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Good Samaritan Clause[1]

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ABSTRACT

This paper is entirely devoted to a new legal instrument called the "Good Samaritan Clause". Its legal recognition constitutes the legislator's response to the concerns raised by the medical community, in view of the unique situation in the country, but also in the world, relating to the prevention, counteraction and suppression of COVID-19. The assumption is that this instrument is to constitute a countertype that excludes the criminal unlawfulness of the act, due to the increased risk of mistakes made by the physicians involved in providing health services during the epidemic. The paper focuses primarily on the dogmatic and legal issues, discussing the catalogue of conditions needed for the application of the instrument mentioned in the title, but it also attempts to critically evaluate the introduced solution. The idea itself of introducing a solution affecting the scope of criminal liability of physicians is good, however, it requires legislative clarification as well.

Key words: countertype; a circumstance excluding the criminal unlawfulness of an act; Good Samaritan Clause; health services; criminal liability of a physician; special circumstances

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INTRODUCTORY REMARKS

The Act of 28 October 2020 on the amendment of certain acts with reference to counteraction against crisis situations connected with COVID-19 [1] in Art. 24 introduces a new and until now unknown legal institution defined as the "Good Samaritan Clause". According to the new regulations, no crime shall be committed, defined in Art. 155, Art. 156 § 2, Art. 157 § 3 or Art. 160 § 3 of the Act of 6 June 1997 — Criminal Law, by the individual who, during the announced state of epidemiological risk or state of epidemics, by means of granting health services based on the Act of 5 December 1996 on the professions of physicians and dentists, Act of 20 July 1950 on the profession of feldshers , Act of 15 July 2011 on the professions of nurses and midwives, Act of 8 September 2006 on the National Medical Rescue or the Act of 5 December 2008 on prevention and combating human infections and infectious diseases within the scope of diagnosis or treatment of COVID-19 and acting in specific circumstances, has committed a prohibited act, unless resulting from negligible lack of care required in certain circumstances.

POSITION OF THE MEDICAL SELF-GOVERNMENT

The proposal to introduce a solution affecting the scope of criminal liability with reference to physicians and other individuals performing medical professions, has first appeared in the Resolution no 71/20/P-VIII of the Supreme Medical Council of 27 May 2020 on accepting the bill of the Act on the amendment of the Act on specific solutions connected with preventing, counteracting and combating COVID-19, other infectious diseases and the thus generated crisis situations [2]. Apart from the criminal law proposal, the bill assumed implementing regulations of Acts modifying the principles of legal liability, also in the scope of civil law, and professional liability of employees of the medical services and medical care units. The epidemic state introduced on the territory of Poland on 20 March 2020 in connection with

1 A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him and departed, leaving him half dead. Now by chance a priest was going down that road, and when he saw him, he passed by. So likewise, a Levite, when he came to the place and saw him, passed by. But a Samaritan, as he journeyed, came to where he was, and when he saw him, he had compassion. He went to him and bound up his wounds, pouring on oil and wine. Then he set him on his own animal and brought him to an inn and took care of him. And the next day he took out two denarii and gave them to the innkeeper, saying, "Take care of him, and whatever more you spend, I will repay you when I come back". Which of these three, do you think, proved to be a neighbor to the man who fell among the robbers? He said, "The one who showed him mercy". And Jesus said to him, "You go, and do likewise." Luke 10:30-37.

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the SARS-CoV-2 infections [3] has imposed the obligation of legally sanctioning the possibility of limiting civil, criminal and professional liability in case of individuals performing medical professions for actions remaining in connection with granting medical care services within the scope of preventing, counteracting or combating COVID-19.

The bill proposed by the Supreme Medical Council (constituting an appendix to the appointed Resolution) was modeled on solutions accepted in the American law which assumed that physicians and other employees of health protection institutions who as volunteers render medical services during the state of public health risk in connection with COVID-19, shall not be liable by virtue of the federal or state law for any damages caused through action or failure during rendering medical services, except for the situation where the damage has been caused by action or failure as gross negligence (misconduct), crime or the employee was under the influence of alcohol or other abusive substances. In March 2020 the clause has been extended to all physicians and other employees of the health protection institutions rendering services within the scope of combating COVID-19.

The medical community indicated the uniqueness of the situation of individuals performing medical services during the epidemic state. It concerned not only the hazardous conditions of the medics, but mainly the necessity to face a new, not yet examined disease classification.

