Conscientious refusal, the requirement of justification, and the fetishisation of conscience in healthcare: a Polish perspective

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A dogma accepted in many ethical and legal frameworks is that the reasons that lie behind conscientious objection (CO) in healthcare cannot be evaluated or judged by anyone other than the objector herself, because conscience is individual, autonomous, and inaccessible to any outside evaluation. In this paper I argue that this view is mistaken: physicians have an obligation to reveal and explain their reasons for CO and that these reasons may be evaluated either ex ante or ex post. In arguing for my claims I refer mostly to the Polish context and I defend some novel claims that have not been analyzed extensively in the debates on CO. First, I introduce a moral threshold requirement: CO is justified only if the reasons behind a refusal are of moral nature and meet a certain threshold of importance. Second, I highlight the similarities between CO in healthcare and the regulations concerning military refusals, including an emerging practice of granting the right to selective CO status to professional soldiers, that places the burden of proof on a petitioner for CO status. My argument highlights the special status of refusing to kill human organism

(military conflicts, abortion, assisted-suicide), and shows that certain other common forms of CO do not warrant accommodation (e.g. emergency contraception).

keywords: conscientious objection, abortion, war, pacifism, patient rights, emergency contraceptives

In its recent application to the Polish Constitutional Tribunal (*Trybunał Konstytucyjny* – TK) concerning the legislation on the conscience clause, the Supreme Medical Council (*Naczelna Izba Lekarska* – NIL) wrote: "Since it is commonly assumed that conscience is sovereign, then it is not known why a physician should justify his worldview in writing".¹ The Tribunal dismissed this part of the complaint in its judgement of 7 October 2015, but it agreed that "The purpose of keeping medical records is not to... record the philosophical and legal views of a physician in writing". It also considered that the written justification for conscientious objection by a physician "should be of medical

¹ Naczelna Izba Lekarska (NIL). 2014. *Wniosek o stwierdzenie niezgodności aktu normatywnego z Konstytucją i ratyfikowaną umową międzynarodową*, 11 March 2014. Available at: <http://trybunal.gov.pl/s/k-1214/> [Accessed 27 Apr 2017].

nature, and not serve to clarify the worldview of a physician or indicate a moral rule underlying his behaviour”.²

In this paper I will show that the requirement to state reasons for conscientious objection in medicine is ethically justified and legally desirable.³ I will challenge the dogma, which is widely accepted beyond Polish law, that since conscience is “individual”, “autonomous”, “sovereign” the reasons behind a refusal to perform a given medical service cannot, by their very nature, be subject to any evaluation or regulation.⁴ I will also show that the lack of a requirement of justification exposes patients to the risk of bearing additional costs, even in situations where there is no a need to protect the integrity of a physician's conscience. Building my argument mostly on Polish cases, where the legal and social status of CO in healthcare is specific, and where the CO clause is overused, comparing with many other EU countries, I will defend an interpretation of the justification requirement, according to which invoking the conscience clause is permissible (both ethically and legally) only when all of the

² Trybunał Konstytucyjny (TK). 2015. Prawo do odmowy wykonania świadczenia zdrowotnego niezgodnego z sumieniem, sygn. akt K 12/14. Available at: <http://trybunal.gov.pl/s/k-1214/> [Accessed 27 Apr 2017].

³ This paper develops some ideas published in Polish, where I focused on the analysis of the judgment of the Polish Constitutional Tribunal of 7 October 2015, see: AUTHOR 2016.

⁴ Galewicz W. Jak rozumieć medyczną klauzulę sumienia? *Diametros* 2012;34:136-145; Wicclair M.R. 2011. *Conscientious Objection in Health Care: An Ethical Analysis*. Cambridge: CUP.

following conditions are met: 1) authenticity: there is no reasonably plausible evidence that the judgements are not genuinely adopted by a physician; 2) relevance: the judgements of conscience are not based on false beliefs about current scientific knowledge or the circumstances of the case, or the content of legal or ethical norms; 3) moral threshold: the normative judgement forming the basis for invoking the conscience clause is of a moral nature and exceeds some threshold of significance or importance.

The position presented here, on the one hand, significantly extends the reasonability view that Robert F. Card has defended in many texts over the years⁵), but on the other hand, differs from the view, defended among others by Julian Savulescu and Udo Schlenk,⁶ which sees conscientious objection in

⁵ Card R.F. Conscientious Objection and Emergency Contraception. *Am J Bioeth* 2007;7:8–14; Card R.F. Conscientious Objection, Emergency Contraception, and Public Policy. *J Med Philos* 2011;36:53-68; Card R.F. Reasonability and Conscientious Objection in Medicine: A Reply to Marsh and an Elaboration of the Reason-Giving Requirement. *Bioethics* 2014;28:320-326. Cf. Kantymir L., McLeod C. Justification for Conscience Exemptions in Health Care, *Bioethics* 2014;28:16-23; 12 Marsh J. Conscientious Refusals and Reason-Giving. *Bioethics* 2014;28:313-319.

⁶ Savulescu J., Schuklenk U. Doctors Have No Right To Refuse Medical Assistance In Dying, Abortion Or Contraception. *Bioethics* 2017;31:162–170; Schuklenk U., Smalling R. Why medical professionals have no moral claim to conscientious objection accommodation in liberal democracies, *J Med Ethics* 2017;43:234-240.

healthcare as never justifiable. First, I introduce a new requirement of moral threshold (section 1). Second, I develop the similarities between the problem of the medical conscience clause, and conscientious objection by conscripts and professional soldiers in military contexts (section 2).

