of the Polish Society of Gynecologists and Obstetricians on the application of the provisions of the Act of January 7, 1993 on family planning, protection of the human fetus, and the conditions of permissibility of pregnancy termination. Text revised on February 23, 2024. It was recalled that in accordance with Article 4b of the Act on family planning, persons covered by social insurance and persons entitled under separate regulations to free medical care are entitled to free termination of pregnancy in a public healthcare facility. The termination of pregnancy is a standard medical procedure that does not require specialized equipment, so if the indications for it are established, the procedure can be performed in any obstetrics-gynecology department. Every hospital is obliged to provide professional, dignified, and safe conditions for its performance (Polish Society of Gynecologists and Obstetricians 2024).

The recognition of the legal and factual problem, as well as the will to change the inability of women to exercise their right to abortion due to physicians invoking conscientious objection[3] has resulted in the preparation (Podyplomie.pl 2024) and submission to the consultation procedure (TVN24 2024a) and signing, on May 14, 2024, by the Minister of Health Iz-

abela Leszczyna, of the Regulation amending the Regulation on the general terms and conditions of contracts for the provision of healthcare services (Regulation 2024).

Pursuant to the new Regulation, par. 6 was added to sec. 3 of the Annex to the amended regulation, according to which a provider performing a contract entered into with the National Health Fund for the provision of guaranteed services in the field of hospital treatment in obstetrics and gynecology is obliged to provide all services included in the contract. In cases where termination of pregnancy is permitted by generally applicable law, the provider is obliged to carry it out at the place of service provision, regardless of the invocation of conscientious objection by a physician practicing with that provider (§ 1 pkt 3 lit. a). According to the cited provision of the Regulation, medical facilities are obliged to organize their work in such a way that at least one doctor can perform the pregnancy termination procedure. If the hospital does not have such a doctor in its staff, it must hire a subcontractor under a civil-law contract.

The newly introduced obligation to ensure the provision of medical services is to be enforced by a contractual penalty of up to 2% of the value of the provider's contract, which is provided for in sec. 30 (1) (1) of the amended regulation (§ 1 pkt 3 lit. b). An assessment of the degree of noncompliance with the contract with the National Health Fund was established as a criterion for the determination of amount of the penalty, which was to be considered on a case-by-case basis, depending on the degree of the violation. The possibility of applying the maximum penalty seems to be intended to discipline hospital managers to thoroughly and comprehensively carry out the contracts concluded with the National Health Fund. In addition, the possibility of terminating the contract for the performance of guaranteed services in part or in whole, without notice, was introduced.

A contractual liability of a healthcare provider for failure to perform its contract with the National Health Fund is not a new solution. However, prior to the amendment of the regulation in question, there was no data on whether this solution was used in practice in the case of abortion (procedure with the statistical number M17 in the JPG system)[4]. The National Health Fund has repeatedly exercised its authority to impose contractual penalties in cases of many unperformed or improperly performed medical services, but in the field of reproductive health it has never used this right. The amendment of the regulation will perhaps contribute to the raising of the level of respect for the law in force, but it is not the solution that women, who demand respect for reproductive rights and the provision of state-guaranteed medical services [abortion], are waiting for. It seems that

even if imposing penalties on state-owned entities performing contracts entered into with the National Health Fund and refusing to perform the pregnancy termination procedure are effective, as of June 30, 2024, the penalty for refusing to perform abortions has been imposed on the Pabianice Medical Center (Zboińska, Juśkiewicz 2024), the deficiency of such a solution is that a penalty is imposed after a violation, which fails to secure the exercise of her rights by a woman who has been denied the pregnancy termination procedure on the basis of a doctor's conscientious objection. It should be noted that the purpose of the introduction of the regulations in question was not, as some indicate (Ordo Iuris 2024; Radio Maryja 2024; Sobolewski 2024) to break doctors' conscience, but to more effectively force the heads of medical entities to organize their work in a manner that will ensure patients' access to guaranteed services, in any facility that has entered into a contract with the National Health Fund.

