CONFLICT OF DUAL LOYALTY AND ISSUES OF LIABILITY WHEN PROVIDING HEALTH CARE

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Abstract

The paper examines topical questions of the conflict of dual loyalty when providing health and medical care in the context of the liability of regulated medical professions. The paper specifies, describes and identifies the impact of professional particularities on the sphere of activity of the vocational holder in general and the particularities in the Czech Republic. The conflict of dual loyalty is highlighted in the relations emerging when providing the medical care, in particular in the relation patient - medical professional - provider of medical care. The article is anchored in the methods of the interpretation of law together with the interpretation from the general to the specific. The medical professionals get very often into the dual loyalty conflict, which concerns legal obligations and the ethics of the profession. The paper examines the difference between the conflicts of dual loyalty and interests. Based on the above-mentioned the paper concludes that the conflict of the dual loyalty and the responsibility of medical profession have many forms, but there are legal, ethical and economic possibilities to solve in in favour of the patient.

Keywords: *health care; medical professional; dual loyalty; liability; safety of patient.*

JEL Classification: K 32

1. Introduction

The paper examines topical questions of the conflict of dual loyalty when providing health and medical care in the context of the liability of such medical professions, which are called as regulated, then with a special regulation for the access to the professional activity. The necessary condition for the exercise of the profession is the obligatory membership in the public corporation, which determines the conditions of the access to the profession and at the same time carries out the supervision over the professionalism and ethics of the exercise of the profession.

The reason of the choice for my theme was, that the special legal regulation and the access to the regulated profession bring a special relation not only between the member of the professional chamber and the recipient of the service but at the same time have an impact on any other interaction of the member of the regulated profession with other colleagues, employers and public bodies. The paper specifies, describes and identifies the impact of such particularities on the sphere of activity of the vocational holder in general and the particularities in the Czech Republic.

The particular problems begin within the exercise of the activity in the so-called relational or helping professions the role of which is to provide any type of public service. Such activity can be practised as a profit-making one as well as a voluntary one. A large scale of professions may be put into this field. Starting with advocates, physicians, ecclesiastics, through social workers up to voluntary service in various types of organizations – hospices, hospitals, organisations occupying with the help to the victims of home violence and a lot of others including foreign help as for example Médecins sans Frontières (Physicians without Borders) or the Czech organisation People in need[2]. And these are exactly these professions where it is necessary to pay attention to the notion called in books as a "dual loyalty". The intensified protection of the recipient of the service, be she called client or patient, at the same time means the necessity of the protection of service provider before unwarranted interferences of the public power.

The **conflict of dual loyalty** is examined in the relations emerging when providing the medical care, in particular in the relation patient - medical professional - provider of medical care.

The basic **methods of the research** are the methods of the interpretation of law. I especially use the over-standard methods of the interpretation of law, i.e. the analysis and comparison in the

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[2] See http://www.msf.org/en, https://www.clovekvtisni.cz/en. consulted on 1.11.2017.

doctrine, doctrine opinions and practice of the courts. Within particular parts of the paper I advance with the method of the interpretation from the general to the specific.

2. The bases of the legal regulation in relation to providing health and medical care in the Czech Republic

The relation patient – physician, or, rather with regard to the complexity and extent of health care, especially in more complicated cases or in bigger health facilities, the relation patient – health professional is considered as the very basis of providing medical care and liability of both – the health professionals on one side and the providers on the other side. Such relation is governed by legal rules as well as by ethical ones.

Last but not least, the real economic possibilities of health care enter into such a relation, the possibilities in the sphere financed by the public sources.

With regard to the membership of the Czech Republic in the European Union (EU) and in general to the globalisation when providing medical care it is necessary to remember, that, without the respect to the fact that the Treaty on the Functioning of the European Union (TFEU)[3] leaves the regulation on providing medical care to individual member states, the principle of free choice of the provider and of free moving of persons and providing services is applied.