1. Authenticity, relevance, threshold

The purpose of the introduction of a legal form of the conscience clause was to protect some people against performing acts that contradict their judgements of conscience, or – as it is specified in literature – violate their moral integrity. Such an integrity can be understood as the relation between accepted principles and expected acts⁷ and many bioethicist assume that since it is in itself wrong to act deliberately against one's moral beliefs, then it would also be wrong, at least *prima facie*, to make someone else act against her moral beliefs, no matter what is the content of her moral beliefs.⁸

This view is grounded in a Thomistic understanding of conscience, that assumes that thinking that what someone is doing is morally good and acting in accordance with one's conscience are necessary, but not sufficient conditions

⁷ Childress J.F. Appeals to Conscience. *Ethics* 1979;89:315-335; McFall L. Integrity. *Ethics* 1987;98:5-20.

⁸ Wicclair. *Conscientious Objection in Health Care*, op. cit.; Brock D.W. Conscientious refusal by physicians and pharmacists: who is obligated to do what, and why? *Theor Med Bioeth* 2008;29:187-200.

of a morally good actions.⁹ They are not sufficient because the judgment of conscience may be false in two ways: “first, when a particular action or kind of action is judged incorrectly to violate or follow from some universal moral principle; second, when one’s syllogism appeals to the wrong universal moral principle by falsely identifying the most morally salient aspect of the action.”¹⁰ Thus, even if the particular judgment of conscience is false, it would be objectively wrong (not only wrong from his or her perspective) for a person to breach his own conscience. From this perspective it is easy to reach a conclusion “the medical professional must demand that his or her serious judgements about what is (or is not) good for the patient be respected, just because acting in good faith is a necessary (although not a sufficient) condition for any good medical conduct and any real care about patients.”¹¹ It is assumed that no one

⁹ For an overview see: M. Głowala. A Thomistic Argument for Respecting Conscientious Refusals. *Diametros* 2016;47:19-34.

¹⁰ S. Chanderbhan. Narrative, Casuistry, and the Function of Conscience in Thomas Aquinas. *Diametros* 2016;47:1-18. See also other papers in this special issue of the journal *Diametros* on Thomas Aquinas' Theory of Conscience and Contemporary Debates on Conscientious Objection: L. Holdsworth. Aquinas and the Natural Habit of Synderesis: A Response to Celano. *Diametros* 2016;47:35-49; P.J. Medeiros. Complicating Conscience, Refreshing Discontent. *Diametros* 2016;47:50-63; M. Piechowiak. Thomas Aquinas – Human Dignity and Conscience as a Basis for Restricting Legal Obligations. *Diametros* 2016;47:64-83.

¹¹ Głowala, *op. cit.* p. 26.

should be allowed to challenge a judgment of conscience of the medical professional, no matter its content.

This approach leads to the fetishisation of conscience that is clearly visible in some documents of the Catholic Church that describe conscience as “the most secret core and sanctuary”¹² of a person and suggest that it is hidden, private, and inaccessible to outside engagement. It is also visible for example in the recent judgment of the Polish Constitutional Tribunal that holds that “the right to conscientious objection should be considered a primary right in relation to its limitations.”¹³ It is probably supposed to mean that the freedom of conscience (as a constitutional value) must never be limited by of some other legal regulations: it is not possible to compare or weigh any values competitive with freedom of conscience. In one of the most surprising fragments of the judgement TK states that “restriction the freedom of conscience cannot be subjected to the proportionality test, due to the inability to determine which constitutional values does the legislature intend to protect at the expense of

¹² Pope Paul VI, Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*”.

Available

at:

http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html [Accessed 27 Apr 2017].

¹³ TK, *op. cit.*

physicians' conscience".¹⁴ Therefore, the Tribunal assumes that the right of a patient to obtain legal and guaranteed medical services like abortion does not constitute such a value.¹⁵

I will argue that this fetishisation of conscience is deeply mistaken, since not every judgment of conscience to which someone is committed deserves protection. What is more, the introduction of an "on-demand conscience clause" for physicians, and without any control, leads to the necessity to respect such statements even if there would be no breach to the moral integrity of a physician, because the judgement of conscience would turn out to be, e.g. inauthentic, irrelevant, or would not be of moral nature at all. In such a case, in fact, we would not protect any values, and the patients would bear losses arbitrarily. Here are some simple examples that may help to understand the limits that legal protection of properly understood moral integrity should have.

The first example concerns the requirement of authenticity. In this context some authors appeal to a standard of coherence that provides a simple test of

¹⁴ Ibid.