The lack of established, unified rules, standards of caring for patients or simply principles of acting in such circumstances excludes the possibility of objective evaluation of the physicians' proceedings in the context of reliable examination of the possible medical malpractice. Moreover, a significant problem lies in the interim course (dependable upon the gradually extended knowledge in this scope) of resolving various procedures connected with providing care to patients suspected or infected with the Coronavirus SARS-CoV-2.

These circumstances have created the grounds to come forward with a solution within the domestic law that would exclude the criminal liability of physicians and other individuals performing medical professions in the case of committing unintentional crimes against life and health defined in the special part of the criminal code, *i.e.* Art. 155, 156 § 2, 157 § 3, 160 § 3 of the Criminal Code, provided that the act has been committed subsequently to treatment performed within combating the COVID-19 epidemic. Whereas, clear focus is given to the temporary and extraordinary character of the proposed standard. It has been correctly observed that the lack of clear regulations of the subject matter may lead to unreasonable criminal liability of the physician and the remaining medical staff for unintentional crimes committed subsequently to treatment performed in good faith within combating the COVID-19 epidemic.

The medical self-government has correctly observed that the matter of criminal liability of the physician or other individual performing medical services during the epidemic state cannot be settled on the level of the individual jury evaluation during a potential criminal procedure on the medical malpractice. It is necessary to implement complex system solutions. Due to the large number (daily!) of infected individuals and those suspected of being infected, the possibility of — even if hypothetical — filing charges against physicians concerning unintentional committing of crime against life and health seems as unacceptable. In this context it cannot be forgotten that medical staff deficiency, particularly in the field of combating SARS-CoV-2, has forced the necessity to perform work incompatible with the possessed specialization. Many physicians did not have any professional experience in treating infectious diseases and directing them to combat COVID-19 was proceeded by the employer's or the governor's decision immediately enforceable. The Supreme Medical Council clearly stresses that *„the proposed system solution will allow for a reasonable shaping of the scope of criminal liability of individuals performing medical professions in extraordinary epidemic risk situation".*

GOOD SAMARITAN CLAUSE IN THE EYES OF THE LEGISLATOR

The Act of 28 October 2020 on the amendment of certain Acts referring to counteracting crisis situations connected with COVID-19, is exclusively limited to criminal law solutions, entirely disregarding the demands reported by the medical self-government to also regulate the matters of civil and professional liability. The solution accepted by the legislator has faced a definite objection within the medical environment, which expects complex support for physicians working with COVID-19, and not illusive support [4]. The current meaning of the analyzed regulation exposes medical employees to civil and professional claims. Moreover, it has not been accepted to introduce in the Art. 24 of the above-mentioned general clause in the form of "special circumstances", whereas the clause is an indeterminate phrase, granting the governing body of the proceeding a significant margin of decision. For, according to Article 24 of the Act, a condition of using the kindness assumed by the appointed regulation is not only acting within the diagnosis or combating COVID-19, but also acting "in special circumstances". It should be firmly underlined that the very fact of the epidemic state constitutes these special circumstances which should justify limiting the criminal liability of those individuals performing medical professions for actions remaining in connection with performing health care services within prevention, counteraction and combating COVID-19. For the record, it's worth mentioning that the legislator does

not indicate what should be understood under the phrase "special circumstances", nor does he give any examples.

"Health benefits" mentioned in the discussed regulations are actions serving the maintenance, rescue, rehabilitation or improvement of health and other medical actions resulting from treatment or separate regulations settling the principles of its performance [5]. In the case of the "Good Samaritan Clause" this definition is somewhat limited, because the legislator clearly indicates that the benefits must be performed according to the: the Act on the physician and dentist profession, the Act on the feldsher's profession, the Act on the nurse and midwife profession, the Act on the Public Medical Rescue and the Act on prevention and combat of infections and human infectious diseases.

The possibility of the criminal disclaimer with reference to physicians and individuals mentioned in the established regulations is basically limited to a few crimes standardized in the criminal code:

— Art. 155 Criminal Code — involuntary manslaughter,
— Art. 156 § 2 of the CC — involuntary infliction of grievous bodily injury,
— Art. 157 § 3 of the CC — involuntary infliction of medium and minor bodily injury,
and
— Art. 160 § 3 of the CC — reckless exposition to direct risk of life or grievous bodily injury.

