

Limitations on freedom of speech related to public health. A few remarks based on the experience of the Republic of Poland with the SARS-CoV-2 pandemic

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Abstract— The SARS-CoV-2 pandemic has undoubtedly become a challenge for all lawmakers around the world - implying, among others, the need to introduce restrictions on freedom of expression due to health protection. Different countries dealt with this challenge in various ways, which was influenced not only by the systems in force in these states, but also by the specific characteristics and conditions of these countries. Hence, the purpose of this study is to answer how did the pandemic affect the legal situation in the Republic of Poland, with particular attention being paid to: 1) statements whose purpose or effect was to make it difficult or impossible for the state to perform the obligations implied by "health protection"; 2) statements substantively contesting the official information policy of the state on pandemic issues; 3) statements of representatives of the authorities, which are a reaction to the expression referred to above in points 1 and 2. Of course, this study - due to the modest volume - does not pretend to be exhaustive. Its purpose is only to outline the title topic and related issues.

Keywords— health protection, public health, freedom of expression, pandemic, Constitution of the Republic of Poland

I. INTRODUCTION

The statement that freedom of expression is not absolute and, consequently, may be the subject to necessary restrictions, already *prima facie* seems to be a truism. After all, the freedom we are interested in is usually discussed in the context of its limits (Biłgorajski, 2013). However, over the 25 years of the Constitution of the Republic of Poland of 1997, limitations on the freedom of speech considering the health protection have been rarely analysed, and if they were, the studies either concerned the obvious issues (such as, for example, the ban on advertising prescription drugs; restrictions on alcohol advertising and cigarettes; limiting the doctors and pharmacists to the circle of people who may legally provide information on

medicines; bans on advertising and promotion of narcotic drugs, psychotropic substances and the so-called substitute means), or resulted only by accident, on the occasion of reflections on the freedom of economic activity (Tworkowska-Baraniuk, Zapolska, 2018: 63–77), and were inevitably limited to the commercial speech (Kamiński, 2006: 506–517). Only the SARS-CoV-2 pandemic has brought wider interest in “health protection” as a premise for limiting the freedom of speech in the Republic of Poland, mainly due to:

- 1) statements, the purpose or effect of which was to make it difficult or impossible for the state to perform the duties implied by “health protection”, e.g., by calling for non-compliance with a quarantine, obstruction of the actions of public authorities in response to the pandemic situation (especially related to the order to wear protective masks, keep a physical distance or vaccination campaign), cases of defamation and insulting public health care and its employees, and other acts of verbal aggression against medics, bearing the hallmarks of crimes under Art. 190 § 1 or Art. 190a § 1 k.k. (Suska, 2020: 478–488);
- 2) statements substantively contesting the official information policy of the state on pandemic issues;
- 3) authorities’ response to the expressions referred to above in points 1 and 2.

Nevertheless, the statements about health care are in fact of general importance as they rise an interest of wide social strata. Before the SARS-CoV-2 pandemic, it was considered that such declarations could only be limited exceptionally when there were particularly strong, irrefutable arguments for it. However, the question arises whether the priority of this type of announcement, manifested even in a kind of presumption of non-compliance with the applicable law of each limit affecting them (Kamiński, 2010: 797–798), has a right to exist now, after

the experiences with the SARS-CoV-2 pandemic?

II. THE CONSTITUTIONAL PREMISE OF HEALTH PROTECTION IN POLAND

In the light of Art. 31 sec. 3 of the Polish Constitution of 1997, “health protection” is one of the six specified *expressis verbis* emanations of the public interest recipient’s category, which may justify introducing restrictions on the exercise of freedom and law, including the freedom of expression. The Polish legislator is not particularly original in this matter, as this premise may limit the freedom of speech on the basis of Art. 10 sec. 2 ECHR (Dz.U. 1993, No. 61, item 284), Art. 52 sec. 1 TFEU (OJEU 2016/C 202/01) or Art. 19 sec. 3 ICCRP (Dz.U. 1977, No. 38, item 167).