¹⁵ Even in Poland abortion, in these rare cases when legal, is treated by law as a guaranteed medical service, for example the Parliament Act on Family Planning, the Protection of Human Foetus, and the Circumstances when Abortion is Legal states that: "Persons who are covered by social security insurance, and persons entitled by other regulations, are entitled right to free abortion in a public health care institution." Dz.U. 1993 nr 17 poz. 78, article 4b (my translation). Available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930170078> [Accessed 27 April 2017].

the rationality of beliefs, including moral or religious ones: “when beliefs within the system are in direct opposition, one or more is irrational,”¹⁶ and an irrational judgment of conscience does not warrant accommodation. I expand this standard to other aspects, in particular to direct opposition between declared judgments and behaviour. Let us imagine that a conscript is working in a private military company (e.g. Academi, the former Blackwater security company), which performs duties typical for soldiers, but refuses military service, while still being a citizen of a country in which it is mandatory. Or let us imagine that a physician refuses to perform certain medical procedures in a public health care institution on the basis of the conscience clause, but performs them in other institutions, or at his private practice. This provides sufficient evidence to the inauthenticity of the judgements of conscience invoked by them. In this case, the issue is clear: we are not dealing with the matter of integrity of conscience at all. By recognising this type of conscientious objection we would only protect some non-moral interests of the interested parties, including financial interests, but not the integrity of their conscience.

In contrast to many artificial examples discussed in the bioethics literature on CO, this last case strictly resembles the actual Polish situation, where it is legal to conduct abortion only if at least one condition is fulfilled: i) the pregnancy is the result of a crime, ii) there are severe genetic defects of the

¹⁶ Meyers C., Eskew S. Religious Beliefs and Surrogate Medical Decision-Making, *J Clin Ethics* 2009;20:192-200.

foetus or iii) the woman's life is imminently endangered or there is a serious and imminent risk for woman's health (in this third case physicians may not appeal to the conscience clause).¹⁷ The official abortion rate is extremely low: in 2015 there were 1044 legal abortions (0.13 per 1000 women aged 15-44) and the number of legal abortion procedures performed in public hospitals in Poland fell by 99% during the late 1980s and early nineties. The number of abortions per 1000 women is much lower than, with the exception of Ireland and Malta, in any other European country, even with those that have similar cultural and religious background. For example in Italy in 2010 the same rate was 10.0 (as a comparison, in the US in 2011 – 16.9 and in England and Wales in 2015 – 16.0). Thus, it is easy to suspect, as many NGOs do, that in reality abortion rates in Poland are much closer to the Italian rates, but most of procedures are performed in the grey area.¹⁸ Moreover, in Poland, according to recent press reports, there are some parts of the country where there are no abortion providers because of the scale of CO refusals (this is the case of Podkarpackie voivodeship, the south-east corner of Poland with the population of 2.1

¹⁷ Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży. Dz.U. 1993 nr 17 poz. 78 z późn. zmianami. Available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930170078> [Accessed 27 Apr 2017].

¹⁸ A. Chelstowska, Stigmatisation and commercialisation of abortion services in Poland: turning sin into gold. *Reproductive Health Matters* 2011;19:98–106.

million).¹⁹ Obviously, in this circumstances, one could suspect whether reasons for CO are authentic, that is whether all physicians in Podkarpackie really believe in the full moral status of fetus, or rather they use CO clause only for their own professional convenience (it is expected from their supervisors, since for example Konstanty Radziwiłł, the previous president of the Polish Supreme Medical Council, and now the Ministry of Health, explicitly claims that he would refer to CO in the case of abortion) and financial gains (the possibility of performing expensive abortions illegally in some private institutions).

The second example concerns the requirement of relevance: let us assume that a physician mistakenly believes, despite easily available and reliable information, that a given drug or procedure causes the death of a young embryo, when in fact it only prevents fertilization.²⁰ She refuses to provide this service, claiming that her conscience does not allow them to participate in the destruction of human embryos. In this case a physician is mistaken about empirical facts. It is also possible to have false beliefs about the other circumstances of the case: let us assume that a conscript believes that the war in which he would have to fight is a war of aggression fought to gain access to another country's natural resources when in fact it is being fought to protect a

¹⁹ Gorzyca A. Legalna aborcja? Nie na Podkarpaciu, *Gazeta Wyborcza* 11.05.2016. Available at: <http://rzeszow.wyborcza.pl/rzeszow/1,34975,20050830,legalna-aborcja-nie-na-podkarpaciu.html> [Accessed 27 Apr 2017].

²⁰ Card R.F. Conscientious Objection and Emergency Contraception, *op. cit.*

minority from genocide. More difficult cases concern false beliefs about the content of legal or ethical norms (including the professional codes): let us assume that a conscript is a supporter of the principle of double effect. However, he refuses military service, by claiming that soldiers are required to direct military operations against non-combatant targets, what – as he claims – lies in contradiction to his conscience. In reality, he is wrong: all rules of engagement accepted by the Western countries explicitly require soldiers to follow international humanitarian law in combat situations and forbid such targeting, although they allow the destruction of such targets, but only unintentionally, and only when civilian or non-combatant losses are not excessive in relation to the “concrete and direct military advantage anticipated”.²¹

In the case of an inauthentic claim of conscience, there is no collision between judgements of conscience and the provision of a given medical or social service. In the case of a mistaken belief about the application of a principle – there would be no collision if the person concerned had a correct belief or got rid of the false one. In both cases, the aim of drawing up a written justification and presenting it to a commission – be it by a physician, a conscript, or a professional soldier – would only enable us to detect whether or not there is a conflict. In this sense, this requirement serves strictly to check the authenticity

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Available at: <https://www.icrc.org/ihl/INTRO/470> [Accessed 27 Apr 2017].

and relevancy of the judgements of conscience.²² Robert F. Card, who defends the use of both of these requirements in the case of medical conscience clause, defines them cumulatively as the reasonability view.²³ In his understanding, it includes, among others, what I have described here as authenticity and, partly, relevancy (intrinsic factors), as well as several additional (extrinsic) conditions, which I do not discuss in this text, as they are non-controversial and enshrined in either law or the code of medical ethics: the requirement to avoid unnecessary harm to patients, the requirement to avoid being guided by self-interest, avoiding discrimination etc.

