Het recht op vrije artsenkeuze binnen het Nederlandse gezondheidsstelsel

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Summary (Engelse samenvatting)

The right to have a free choice of doctor, as a right that belongs to the patient, client or other person involved, is regularly described in Dutch legal literature, case law and legislative history as the right to choose for a preferred doctor or other healthcare provider. Therefore, it is remarkable that no previous research has been performed in legal science concerning the legal basis of the right to have a free choice of doctor. Even more, considering that in current legal literature the patient's right to self-determination is commonly referred as the most important right in health law.

Rationale behind this can be found in the circumstance that patients would possibly not see another doctor or healthcare provider instead of the preferred one, because of a lack of trust. If and insofar patients will be restrained because of this to visit a healthcare professional at all, this causes a direct threat for the right to have access to healthcare services, as well as it – considered from macro-perspective – causes a threat to public health.

Taking this in consideration, the main objective of this thesis is to determine if, and to what extent the right to have a free choice of doctor is constitutionally embedded, and if so, whether this has any consequences for the Dutch healthcare system.

In chapter 1 the author starts with a general introduction of the central theme, explains the outline of this thesis, discusses the scope of the thesis, and describes how main and sub questions are methodologically analyzed and answered in subsequent chapters. Additionally, in this chapter the author discusses the importance of, and attention for case law of the European Convention on Human Right (ECHR) for this thesis.

Chapter 2 analyzes the question what should be considered as the legal basis of the right to have a free choice of doctor, and consequently, if this right should therefore be considered as constitutionally embedded.

In conclusion, there are indications that the right to have a free choice of doctor should be considered as a constitutionally embedded right. Within this chapter the right to have a fee choice of doctor is approached as the right to choose freely for a preferred healthcare professional. The patient's confidence in the care provided by this healthcare professional is of great importance. Under these circumstances, the right to have a free choice of doctor is based on the right to self-determination under the constitutional safeguards of Article 8, paragraph 1 ECHR. As mentioned in chapter 2, the right to self-determination is not absolute. Member states are allowed to interfere with these rights, as far as it is in accordance with the law and it should be considered necessary according to paragraph 2 Article 8 ECHR. In this perspective, it is conceivable that the right to have a free choice of doctor may be subjected to restrictions in favor of financial sustainability of the national healthcare system.

Under the regime of Article 8 (1) ECHR positive obligations exist for member states to provide a legislative and administrative framework so that the rights under article 8 (1) ECHR are given effect under national law.

Notably, the Dutch legislator had the intention to implement the right to have a free choice of doctor under the regime of Article 13 (1) private healthcare insurance act (in Dutch: Zorgverzekeringswet (Zvw), even for patients with a natura-insurance. Article 13 (1) Zvw is practically implemented and given effect by health insurers. Since the rights deriving from Article 8 (1) ECHR even have horizontal effect – with regard to the contractual relationship between insurers and insured individuals – it is assumable that if and insofar insurers do not respect the concerned freedom of choice it will result in an unlawful act as a violation of Article 8 (1) ECHR.

Regarding chapter 2 and the conclusion that there are indications that the right to have a free choice of doctor should be considered as a constitutionally embedded right under Article 8 ECHR, the subsequent question arises what kind of consequences this does imply for the Dutch healthcare system. Merely, this depends on the organization of the legal healthcare framework. As discussed in chapter 3, the organization of the Dutch legal healthcare system is based on a framework of four individual healthcare acts, namely (1) the Zvw (private healthcare insurance act), (2) the public long-term care act (in Dutch: Wet langdurige zorg, Wlz), (3) the youth care act (in Dutch: Jeugdwet), and the social care and support act (in Dutch: Wet maatschappelijke ondersteuning, Wmo 2015).

As described in chapter 3, each scope of the foregoing healthcare acts is precisely demarcated. Therefore, only insurers or municipal administrations are exclusively responsible – based on the applicable and demarcated healthcare act – to organize and finance necessary care. At the same time, when patients can successfully benefit from (insurance) claims based on one healthcare act, no other healthcare financiers – as mentioned in the other healthcare acts – are responsible to provide the same necessary care. Nevertheless, sometimes this results in confusing situations, since there is overlap between covered care based on the various healthcare acts. Consequently, for some of them involved in these situations, this results in deprivation from adequate and necessary healthcare.