TFEU guarantees, within four fundamental freedoms, that the acquired qualification for the exercise of medical or non-medical profession shall be recognised in particular member states. It is anchored in the Directive No. 2005/36/EC on recognising qualifications. This directive continues in the Czech internal legal regulation, Act no. 18/2004 of Coll. on recognising the specialised qualification. This act concerns the persons who acquired the education in some of the member states of EU. As to the other applicants for the execution of medical profession the provisions of internal legal regulations of particular member states are applied.

In the **sphere of health care the Czech Republic** is bound by numbers of international treaties and conventions. The sources of medical law can be divided into international and national ones. With respect to the extensiveness and fragmentation of the legal regulation, which arises from the very interdisciplinary character of the medical law, I shall pay attention to the basic legal regulations of the public and private law only.

Convention for the Protection of Human Rights and Dignity of the Human Being, Convention on Human Rights and Biomedicine belong to the most important international sources of the medical law. The Convention on Human Rights and Biomedicine continues in the Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings[4], which the Czech Republic also has ratified.

The European Union anchored the right to the protection of health as one of the basic rights in EU, in the Article 35 of the EU Charter of Fundamental Rights and Freedoms. However it is necessary underline that in conformity with the article 168 of the Treaty on the Functioning of the European Union (TFEU) such rights are perceived as the rights completing the politics of member states only. EU also provides the assistance when determining the measures for the safety of patients and protection of public health, including the prevention of taking the narcotics.

The basic framework of the internal regulation for the right to health and health care is specified in the Constitution of the Czech Republic and in the articles 6 and 31 of the Charter of Fundamental Rights and Freedoms.[5]

The Act No. 372/2011 of Coll., on Medical Services, provides for the public law regulation of medical and health care services.

The Civil Code, the Act No. 89/2012 of Coll. (CC), introduced, as the pivotal regulation of private law, new provisions concerning the physical and mental integrities in Sections 91 to 117. In

[3] C- 326/47. Available on-line http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN, consulted on 1.11.2017.
[4] No. 96/ 2001 and 97/2001 Coll. of International Treaties.
[5] Constitutional Act No. 2/1993 of Coll.

the part devoted to the obligation relationship CC governs the special kind of the mandate contract, which is the contract for health care, Sections 2636 to 2651. In these provisions delivery of health care is understood as a private relation, not the relation assured by the public medical insurance. The legal regulation of contract clauses concerning providing medical services stipulates for substantially larger sphere than are the medical services provided pursuant to medical legal regulation. In full scope the above-mentioned sections have an impact on the services, which could be determined as complementary ones, e.g. cosmetic surgery, massages or wellness with rehabilitative care. The provisions on contractual relation between a patient and a provider have the impact on alternative medical methods not paid by the public medical insurance, including therapists.

The richness of norms, practice of the courts, case-law and notions of medical law as an overview of particular branches of public and private law creates the possibilities of its development on one side, on the other side the possibility of their various interpretation and practical application is the subject of conflicts and confusions. The just mentioned fragmentation and necessity of interdisciplinary and multidisciplinary approach to the problems has a very significant impact on the relation patient – physician – provider.

The progress and scientific and technical development in medicine often exceed the possibilities and capacities of legal regulation, which again results in the legal doubts and supports the possibility of the conflict of two or more interests.

3. Health and medical care and conflict of dual loyalty

The basic image of the medical profession is older more than 3000 years, when, even in 20th century the physician enjoyed the privileges and very specific appreciation in the society. His liable role brought the social position exceeding enormously other professions. Only in the second half of 20th century the discussions were opened and this whether the medical profession is really so exceptional that it requires, in comparison with other professions, the specific qualities both professional and ethical ones[5]. The milieu of providing health care is a specific zone where complex inner hierarchy and customs are applied, often not anchored in written form. Nevertheless, the relation between the patient and the physician is very strongly changing into the market relation. In European countries the doctrine has been pointing it out since the second half of 20th century.[6]

In the Czech Republic such development arrived during the last twenty years. Koutecký, M. D., comments on it: "*Medicine is a delicate system. It is influenced by the overall condition of the society, in particular by its economic or social principles, but by its morals, too. That is why medicine cannot be better than the society in which it is anchored… Therefore, the paradox of the weekday is coming, for which it is characteristic: depraved attitude to work…, unnatural relation to money. Nothing is more important than property…"*[6]

Health care is actually provided as a complex and wide one. The original role of medicine – urgent aid – has changed into the long-term treatment and the consequent complex of social care. This brings, without any doubts, the essential modifications in exercising the medical profession which is not a relation patient – physician any more, but concerns the relation between one recipient and the whole scale of services and persons.