The interpretation I propose expands the Card's reasonability view, because I assume that the requirement of relevancy concerns not only empirical data and circumstances of the case but also the content of legal or ethical norms (as in the above example of a conscript, a supporter of the principle of double effect). Moreover, these two requirements, authenticity and relevance, are not sufficient and we need the moral threshold requirement: a judgement of

²² Meyers C., Woods R.D. An Obligation to Provide Abortion Services: What Happens when Physicians Refuse? *J Med Ethics* 1996;22:115-120; Meyers C., Woods R.D. Conscientious Objection? Yes, But Make Sure It Is Genuine. *Am J Bioeth* 2007;7:19-20; Weinstock D. Conscientious Refusal And Health Professionals: Does Religion Make A Difference? *Bioethics* 2014;28:8-15.

²³ Card R.F. Reasonability and Conscientious Objection in Medicine, op. cit.

conscience, on the basis of which someone refuses to perform a given service, is of moral nature and exceeds some threshold of significance or importance.

It is important not to mix together two distinct issues in this context: 1) whether the ground of the person's objection is morally plausible or in fact derives from a belief that is itself morally perverse or pernicious (and in this case CO would be rejected in the light of the Card's extrinsic factors or my first two requirements); or 2) whether the ground of the person's objection is not sufficiently morally serious (CO would not be rejected on the reasonability view or my two first requirements, but it would be rejected by my moral threshold requirement).

Here are an actual Polish example, which visualizes the first case: A physician from northern Poland refused to handle information about the health condition to a homosexual woman (formally single, since homosexual marriages are not allowed in Poland), after recognizing that the information would be used in the adoption process. The physician based her refusal only on the statement that the adoption by a homosexual "it would be wrong for children" (finally, the physician got a rebuke from her supervisor and the patient ombudsman).²⁴ This example resembles fictional cases described sometimes in the bioethics literature about physicians who refuse to perform a given service in relation to

²⁴ Siedlecka E. Pierwsza lekarka ukarana za homofobię. Gazeta Wyborcza 20.11.2016. Available at: <http://wyborcza.pl/7,75398,21005568,pierwsza-lekarka-ukarana-za-homofobie-lekarz-nie-ma-prawa.html> [Accessed 27 Apr 2017].

persons of particular gender, religion, race.²⁵ Although in cases like these no one has to doubt the authenticity of the beliefs of the physician, who may be a sworn homophobe (or sexist, racist...), but the judgement of conscience violates my relevance requirement (or Card's extrinsic conditions), because it goes against the standard codes of medical ethics (e.g. the Polish version of Physician's Oath, based on the Declaration of Geneva) that explicitly prohibit discrimination based on "race, religion, nationality, political views, financial status and other" (I assume that a sexual orientation also belongs to this category).²⁶ It is commonly assumed that even if a physician may refuse to provide *some* treatments referring to CO, she may not apply CO to refuse to treat *some* patients. This approach may also exclude the possibility of refusing certain medical services due to a critical evaluation of the goals of choices of the patient (for example, Mark Wicclair provides a hypothetical example of physician refusing the further treatment of a patient who rejects the next chemo treatment series).²⁷

So, the question is how to distinguish morally serious grounds for conscientious objection from these not sufficiently serious? The easiest test that

²⁵ Wicclair, *op. cit.*

²⁶ Naczelna Izba Lekarska (NIL). 2003. Kodeks Etyki Lekarskiej. Available at: http://www.nil.org.pl/_data/assets/pdf_file/0003/4764/Kodeks-Etyki-Lekarskiej.pdf [Accessed 27 Apr 2017].

²⁷ Wicclair, *op. cit.*

can show which convictions have a genuine and serious moral dimension is to meet a certain set of characteristics. Psychological research shows that nearly everyone distinguishes morality from convention in four respects: seriousness, generality, authority-independence, and objectivity (for example, when analysing psychological studies on the differentiation between moral and conventional norms, Victor Kumar shows that these requirements are characteristic for all doctrines considered moral).²⁸ The generality requirement is particularly interesting in this context: it means that a particular normative judgement involves reasonable hope that it will be adhered to by any rational person, who finds herself in given circumstances, regardless of her religious affiliation or moral beliefs. This view does not assume any particular view on the nature of general morality, in particular it does not assume a Kantian approach, according to which moral principles are maxims that we could will to be universal laws. It only assumes that a physician, who acts as a public official, and whose CO refusal may bear extra costs to patients, should be allowed to refer to CO only in such rare cases when the violation of her judgment of conscience would infringe her moral integrity, so she must be able not only to present interpersonal reasons for her judgment of conscience, but also see this judgment as crucially important. This view is clearly inspired by “public reason” view of justification, that is an intersubjective and idealized practice of

²⁸ Kumar V. Moral judgment as a natural kind. *Philos Stud* 2015;172:2887-2910.

argumentation used in all instances where some person or group exercises coercive power over another person or group. Highlighting the generality requirement makes it in general agreement with a Thomistic conception of a conscience, which is “result of thinking hard, honestly, and practically on a particular issue and canvassing aid from wherever possible, rather than being an... internal oracle.”²⁹