The practice of application of the law in force in the area of permissibility of abortion and the abuse by doctors of the conscience clause as a tool for avoiding the performance of obligations or trouble had already been reflected in public opinion polls before the regulation was amended. In June 2023, a survey was conducted by IPSOS, commissioned by Radio Tok Fm and Okopress.pl (Rzeczpospolia 2023) which yielded the following results. According to 65 percent of those surveyed, the conscience clause invoked by doctors who refuse to terminate pregnancies should not apply in public hospitals. According to the respondents' declarations, 96% of those who voted for the Left, 86% of those who voted for the Civic Coalition, 73% of the Third Way supporters, and more than half (53%) of those who voted for the Confederation were against the conscience clause. The biggest surprise was the declarations of the supporters of Law and Justice party, which divided almost equally: 41% declared their support of the conscience clause and 42% were against invoking it in public hospitals. (Chrzczonowicz 2023) Another surprise was the answers given by churchgoers. As many as 46% of them oppose doctors' right to invoke the conscience clause in the case of abortions permissible by law. The Catholic Church, as an advocate for the protection of the conceived child, also favors leaving in place the existing regulations regarding a doctor's ability to invoke conscientious objection.

The survey conducted by IPSOS clearly illustrates that the problem of pregnancy, accessibility to abortion, and inability to benefit from a medical service to which one is legally entitled, due to the refusal of a doctor invoking the guarantees provided for in Art. 39 of the Act on the profession of physician, is in fact a women's problem Depriving doctors of the

ability to invoke conscientious objection in public hospitals was supported by 71% of women and only 57% of men; the respondents apparently most concerned because of being in the reproductive age, i.e. in the 18–39 years old and 40–59 years old groups, voted, respectively, in favor of abolishing the conscience clause: 77% of women and 54% of men in the first age group, and 77% of women and 61% of men, in the second group.

Conclusions

Currently in Poland, the conscience clause concerns practically only the unavailability of the pregnancy termination procedure, which is why it comes up in debates about abortion. It should be clearly emphasized that women in Poland need to be treated with dignity and require a comprehensive abortion policy based on solidarity, respect for rights, and access to a variety of services. One should bear in mind that both prohibition and obstruction of legal abortion constitute an institutionalized form of violence against women. By placing a woman's right to a legal medical service and a doctor's right to conscientious objection in opposition to each other, all abortion policy stakeholders compound an already difficult and complex situation marked by extreme emotions. This poses a threat to the sense of security of a woman, who is often lost, confused, and burdened with the weight of fear and a sense of responsibility for her choice and decision.

The legal and factual situation in Poland results in the need for women but also doctors to stand in solidarity against any political, worldview, or ideological pressure that not only destroys ethical and professional integrity, but also undermines public trust in the medical professions. Undoubtedly, a shortcoming of the Polish system that causes uncertainty and spreads unreliable information in the public space is the failure of the Minister of Health to keep a register of refusals to provide pregnancy termination services in cases where it is allowed by law due to the doctor's invocation of the conscience clause. This is because medical service providers are required only to report data on the services provided (Minister of Health 2024).

The conscience clause existing in the Polish legal order does not exempt the state from the obligation to guarantee effective access to legal abortion. The practice of application of the applicable law should respect a doctor's right to conscientious objection, while not negating a pregnant woman's autonomy and rights. The system for provision of healthcare services should be designed in a way that allows the patient to receive the service to which she is entitled as soon as possible. In the case of pregnancy termination, this

requirement is implied from the statutory limitation of the fetal age by which the procedure can be performed. On the other hand, the invocation of the conscience clause does not result in the doctor imposing on the patient the moral principles adhered to by the former. The essential goal is to enable the doctor to maintain his or her professional and ethical integrity and respect for the morality he practices. However, in a situation of a serious risk to the patient's health or life, the protection of these values has absolute priority over the doctor's personal beliefs and interests, and any inaction or inadequate action that puts the patient at risk of death or harm to his or her health is unlawful and grossly unethical. The state is obliged to seek such solutions that allow the widest possible implementation of all rights, including those that may conflict with each other.

NOTES

[1] For example John Paul II City Hospital in Rzeszów (SPZOZ no. 1) and the PRO FAMILIA Specialized Hospital in Rzeszów; for more information, see: results of the 2019 monitoring of abortion availability in Rzeszów conducted by the Federation for Women and Family Planning, https://federa.org.pl/dostepnosc-aborcji-rzeszow/.

[2] The "Safe, Conscious Me" program covers in vitro procedures, oncofertility, expanded prenatal screening, availability of abortion, access to emergency contraception, HPV vaccination, perinatal care, and health education in schools.

[3] The explanatory memorandum to the draft regulation states that: "As a result of the abuse of the so-called conscience clause by some doctors, women are often unable to exercise their right to legally terminate a pregnancy".

[4] Each medical procedure is marked with a code in the Uniform Patient Groups (JGP) System, which was introduced in Poland on July 1, 2008 under the National Health Fund President's Order no. 32/2008/DSOZ of June 11, 2008 on the definition of the conditions for entering into and carrying out contracts of the hospital treatment type. Healthcare services are contracted and billed on its basis.

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