In the early years of the Constitution of the Republic of Poland of 1997 being in force, a dispute between Krzysztof Wojtyczek and Mirosław Wyrzykowski regarding the concept of health protection emerged in the science of law. When the first author represented the view that it is one of the most unambiguous (next to “environmental protection”) constitutional grounds for interfering with the sphere of human rights, the application of which does not require evaluation and does not leave the organs applying the basic law with a wider decision-making leeway (Wojtyczek, 1999: 192), the other claimed that the concept of public health is particularly difficult to define (Wyrzykowski M, 1998: 50–51). Time has resolved the above dispute in favour of K. Wojtyczka, because in the last twenty years the scope of designations of the term “health protection” has not been significantly supplemented by literature and case law in comparison to the state of the prime application of the Polish Constitution (Garlicki, 2003: 25; Garlicki, Wojtyczek, 2016: 87–88).

Consequently, the premise we are interested in can be understood in two aspects (the basis for separating them is the Judgement of the Constitutional Tribunal of 09.07.2019, Ref. No. SK 48/05, in which it was stated that provided for in Art. 31 sec. 3 of the Polish Constitution, the possibility for the legislator to limit the scope of exercise of freedom due to the health protection may refer both to the protection of health of the entire society or its individual groups, as well as the health of the individual persons). Firstly, *sensu largo*, as “protection of public health”, thus referring to the protection of health of the entire society or its individual groups. Therefore, these are situations in which there may occur with high probability, determined in the basis of current medical knowledge and life experience, a threat to the health of a larger number of people at the same time (Rakoczy, 2006: 124). In the broad sense, the premise of health protection implies the obligation on the part of public authorities to protect the non-controversial public interest (Boć, 1998: 69) by providing such a legal and social context that would be conducive to the removal of external (coming from outside the human body) threats to the health of many individuals. In particular, examples include the issues regulated in Art. 68 of the Polish Constitution, i.e., preventing infectious diseases, assistance in emergency situations and medical care (it is also worth paying attention in this context to

the tasks set out in Art. 2 of the Act of September 11, 2015 on public health - Dz.U. from 2021, item 1956, as amended - which, in accordance with Art. 1 sec. 2 of the above-mentioned legal act are the definition of public health). The above findings correspond to the classic definition of public health by C. E. A. Winslow in the light of which it is “the science and art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health” (Leowski, 2018: 14; Koziński, 2011: 17).

Secondly, the premise can also be understood in the strict sense, i.e., as a protection of the health of a person to whom the restriction is to apply. In this point, it generates an obligation on public authorities to eliminate behaviours inducing the individual to voluntarily destroy their health. It is about a threat coming from the inside of a human body and the person itself, who may want to risk or damage one’s health, e.g., through drinking alcohol, using drugs (Judgement of the Constitutional Tribunal of 04.11.2014, SK 55/13), psychotropic substances of substitute mean; not wearing a seat belt in a car (Judgement of the Constitutional Tribunal of 09.07.2009, SK 48/05) or refraining from a vaccination where its safety and effectiveness have been confirmed.

To conclude, it should be stated that referring to health protection makes it possible to fight or prevent health threats coming both from the outside and the inside of a human body (Boć, 1998: 69). The border between them is of course fluid. For example, if a given individual publicly promotes behaviours harmful to their health, they also pose a threat in the broad sense of the term, because other people may follow in their footsteps. However, there should be no automatism in the application of this premise, e.g., in preventing a person from practicing a specific profession (such as policeman or firefighter) due to HIV infection, chronic hepatitis or acquired immunodeficiency syndrome (AIDS), provided that their condition does not make the individual completely incapable of work. Then it would be contrary to the Polish Constitution of 1997 (Judgement of the Constitutional Tribunal of 10.12.2013, U 5/13).

III. THE PANDEMIC STATEMENTS CONCERNING PUBLIC HEALTH

As outlined above in the introduction, statements regarding broadly a health care, especially during the SARS-CoV-2 pandemic, are of general importance and raise an unusual interest and concern of wide social strata, which is unfortunately accompanied by common discernment, enabling the verification and assessment of information and views of strictly medical provenance. Hence the universal tendency to be affected by the opinions of people who pretend to play the role

of authorities in various features of the pandemic crisis. It can have positive and desirable consequences, such as a better understanding of this situation and taking actions aimed at protecting both individual and collective health. Otherwise, it can generate extremely negative effects if the authority is used in bad faith, as in the case of Andrew Wakefield, who consciously, guided by the desire to gain personal benefits, published an article in *The Lancet* magazine containing false and unreliable information (Lusawa, Pinkas, Zgliczyński, Mazurek, Wierzba, 2019: 40–45; Deer, 2020; Mnookin, 2011; Marchewka, Majewska, Młynarczyk, 2015: 95–102; Bieniek, 2020: 433–454; Jaśkowiec, 2020: 457–473).