Let us see this requirement on a real example: if someone actually recognises the personal status of a human foetus – she will probably hope that everyone will treat foetuses in a similar way, and will claim that other normative views – which do not assume such a status – are somehow wrong (this is not to say that this person must seek to change the law, because many commonly entrenched moral judgements have no corresponding legal sanction). Another example could be a belief that it is impermissible to kill innocent adult persons – even if they are requesting to die. In contrast to these two examples, a follower of Judaism, who adheres to the prohibition to work on Saturdays or circumcises newborn boys, probably does not expect this from other people who do not profess their religion. The same concerns a follower of Islam, who considers particular outfits or headgear to be proper, or a Catholic, who has a particular belief what is a proper purpose of sexual intercourse (“procreation has to be the goal of every sexual act”). This last example may be particularly

²⁹ Mahoney, J. *The Making of Moral Theology: A Study of the Roman Catholic Tradition*. Oxford: Oxford University Press 1987.

important in the context of CO, since many physicians in catholic countries refuse to prescribe birth control (including these “morning after” pills that prevent fertilization, but do not prevent the implantation of a fertilized egg) by invoking CO. For example, this is a case of Konstanty Radziwiłł, the Polish Ministry of Health, who recently acknowledged that he would refuse to prescribe a morning after pill to a victim of rape, even in the case of a pill that does not obstruct the implantation of the already fertilized embryo.³⁰ Proceeding contrary to rules, which are accepted only as guidelines applicable within a given group and serving as a confirmation of group membership (to a given religion, national, racial, but also profession) would not, within this meaning, violate the integrity of conscience sufficiently to authorise a physician to transfer the costs of protecting these types of judgements to patients. In Poland those requirements can sometimes be met in case of abortion. In other countries, those requirements can be also met regarding euthanasia on request or assisted suicide. However, in the light of this proposition there is no possibility of referring to the conscience clause in the situations, when the judgment is not an important moral judgment but is based solely on prudential reasons on a group identification. Practically, referring to the conscience clause would not be acceptable in cases of prescribing “the morning after” pills.

³⁰ RadioZET.pl. Minister zdrowia: nawet zgwałconej kobiecie nie przepisałbym pigułki "dzień po".

Available at: <http://wiadomosci.radiozet.pl/Polska/Powolalbym-sie-na-klauzule-sumienia.-Konstanty-Radziwill-w-Radiu-ZET> [Accessed 27 Apr 2017].

So, according to my proposition, we are dealing with an important violation of a physician's moral integrity only when she would be forced to act contrary to generalizable moral judgements in a proper sense. The question is who should evaluate and assess physicians request for CO. In the next section I will show that the assessment of whether a given principle of normative judgement meets this requirement would be the duty of a body evaluating physicians' statements and would not require any special knowledge about academic ethical debates.

2. Conscientious objection in the case of conscripts and professional soldiers

In this section I highlight the similarities between CO in healthcare and the regulations concerning military refusals, including an emerging practice of granting the right to selective CO status to professional soldiers, that places the burden of proof on a petitioner for CO status. The main similarity between the conscripts and physicians seems to be as follows: some of the conscripts refuse to participate in institutions that use violence and approve of the possibility of killing other people. They do not agree that reasons related to safety (self-defence, defending other people, protection of territory) are sufficient to justify the acceptability of killing or using violence, even when they are perfectly legal. The most popular case of applying the conscience clause by some physicians is abortion. A simple analogy would state that some physicians consider fetuses

to be entities with full moral status and various ethical or legal considerations that allow abortion do not constitute, in their opinion, a sufficient reason to justify morally the abortion. So, the conscience clause in healthcare has its legal equivalent in the provisions concerning alternative military service for conscripts (these laws are still in force in many countries, but since the abolition of compulsory military service they have been virtually defunct). In Poland, for example, the law exempted persons whose “religious beliefs or moral principles do not allow them to perform this service” from the obligation to perform military service. However, a person wanting to receive an exemption had to provide:

1) a statement of their religious beliefs; 2) an indication of a basis found in the religious doctrine, which excludes the permissibility of performing military service, as well as a demonstration of a genuine link to the professed religious doctrine or an indication of one's moral principles, which contradict the obligations of a soldier performing military service.³¹

³¹ Ustawa z dnia 28 listopada 2003 r. o służbie zastępczej. Dz.U. 2003 Nr 223 poz. 2217 z późn. zmianami. Available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20032232217> [Accessed 27 Apr 2017].

Polish courts ruling on the basis of this provision stressed that the need to reveal one's beliefs is not at odds with the constitutional right to privacy (understood as a right not to be forced to reveal your worldview), because it is the conscript who, voluntarily, undertakes not to perform a universal obligation, and without revealing those beliefs it could not be determined whether they actually prohibit him from performing military duty.³²

What is more, in recent years there have been interesting academic discussions on the acceptability and understanding of selective conscientious objection in the case of professional soldiers. Some countries, in practice, have begun to allow for conscientious objection also in this case.³³ The United States is a particularly interesting case: in the years 2002-06 as many as 425 persons applied for objector status, and in 224 cases the matter was decided positively – despite the fact that the US military was completely professional back then, and signing up for military involved explicitly acknowledging that one is not a conscientious objector defined as: "a firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief".