In chapter 4 this thesis focusses on the question to what extent the right to have a free choice of doctor is guaranteed within the scope of the Zvw and how this relates to the effect of Article 8 (1) ECHR. Under the Zvw, insured individuals with a restitution (reimbursement) insurance can absolutely benefit the right to have a free choice of doctor as a result of the nature of that kind of insurances. Regarding Article 13 (1) Zvw, the legislator apparently also guaranteed this right for Individuals with a natura-assurance, so that they can visit both contracted and non-contracted healthcare

providers. It follows from case law concerning Article 13 (1) Zvw, that an insured individual based on a natura-insurance is entitled to such an amount of reimbursement of the costs for a non-contracted healthcare provider that this shall not prevent them from visiting the preferred provider, also known as the 'hinderplaalcriterium' (dutch).

In practice, health insurers regularly cut on the amount of reimbursement, if and insofar an insured individual visits a non-contracted healthcare provider. This reduction varies from 25-30% of the market rate, which means that the rate is no longer in line with the market. Such a cut on the amount of reimbursement is in the opinion of the author in conflict with the 'hinderpaalcriterium' and therefore it constitutes a violation of the right to have a free choice of doctor. In legal practice currently no consensus exists on the minimal amount of reimbursement under Article 13 (1) Zvw. Regarding Article 8 (1) ECHR the legislator of the national member state is primarily responsible to implement and to give effect to the underlying rights of Article 8 (1) ECHR.

In addition to chapter 4, chapter 5 focusses on the sub question whether the healthcare provider is legally obligated to inform patients about the amount of reimbursement that the insured individual may receive from his healthcare insurer, and specifically if the healthcare provider is obligated to inform patients about unlawful cuts on the amount of reimbursement. The conclusion of this chapter is that the legal obligation to inform patients under the Wmg does not include the obligation to inform patients on the foregoing aspects. After all, this is the primary responsibility of health insurers, noting that a generic cut on the amount of reimbursement – as it follows from chapter 4 – is definitely a violation of the concerned right to have free choice of doctor.

Subsequently, chapter 6 analyzes the right to have a free choice of doctor within the – so called – social domain (Jeugdwet and Wmo 2015). Within the social domain (health)care professionals are generally employed by youth or social care providers. In this perspective, this thesis also refers to the right to have a free choice of care provider instead of doctors.

Following this thesis, the right to have a free choice of care provider is embedded within the legal framework of the social domain via personal budgets (pgb). Based on a pgb, the client can involve any preferred non-contracted care provider who can be paid by the provided personal budget. Therefore, the question arises whether the 'hinderpaalcriterium' – that applies for the minimal amount of reimbursement under Article 13 (1) Zvw – equally applies for non-contracted care providers within the social domain.

Regarding case law on the minimal amount of budget, personal budgets could be seen as sufficient when they are in line with usual contracted rates. If these budgets are lower than the usual contracted rates, it follows from case law that the hourly rate for a

personal budget must reasonably enable the client to achieve self-reliance and participation. In other words, even within the social domain the provided financial means to involve non-contracted care providers should be sufficient and may not constitute an actual obstacle to visit preferred non-contracted care providers. It is up to the municipal administration to perform in each case an individual assessment.