The conflict called dual loyalty was and still is oftentimes considered as just an ethical conflict when the physician must decide between the interest of a patient and the interest of a third person. In the contemporary globalised society, and often for the reasons of our membership in EU, when the standardised demands are put on the third party, thus the provider of medical facility, the demands concerning the activity of the provider – legal or natural person, who is, at the same time, the business object, the conflict is usually broader, for it relates very often to the conflict of various, very often contradictory legal obligations.

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[6] Koutecký, Josef: Problems and Paradoxes in Medicine at the Turn of the Century. In: Hofmeister, H. *Der Mensch als Subjekt und Objekt der Medizin*. Neukirchen-Vluyn: Neukirchener 2000. p. 29 - 31.

The relation patient - physician, or rather with the complex and extensiveness of health care, in particular in more complicated cases or in bigger medical facilities the relation patient – medical professional is considered as the very basis of providing health care and the liability of medical professionals and providers. Such relation is governed by legal norms as well as by ethical ones.

The important part of the relation is the principle of confidentiality not only in one concrete physician, but in health care, too, which facilitates the early searching of medical aid and care.

To the **fundamental duties of medical professionals,** in particular in the relation physician - patient belong[7]:

a) Duty to treat.
b) Duty to use all available possibilities of treatment and apply current knowledge of science.
c) Duty to contribute to further development of science.
d) Consent of patient with medical interventions.
e) Confidentiality of the patient in the physician.
f) Partner's relation between physician and patient.
g) Autonomy of medical profession.
h) Medical qualification and free exercise of profession.

The medical professional gets very often into the conflict concerning his legal obligations on one side and the ethics of the exercise of profession in a large sense of the word. More than it is usual for other relations among people in the society, the ethical and legal merge together during the exercise of the medical profession. Quite often the medical norms are very difficult to be understood by medical professionals, for there are no measurable data here. It is difficult to measure philosophical notions like freedom or dignity. Last but not least, the abstract notions concerning the ethics cannot be verified, measured or weighed. [8]

Such conflict, within the exercise of medical profession is the heart of **dual loyalty**. It points out to the obligation of a member of regulated profession to follow not only the generally binding legal norms, but the ethics and rules of professional chambers.

The dual loyalty must be differentiated from the conflict of interests. The **conflict of interests** usually begins between the own benefit and the legal requirement for the behaviour or the benefit of another person, while dual loyalty presents the conflict between two incompatible externalities.

The typical case of the conflict of interests is carrying out the unnecessary examination for the purpose of increasing the incomes of the medical facility.

It is necessary to solve the conflict of the type of dual loyalty in the case when a medical professional himself has no benefit of his conduct, but nevertheless there is a patient's interest on one hand and on the other hand the interest in general.

The necessity to resolve every day, within providing health care, the conflict of two or more external influences can lead to malpractice and consequent liability of a medical professional.

There are three causes of the fact that in health care the above-mentioned questions are particularly pressing.[9]

- Continuous lack of financial means
- Dynamics of family life
- Social and cultural influences.

The medical professionals, in particular physicians, appreciate a lot their independence of making decisions as they are trained for it. So that their basic guide should be the best interest of their patient. The ethical professional codes still underline such an approach.

World Medical Association Declaration of Geneva binds physicians with the words: *„the health and well-being of my patient will be my first consideration*"; and in World Medical

[7] Deutsch, Erwin: *Medizinrecht.* Springer-Verlag, Berlin,Heidelberg, 1997, p. 8 – 1.
[8] Vácha, M., Königová, R., Mauer, M. *Základy lékařské etiky.* Portál Praha, 2012 p. 24 - 25.
[9] Williams, J. R. *Dual loyalties: How to resolve ethical conflict*. "South African Journal of Bioethocs and Law (SAJBL)" 2009. No. 1. p. 8 - 11.