Art. 24 of the Act of 28 October 2020 contains a criminal disclaimer — provided that additional, detailed criteria are met by - physicians, dentists, feldshers, nurses, midwives and paramedics. According to the opinion of the National Chamber of Physiotherapists the above-mentioned catalog needs to be supplemented by physiotherapists who also perform health services to patients hospitalized due to COVID-10 [6]. Similar objections have been submitted by the National Chamber of Laboratory Diagnosticians, who indicate the obligation to legally also protect this professional group. Despite the numerous demands of particular professional groups, physiotherapists and diagnosticians have not been directly included in the new regulations, which means that they will be able to refer to the "Good Samaritan Clause" only if they are directed to combat the epidemic. This means that the criminal disclaimer only concerns those cases of performing medical services within diagnosis or treatment of COVID-19, which subsequently excludes the possibility of exercising the title solution against individuals performing any other diagnostic and therapeutic actions not connected with infecting the patient with SARS-CoV-2.

The legislator excludes the possibility of applying the "Good Samaritan Clause" in case of gross negligence with reference to precautions required in the given circumstances. Similarly, as in the case of the controversial notion of "special circumstances" mentioned above, this record opens limitless possibilities of interpretation, both in the case of preparatory, as in jurisdiction proceedings. Settling the matter of possible infringement of the precaution principles should rely on an objective model. While evaluating the possible occurrence of the negative premise of applying the title institution, the individual features (personality) of the perpetrator of the crime mentioned in the Act should be considered, at the same time including the special conditions of the performed work. As an example, we could indicate the physician's fatigue, the type and nature of competence and skills, lack of time or equipment. This matter should also be examined in terms of the organization of health care which is already on the edge.

It seems that the most reliable evidence leading to settle the matter of committing a given prohibited act due to gross negligence with reference to precautions required in the given circumstances will be the court appointed expert's opinion, which does not clearly rule out the remaining measures assumed by the regulations of the criminal code. In order to disclaim the criminal liability of the physician, the conclusion of the opinion must clearly indicate that while performing medical services to the patient, the perpetrator has abode by any precaution rules required in particular circumstances.

The justification to the bill initiated by members of parliament on the amendment of certain Acts in connection with counteracting crisis situations connected with the occurrence of COVID-19 [7], it has been indicated that *„during the epidemic risk or epidemic state, criminal disclaimer should occur in case of particular acts committed by individuals performing medical professions, if the medical actions are undertaken in order to combat the COVID-19 epidemic (for e.g. when medical services are performed by individuals who in non-epidemic circumstances would not have been performing these services - thus, performing services by physicians who are in the course of completing their specializations or physicians who are experts in other fields than the possessed specialization). Criminal disclaimer is also limited, if the effect in the form of death of the deceased, grievous bodily injury, organ dysfunctions, health disorders or causing direct risk of life loss or grievous bodily injury, was the result of gross power abuse or gross non-performance of duties".*

SUMMARY

Introducing the "Good Samaritan Clause" in the Polish legislation should be thus accepted. The assumption that the institution is to create a counter type, a circumstance excluding the criminal unlawfulness of an act in connection with a greater risk of mistakes made by individuals engaged in performing medical services during the epidemic.

This solution is, thus, an answer to the numerous demands submitted by the medical environment, forced to act in extraordinary conditions, without due preparation not only professionally, but also mentally. However, in order for

the said institution to fulfill the expectations of the initiators, it still requires further refinement because the form of it, settled by the legislator, does not constitute any real legal protection for physicians and the remaining medical staff members. The provision of Art. 24 of the Act of 28 October 2020 on the amendment of certain Acts referring to counteracting crisis situations connected with COVID-19, contains not only unclear, but also arbitrary criteria which provide significant freedom of interpretation, which might be abused during the criminal proceeding. It should be underlined that this solution is temporary, and the time of its effectiveness is limited by the risk of epidemic or state of epidemic throughout the country. For this reason, it is hard to discuss the necessity of implementing system solutions which would have been permanently included in the legislation. This is, besides, the idea of the initiators of the title solution. However, according to the Swedish model of "no fault", definite action should be undertaken towards system solutions for medical problems without the necessity of being held criminally or disciplinary liable.

Moreover, it introduces the possibility of only criminal disclaimer for medical mistakes, exposing the physician to issues of disciplinary liability in cases of infringing the medical code of ethics and regulations connected with performing the physician's profession. It also leaves the possibility of bringing lawsuits connected with committing specific medical mistakes.

Conflict of interest

None.

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