³² WSA, II SA/Wa 1300/08, 26.11.2008. Cf. European Court of Human Rights. Bayatyan v. Armenia, 23459/03, 07.07.2011.

³³ Minear L. Conscience and Carnage in Afghanistan and Iraq: Us Veterans Ponder the Experience. *Journal of Military Ethics* 2014;13:137-157.

Two features of the law of military conscientious objection should be highlighted here: the requirement of the generality and the requirement of anteriority.

The first matter is that exemption from military service is possible only in such cases in which religion or the advocated principles "contradict the obligations of a soldier performing military service". This means that the basis for exemption must lie in the objection to the performance of military service itself, rather than to participation in a particular armed conflict.³⁴

Of course, there are pragmatic reasons for this view: it is easier for commissions to check the membership of a particular religious group than to assess the merits of arguments against a given military conflict. However, it does lead to quite a paradoxical result: pacifist positions in a strict sense, that is, ones which teach that no one should ever use force, even in self-defence or to prevent the use of force, are not treated by many philosophers as credible.³⁵ Therefore, in recent years some scholars have challenged the legitimacy of selective exclusion of conscientious objection in the case of conscripts, and have

³⁴ Gillette v. United States. 401 U.S. 437, 08.03.1971.

³⁵ McMahan J. Pacifism and Moral Theory. *Diametros* 2010;23:44-68.

even called for the possibility of invoking conscientious objection in the case of professional soldiers, who consider a given war unjust.³⁶

In the case of a medical conscience clause there are also discrepancies concerning whether a physician should only have the ability to invoke a general or also a selective conscientious objection. The recent judgement of TK made these provisions similar to the regulations concerning conscripts by explicitly excluding the possibility of selective conscientious objection in the case of physicians. Such an interpretation – although, of course, it makes managing health care facilities easier – is problematic from a philosophical point of view, in the same way that it is in the case of conscripts, because unconditional opposition to performing, e.g., abortions is not an obviously defensible view, since one may believe that some abortions are permissible while others are not.

It is easy to imagine a physician who recognises that foetuses have full moral status, and thus believes abortion to be generally wrong but who accepts that it can be permissible not only when the continuation of a pregnancy seriously threatens the life or health of the pregnant woman, but also when a pregnancy is the result of a crime. Nevertheless she refuses to perform it in the case e.g. Down syndrome.

³⁶ Ellner A., Robinson P., Whetham D. *When Soldiers Say No. Selective Conscientious Objection in the Modern Military*. London: Ashgate 2014; May L. Contingent Pacifism and Selective Refusal, *J Soc Philos* 2012;43:1-18.

The second issue is the requirement of anteriority, which in law applies to both conscripts and physicians. TK clarified the anteriority requirement in the case of physicians, stating that the notification of invoking the conscience clause should be "a priori, addressed to one's superior, in principle, at the time of establishing the employment or service relationships, or possibly – during its course – when, as a result of a change of beliefs, a physician wants to refrain from performing services that they could perform earlier in line with their own conscience".³⁷ This clarification has very interesting features. First, it allows a physician to change their views at any time and disengage themselves from performing certain services. Second, a one-time declaration prevents a physician from being confronted with the necessity of refusing to perform certain services for specific patients, as they are simply not directed to that physician. According to TK this is one of reasons why an obligation to provide a referral to an alternative physician or clinic cannot be prescribed to a physician who objects to a procedure on conscientious grounds (the judgment resulted in the situation where no person or institution in Poland has a duty to inform a patient where she can perform some procedures that are legal and covered by the state insurance). Third, prior notification of the employer on the decision not to perform certain services does not require any justification on the part of the physician and cannot be challenged by anyone.

³⁷ TK, *op. cit.*

As can be seen, the differences between the current legal regulations on conscientious objection in the case of physicians and conscripts are significant. On the example of Polish regulations I have shown that, unlike conscripts, a physician: 1) never has to disclose their religious or moral views that form the basis of conscientious objection; 2) never has to explain why their worldview would prevent them from performing a given service; 3) nobody can verify or control their prior statement on the refusal to perform medical services; 4) may submit a refusal to perform a given type of services at any time.

In the case of conscripts, it was assumed that the burden to demonstrate authenticity or relevance before a specially appointed commission rests with them. Is the situation of physicians and conscript or soldiers similar enough to make the medical conscience clause similar to the military one? I believe so and I do not see any good reasons for it to be different in the case of physicians, and for their statements to be evaluated *ex ante* by such a commission or *ex post* by a court. Some argue that – at least in the case of certain countries (e.g. United Kingdom) – calling physicians who invoke CO before a special commission would not be a good idea, because “the number of false positives would be very small, and not enough to justify the cost of running the tribunals.”³⁸ However, it seems that this is an issue that depends on a social context, and other countries, like Poland, this argument and other similar arguments are not sound.

³⁸ Cowley C. Conscientious objection and healthcare in the UK: why tribunals are not the answer. *J Med Ethics* 2016;42:69-72.