It should be noted that the right to have a free choice of care provider is guaranteed differently under the legal framework of the social domain in comparison with the Zvw. Within the social domain, the right to have a free choice of doctor/care provider is only guaranteed by means of pgb, which can be used for all youth and social care services under the Jeugdwet or Wmo 2015. In this context, the applied rates are legally regulated. On the other hand, within the Zvw the right to have a free choice of doctor is guaranteed by the ability to choose for a restitution insurance or to choose and apply for reimbursement under a natura insurance pursuant Article 13 (1) Zvw. In this context, it should be noted that health insurers structurally act in conflict with this Article by applying a generic cut on average contracted rates. Moreover, it is remarkable that the pgb as instrument is recently introduced within de Zvw too. However, the scope of the Zvw-pgb is limited to the use for district nursing services. It is unclear what the Zvw-pgb adds as value for the freedom of choice of the insured individual – regarding the right to have a free choice of doctor and the intentions of the legislator in this context – in addition to the options under Article 13 (1) Zvw. The legislator's principal argument for the introduction of the Zvw-pgb seems to be harmonization of the legal healthcare framework, since the pgb also exists under other healthcare acts. These considerations are hard to follow, since the implementation and realization of the right to have a free choice of doctor/care provider within the Dutch legal healthcare framework is anything but harmonized.

Subsequently, in chapter 7 it is studied how the right to have a free choice of doctor is guaranteed within long-term care – the Wlz-act – and how this relates to Article 8 (1) ECHR. Even in this context, the right to have a free choice of doctor is guaranteed by means of the pgb. It is remarkable that the scope of the Wlz-pgb is limited since it cannot be used for residential care facilities. In other words, the pgb can only be used if and insofar the client receives extramural care services. Following this chapter, this limitation is possibly not justifiable. Moreover, under all other foregoing healthcare acts the legislator did not apply this kind of limitation to the scope of the pgb. Based on legislative history it remains unclear why this restriction is justified within this context, whereas the legislator failed to explain why this restriction is applied. The underlying legislative considerations within the various healthcare acts are not easy to follow and remain largely unclear. Regarding to Article 8 ECHR, this could lead to the conclusion that de Dutch legislator violates its positive obligations under Article 8 ECHR to guarantee the right to have a free choice of doctor.

Chapter 8 examines the right to have a free choice of doctor within the legal context of involuntary treatments/care. There is a group of patients who – because they are considered decisionally incompetent – are not able to determine what is in their own interest and therefore to choose adequately for specific healthcare providers. If necessary, under the Wzd and the Wvggz involuntary treatments/care can be imposed on these individuals. The principle of 'informed consent' does not apply to this kind of healthcare. Therefore, the question arises whether the right to have a free choice of doctor applies in equally to this group of individuals.

Regarding analysis in this chapter the conclusion can be drawn that the right to have a free choice of doctor within the context of involuntary care is of great importance. After all, by imposing involuntary care the state infringes already client's rights to self-determination. In perspective of the principle of proportionality and subsidiarity, necessarily within this group of clients it is important to assess whether the right to have a free choice of doctor can be guaranteed either way. If the clients' choice is not taken into consideration while imposing involuntary care, the infringement of the right to self-determination cannot be justified.

While applying the foregoing framework on the Wzd or the Wvggz, it should be noted that the client's freedom of choice under regime of the Wvggz is guaranteed as far as possible. Following the legislative history of the Wvggz, this was explicitly done to guarantee the client's freedom of choice following from Article 8 (1) ECHR. Therefore, it is curious why the freedom of choice is guaranteed to a lesser extent under the Wzd. From a legal perspective, the difference between the implementation of the positive right of choice under the Wvggz and the Wzd cannot be defended.

Chapter 9 discusses some current topics within the context of chapter 4.

Chapter 10 contains this thesis' main conclusions and some concluding remarks. It is argued that there are convincing arguments for assuming that the right to have a free choice of doctor is constitutionally guaranteed, mainly under Article 8 (1) ECHR. This conclusion implies certain consequences for the Dutch healthcare legal framework, even more because actual implementation and realization of the right to have a free choice of doctor appeared to be legally vulnerable. In particular when it is about the implementation and realization of this right under regime of the Zvw, especially for those with an natura insurance, and the Wlz, whereas the concerned right exclusively applies for extramural care. An important recommendation is to harmonize the healthcare legal framework with regard to the patient's freedom of choice, while critically assessing the pgb as instrument. In the opinion of the author, it could be beneficial to introduce a certain 'obligation to contract' as instrument to guarantee the implementation and realization of patient's freedom of choice in individual cases.