Association International Code of Medical Ethics is declared [10]: "*A physician shall act only in the patient's interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient."*

4. Legal and ethical liability and conflict of dual loyalty when providing health and medical care

When considering the liability of a physician, medical professional or health care professional it is therefore very necessary to distinguish between the fact if the authorized person acted in her own interest or she was obliged to solve the conflict of two externalities which creates quite often the situation difficult to be solved between the medical, ethical, occupational and public duties.

It is evident that medical professionals performing the regulated profession are, by nature of their activities with the necessity of the independent, very often rapid, decision making under stress, determined to be the natural managers and leaders in working teams. Of course it leads to higher pressure, both internal and external as well as society-wide, for the liability of activity performance.

Discovering and investigation of misconduct and malpractice when providing medical care is problematical because of the fact that the concrete misconduct is appreciated again by the physician – expert and therefore there is the effort to hide the errors in providing medical care and the impulses of the physicians themselves are rather sporadic ones. On the other hand however the creation of a certain type of social and professional identity and social attachments is an important prevention against the ethical misconducts as well as legal ones.

The rising competition in the medical market leads to the situation that the professional collegiality often gets into conflict with the market interests, so with the interests of stakeholders. In health care the most important external stakeholders are patients who address very often the media, too, so, in the interest of the profession itself is not to cover the professional errors.

The compulsory membership in the professional chamber is without any doubt, the advantage for the patient – the recipient of the service. Professional rules, in particular ethical ones, order the physician to prefer the interest of the patient before her own one. The professional rules of the relevant professional chamber are the essential source of legal regulation for solving the conflict of dual loyalty and conflict of interests between the member of professional chamber and the patient.

The relation physician - patient has significantly changed. The personal relation of mutual confidentiality was replaced by the service of the employee and the relation between the client and the expert. The patient continues to be one person and one personality, whereas there are a lot of physicians. In the background of the treatment there are "doctors" whom the patient cannot practically see or cannot even see at all. "*A new physician, oriented to the process on making experiments with human beings and equipped with new technologies replaced in very many cases the doctor treating human diseases."*[11]

The integral part of the solution of the conflict of dual loyalty is to guarantee the security of the patients under providing health care. The security of the patients is thought the real physical security, including prevention from the entry of unauthorised persons, as well as the safe providing of health care in accordance with the present knowledge of science.

With respect to the safety of the patient such measures, which do not threaten him with complications not resulting from the sickness itself for which s/he is treated, present a part of the treatment. The patient, whose personal safety is threatened or even disrupted during the treatment, has worsened conditions of his/her return into everyday life.

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[10] Available on-line: https://www.wma.net/policies-post. consulted on 1.11.2017.

[11] Koutecký, Josef: Problems and Paradoxes in Medicine at the Turn of the Century. In: Hofmeister, H. *Der Mensch als Subjekt und Objekt der Medizin*. Neukirchen-Vluyn: Neukirchener 2000. p. 29 - 30.

The important question, which has to be resolved in connection with the conflict of dual loyalty, is the transition to the information society in public health. On one hand, the global information society becomes a great advantage **in** the public health, for it enables to share and rationalize the care of patient and to make wider the use of highly innovative technologies. On the other hand, the entry of information technologies into this field is though connected with concrete risks, which will be dealt with below, but it can lead to the weakening and releasing the relation between patient and physician – the accessibility of information on-line, the possibility to consult about various web pages and medical services using social networks, decreases the information predominance of a specialist over the patient. The information technology thus radically modifies such relation for the medical professional becomes the guide of the patient and a manager of medical information, not the person who makes decisions.