One of the arguments against equating the situation of conscripts and physicians is as follows: refusal in the case of conscripts affects a general obligation, similar e.g. to tax obligation. Hence, one might argue that the reasons behind refusal should be more carefully examined in the case of conscripts than in the case of physicians who only refuse to perform specific services. This argument, however, is double-edged: it could be argued that it is the physicians who are obliged to provide more precise justification behind the refusal, because they have undertaken their profession voluntarily, and chose a specialization with full knowledge of what type of services they will have to perform. No one forced them to choose their profession, nor are there any obstacles to resigning or changing their specialization at any given moment. Moreover, they have also embraced the role-based duties, including to provide legally sanctioned treatments unless there are important moral considerations in conflict, and they receive rich goods from society (salary, status, state-funded education etc.). I also assume that it does not matter (at least in the European context) whether a physician is a public or private employee, since I concentrate on procedures funded by the public provider (no matter if in the public hospital or through a private contractor), so I do not consider here CO in the case of private, for-profit corporations.³⁹ In contrast, a vast majority of conscripts did not choose military service voluntarily, nor can they quit being soldiers or refuse

³⁹ West-Oram P., Buyx A. Conscientious Objection in Healthcare Provision: A New Dimension, *Bioethics* 2016;30:336-343.

service at a time of their choosing. So the status of CO in healthcare is much more similar not to CO in the case of conscripts, but to the case of professional soldiers, who voluntarily entered their profession, and at some point changed their mind about the permissibility of their actions.

Moreover, one could argue against comparing the situation of conscripts or soldiers and physicians by considering that the scope of duties transferred to others is smaller in the case of physicians than military personnel. With the exception of conscription during times of war, the situation is exactly the opposite. When physicians that have a monopoly on medical services refuse to perform a procedure, it makes patients' access to guaranteed medical services difficult or sometimes even impossible and causes other physicians to have more work (I understand "guaranteed medical services" as services that are free of charge for all patients with a standard public insurance coverage, so in Poland it covers abortions in these rare situations when legal).

The cost of such a transfer of costs onto others is particularly visible in the case of abortion in Poland where only a small percentage of physicians agree to perform it. The fact that patients bear additional costs was confirmed by the judgments of the European Court of Human Rights (ECHR) which ruled out that the Polish government does not provide effective mechanisms for obtaining abortion, even in these very rare cases when it is legal, for example in the

famous case of a 14-year old girl from Lublin, whose pregnancy was the consequence of a criminal act.⁴⁰

In contrast, refusing military service at a time of peace in a country where conscription is universal (e.g. today's Israel) does not increase significantly the responsibilities of the remaining conscripts (because everyone is conscripted anyway) and does not diminish significantly the defence abilities of the country. It may be different in countries in which conscription is selective, that is there must be a certain number of people in the military, and during times of war (e.g. like the US during Vietnam war), but no western state, except Israel, has waged war with the use of conscripts in the last 40 years, the last such conflict being the American war in Vietnam.

Here is another possible argument for treating conscripts more harshly than physicians in the case of CO: one could argue that conscripts are far more likely to falsely invoke conscientious objection than physicians. At first sight there seems to be little reason for a physician to seek to avoid participating in some medical procedure unless he has some moral objection to it; whereas any person has a strong self-interested reason to avoid being conscripted, which is that being a soldier is very dangerous. One could appeal to this difference as a basis for claiming that conscripts and soldiers must justify their refusal to participate while physicians do not. The evaluation of the weight of this

⁴⁰ P. and S. v. Poland, European Court of Human Rights, 57375/08, 30.10.2012; Tysic v. Poland, European Court of Human Rights, 5410/03, 20.03.2007.

allegation is obviously problematic, because – in its nature – it remains an empirical generalization unsubstantiated by any specific research. But, as in the previous argument, with the exception of conscription during times of war, the situation seems to be exactly the opposite. There are no special prudential reasons for conscripts to avoid participating in military during peacetime (usually they must spent more time in an alternative service, which usually is also treated by many people as less prestigious). In contrast, there are very strong prudential reasons for physicians to refuse, since abortion in no way assist in their professional or scientific careers – both because it is not cognitively interesting, but may also be unwelcome, at least in some catholic countries like Poland, by their superiors and many abortion clinics or directly physicians who do not refuse are susceptible to antiabortion harassment (84 percent of American clinics reported at least one form of antiabortion harassment in 2011,⁴¹ I do not know any similar statistics for Poland, but there are regular press reports about such incidents).

3. Conclusion

In this paper I argued that the legal measures concerning the conscience clause for physicians should be similar to regulations applicable to conscripts or

⁴¹ Guttmacher Institute, Induced Abortion in the United States, September 2016. Available at: <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [Accessed 27 Apr 2017].

– in some countries – professional soldiers. What's more, I argued that not only should the authenticity and relevance of a given judgement of conscience be evaluated, but this judgement should be above some threshold of moral importance.

References

1 Żuradzki T. Uzasadnienie sprzeciwu sumienia: lekarze, poborowi i żołnierze, *Diametros* 47: 98-128.

2 Naczelna Izba Lekarska (NIL). *Wniosek o stwierdzenie niezgodności aktu normatywnego z Konstytucją i ratyfikowaną umową międzynarodową*, 11 March 2014, <http://trybunal.gov.pl/s/k-1214/> [Accessed 27 Apr 2017].