There is no question that statements, the purpose or effect of which was to hinder or prevent the state from performing the obligations implied by health protection, e.g. calling for non-compliance with quarantine, obstruction of the actions of public authorities in response to the pandemic situation (order to wear protective masks or the vaccination campaign), cases of defamation and insulting of the public health service and its employees, and other acts of verbal aggression directed against medics, bearing the hallmarks of crimes under Art. 190 § 1 k.k. or 190a § 1 of the Penal Code, should be subject to restrictions, as they pose a threat to the health and life of often an unspecified number of people. Although the freedom of expression is of key importance in a democratic state, it always has to give way to the triad: the right to life, freedom from torture, degrading and inhuman treatment, and the right to freedom and personal security (Kamiński, 2010: 797). The significance of such values as human health and life must therefore always prevail over the possibility of freely expressing one's views and providing information on the health sphere. Of course, such weighing must take place *casu ad casum*, after careful verification of a given statement and its possible consequences as well as the usefulness, necessity and proportionality *sensu stricto* of the planned restriction.

In this context, it is worth paying special attention to the declarations of opponents of preventive vaccinations, commonly referred to as “anti-vaxxers” (this movement has a long tradition - first anti-vaccination attitudes were recorded as early as the 18th century, when Boylston and Mather started immunization by infecting with the material containing smallpox virus; see also: Marchewka, Majewska, Młynarczyk, 2015: 95–96). The representatives of this movement often discredit and distort the results of scientific research and preach theses contrary to the findings of science which are not supported by the scientific world. They select studies and facts to use only those convenient for them, which allows to claim to be based on the findings of science; change hypotheses when their claims are refuted; they attack, often in a very indiscriminate way, their opponents. As a result, the statements are filled with emotions and suppose to shock the recipients. For example, they completely ignore the advantages and benefits of vaccination, emphasizing the side effects, vividly describe the suffering of parents and children allegedly caused by a given vaccine, etc. (Marchewka, Majewska, Młynarczyk, 2015: 96–99) In this way, they effectively discourage the public from vaccinations, and thus deprive them of the protection they

guarantee both to individuals and the population (the so-called collective protection). In addition, they generate the risk of recurrence of infectious diseases that can be prevented by vaccination (Marchewka, Majewska, Młynarczyk, 2015: 99–100).

In the case of evaluating communication, e.g., members of the anti-vaccine movement, two concepts should be noted: misinformation and disinformation. Both concern the dissemination of untrue and unreliable information, which may pose a real threat to the health or life of even many people, but the intention of the author differs them. Misinformation means “reproducing false information”; a message is disseminated in the public space that is not consistent with scientific knowledge, but in “good faith” or without awareness that the information is false. Disinformation, on the other hand, is “creating and disseminating false information”, in a deliberate and intentional way. The sender of the message is aware of the fact that he is spreading lies, half-truths or manipulating data, and his actions are dictated by the desire to obtain benefits, for example financial or political (Lusawa, Pinkas, Zgliczyński, Mazurek, Wierzba, 2019: 42).

IV. CONCLUSIONS

To sum up, it should be pointed out that in the case of disinformation we are dealing with the manifestation of statements which eludes the commonly recognized interpretations of freedom of speech and, in principle, which should be qualified in the terms of legal abuse (in the concept of law abuse, certain statements are excluded from public debate and the free market of ideas in the name of protecting other values; see also: Bodnar, Szuleka, 2010: 150–172). In this way, certain types of utterances would be scrutinized at all as to whether they fall within the acceptable borders of limiting the freedom of expression. They would simply be not considered as an exercise of the freedom of speech (Biłgorajski, 2014: 11–35). On the other hand, in the case of misinformation, it would be advisable to carry out a proportionality test and to introduce restrictions on the freedom of expression that meet the requirements.

Of course, both terms: misinformation and disinformation can be applied not only to anti-vaccine movements. It happens that such statements come from representatives of public authorities. In such situations, priority should be given to the expression of people who substantively correct false information of authorities, and any attempts to punish them are pointless and deserve stigmatization.

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