The great advantage of modern technologies is the possibility to increase the efficiency of providing health care and the transparency of its expenses and to increase the respect concerning the patient's autonomy, too. Information technologies have, and will have, essentially greater impact into the sphere of liability for providing health care, for the shared and electronically available documentation is the advantage for the providers of health care and their employees on one hand, but on the other hand it creates undoubtedly much larger scope for proving the misconduct.[12]

5. Conclusion

The relation **patient – physician – provider** runs in practice under legal, ethical, moral and economic influences on one side, but also owing to human opinions and experience, absolutely unforeseeable within the everyday life.

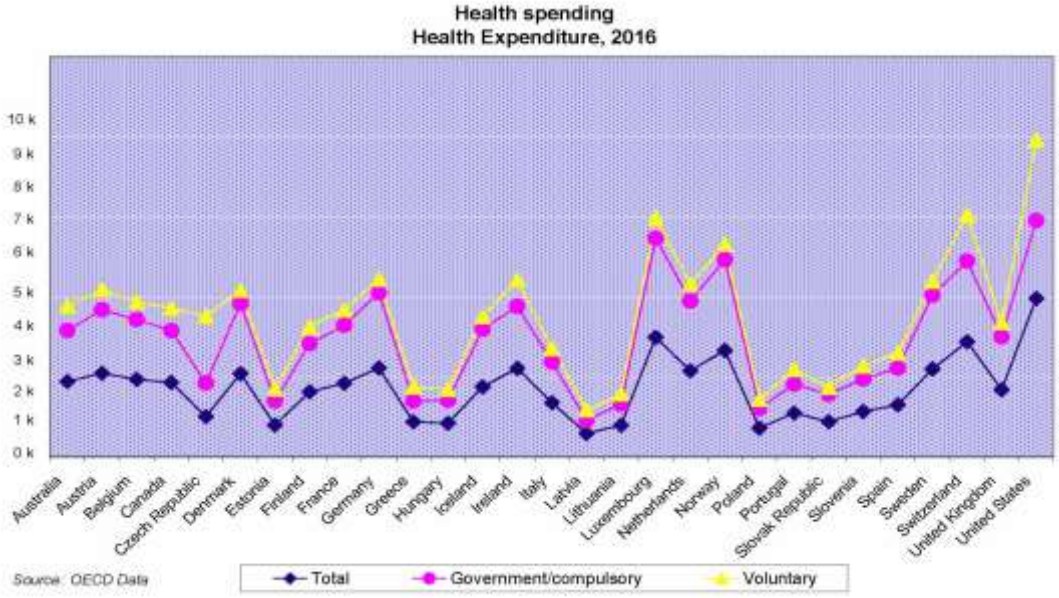
The undeniable risk for health care is primarily the human factor and also the technique used during providing health care. The medicine becomes the highly sophisticated technical matter. Nevertheless, the human factor is behind the times of technical possibilities. The concern about the possible liability for using available, but not entirely tested medicines, leads to the defensive medicine. The providers and in particular physicians try to resolve the conflict of dual loyalty in such that manner that they do not inform the patient of possible, available and most modern methods or they do not recommend them to him being apprehensive about putting themselves and providers, too, to the risk of penal or civil sanction in the case of failure.

The demands of various branches of medicine lead to the possible burn out syndrome of medical professionals. The techniques of prevention of negative impact of the exercise of profession on an individual are however much less used in medicine than in other helping professions.

On the other hand, the human capital and knowledge, including the capacity to work with the most modern findings of science and technique, are the basic advantage if health care in the Czech Republic. In comparison with developed countries of European Union and the Organisation for Economic Co-operation and Development (OECD), public health care is able to provide everyday top-class care and of high quality and this at lower costs as it is proved in the graph of percentage expenses of the gross domestic product of selected member states of OECD.

The conflict of dual loyalty has a lot of forms. Nevertheless, it always concerns the interaction among people in the milieu where the maintenance of basic human values – life and health are discussed, which requires the deep knowledge, human and occupational experience and maturity. The medical law and medical management should be the ground for such processes during providing health care, when the human health and the quality of life are constantly strengthened and improved.

[12] Rothman, D. J., Blumenthal, D. *Medical Professionalism in the New Information Age*. New Brunswick. N.J.: Rutgers University Press 2010. p. 2 - 5.



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