3 Trybunał Konstytucyjny (TK). K 12/14. Available at: <http://trybunal.gov.pl/s/k-1214/> [Accessed 27 Apr 2017].

4 Galewicz W. Jak rozumieć medyczną klauzulę sumienia? *Diametros* 2012;34:136-145.

5 Zielińska E. (ed.). *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*. Warszawa: Wolters Kluwer 2008.

6 Wicclair M.R. *Conscientious Objection in Health Care: An Ethical Analysis*. Cambridge: CUP 2011.

7 Card R.F. Conscientious Objection and Emergency Contraception. *Am J Bioeth* 2007;7:8–14.

8 Card R.F. Conscientious Objection, Emergency Contraception, and Public Policy. *J Med Philos* 2011;36:53-68.

9 Card R.F. Reasonability and Conscientious Objection in Medicine: A Reply to Marsh and an Elaboration of the Reason-Giving Requirement. *Bioethics* 2014;28:320-326.

10 Card R.F. In defence of medical tribunals and the reasonability standard for conscientious objection in medicine. *J Med Ethics* 2016;422:73-75

11 Kantymir L., McLeod C. Justification for Conscience Exemptions in Health Care, *Bioethics* 2014;28:16-23.

12 Marsh J. Conscientious Refusals and Reason-Giving. *Bioethics* 2014;28:313-319.

13 Savulescu J., Schuklenk U. Doctors Have No Right To Refuse Medical Assistance In Dying, Abortion Or Contraception. *Bioethics* 2017;31:162–170.

14 Schuklenk U., Smalling R. Why medical professionals have no moral claim to conscientious objection accommodation in liberal democracies, *J Med Ethics* 2017;43:234-240.

15 Ustawa z dnia 28 listopada 2003 r. o służbie zastępczej, Dz.U. 2003 Nr 223 poz. 2217 z późn. zmianami,
<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20032232217>.

16 Minear L. Conscience and Carnage in Afghanistan and Iraq: US Veterans Ponder the Experience. *Journal of Military Ethics* 2014;13:137-157.

17 McMahan J. Pacifism and Moral Theory. *Diametros* 2010;23:44-68.

18 Ellner A., Robinson P., Whetham D. *When Soldiers Say No. Selective Conscientious Objection in the Modern Military*. London: Ashgate 2014.

19 May L. Contingent Pacifism and Selective Refusal, *J Soc Philos* 2012;43:1-18.

20 West-Oram P., Buyx A. Conscientious Objection in Healthcare Provision: A New Dimension, *Bioethics* 2016;30:336-343.

21 Minerva F. Conscientious Objection in Italy. *J Med Ethics* 2015;41:170-173.

22 Gorzyca A. Legalna aborcja? Nie na Podkarpaciu, *Gazeta Wyborcza* 11.05.2016 <http://rzeszow.wyborcza.pl/rzeszow/1,34975,20050830,legalna-aborcja-nie-na-podkarpaciu.html>

23 Case of P. and S. v. Poland, European Court of Human Rights, Application no. 57375/08, 30 October 2012

24 Case of Tysiąc v. Poland, European Court of Human Rights, Application no. 5410/03, 20 March 2007.

25 Wicclair M.R. Reasons and Healthcare Professionals' Claims of Conscience. *Am J Bioeth* 2007;7:21-22.

26 Guttmacher Institute, Induced Abortion in the United States, September 2016 <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>

27 Cowley C. Conscientious objection and healthcare in the UK: why tribunals are not the answer. *J Med Ethics* 2016;42:69-72.

- 28 Childress J.F. Appeals to Conscience. *Ethics* 1979;89:315-335.
- 29 McFall L. Integrity. *Ethics* 1987;98:5-20.
- 30 Brock D.W. Conscientious refusal by physicians and pharmacists: who is obligated to do what, and why? *Theor Med Bioeth* 2008;29:187-200.
- 31 Meyers C., Eskew S. Religious Beliefs and Surrogate Medical Decision-Making, *J Clin Ethics* 2009;20:192-200.
- 32 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://www.icrc.org/ihl/INTRO/470>.
- 33 Meyers C., Woods R.D. An Obligation to Provide Abortion Services: What Happens when Physicians Refuse? *J Med Ethics* 1996;22:115-120.
- 34 Meyers C., Woods R.D. Conscientious Objection? Yes, But Make Sure It Is Genuine. *Am J Bioeth* 2007;7:19-20.
- 35 Weinstock D. Conscientious Refusal And Health Professionals: Does Religion Make A Difference? *Bioethics* 2014;28:8-15.
- 36 Siedlecka E. Pierwsza lekarka ukarana za homofobię. Gazeta Wyborcza 20.11.2016, <http://wyborcza.pl/7,75398,21005568,pierwsza-lekarka-ukarana-za-homofobie-lekarz-nie-ma-prawa.html>
- 37 Wicclair M.R. Conscientious Objection In Medicine. *Bioethics* 2000;14:205-227.
- 38 Kumar V. Moral judgment as a natural kind. *Philos Stud* 2015;172:2887-2910.

39 Del Bò C. Conscientious Objection and the Morning-After Pill. *J Appl Philos* 2012;29:133-145.

40 Głusiec W. Klauzula sumienia dla farmaceutów. Analiza opinii wydanej przez Comitato Nazionale per la Bioetica. *Diametros* 2012;32:67-76.

41 Bovens L. The rhythm method and embryonic death. *J Med Ethics* 2006;32:355-356.

42 Żuradzki T. Moral uncertainty in bioethical argumentation: a new understanding of the pro-life view on early human embryos. *Theor Med Bioeth* 2014;35:441-457.

43 Moller D. Abortion and moral risk. *Philosophy* 2011;86:425-443.

44 MacAskill W. Normative Uncertainty as a Voting Problem. *Mind* 2016;125:967-1004.