

## The right to health:

### a thin line between social rights and positive obligations of the State

Pavel Molek

From the beginning, the European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted as a document including only civil and political rights. As documented by a remark of Pierre-Henri Teitgen during adopting the European Convention (1<sup>st</sup> Session, 19 August 1949), civil and political rights are „essential for a democratic way of life“. Economic, social and cultural rights, more problematic and supported in the global discussions mainly by socialist states in that period, were left for later separate treatment which materialized in 1961 European Social Charter.

Nevertheless, those two groups of rights are inherently „united in diversity“ as documented in the ECtHR judgment *Airey v. Ireland* (9 October 1979, app. no. 6289/73): *„The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.“*

The most important gate for States' duties corresponding to social and economic rights into the frame of the European Convention rights is the concept of „positive obligations“ stemming from different Convention rights. Taking the right to health as an example, some aspects of it were articulated by the ECtHR on the basis of the positive aspects of right to life (Art. 2), the prohibition of torture (Art. 3), and the right to respect for private and family life (Art. 8). They are sometimes connected even to the right to a fair trial (Art. 6) and the right to an effective remedy (Art. 13) as can be illustrated on ECtHR judgment *Oyal v. Turkey* (23 March 2010, app. no. 4864/05) classifying the failure to provide a patient, infected with HIV virus by blood transfusions at birth, with full and free medical cover for life, as a violation not only of Art. 2 but of Arts. 6 and 13 as well, due to the length of the domestic procedure. A specific type of positive obligations are the procedural aspects of Art. 2, found violated in GC judgment *Šilih v. Slovenia* (9 April 2009, app. no. 71463/01) on account of the inefficiency of the Slovenian judicial system in establishing the cause of and liability for the death of the applicant's son who sought medical assistance for nausea and itching skin and died in a

hospital after he was injected with drugs to which he was allergic. The criminal case was pending for 13 years.

There is a whole range of cases where positive aspects of these rights were found to be violated by not providing health care in some specific situations or in cases regarding particular vulnerable groups. First of these vulnerable groups, whose status require the ECtHR to be more demanding in health care questions, are persons in detention. The ECtHR formulated a general duty of states to ensure that diagnosis and care in detention facilities, including prison and psychiatric hospitals, are prompt and accurate, including regular supervision (*Kudła v. Poland*, 26 October 2000, app. no. 30210/96). It reminded states of this duty in several cases: prisoner suffering from a serious heart disease who died after almost four years spent in a pre-trial detention building without a hospital wing, despite medical opinion to the contrary with his bypass surgery cancelled on three occasions (*Dzieciak v. Poland*, 9 December 2008, app. no. 77766/01); prisoner diagnosed with pneumonia and fourth clinical stage of HIV infection, who after being sentenced to the payment of a fine remained in detention for two weeks as a preventive measure, despite his critical condition, and died two weeks after his release (*Salakhov and Islyamova v. Ukraine*, 14 March 2013, app. no. 28005/08); detainee with tuberculosis where delay in correct diagnosis had amounted to inhuman and degrading treatment (*Vasyukov v. Russia*, 5 April 2011, app. no. 2974/05); formulating a positive obligation to prevent the spreading of contagious diseases like tuberculosis and hepatitis in the prisons, to introduce a screening system for prisoners upon admission and to guarantee prompt and effective treatment (*Poghosyan v. Georgia*, 24 February 2009, app. no. 9870/07); failure to provide a prisoner with adequate orthopaedic footwear (*Vladimir Vasilyev v. Russia*, 10 January 2012, app. no. 28370/05); or to provide a detainee with defective eyesight with glasses (*Slyusarev v. Russia*, 20 April 2010, app. no. 60333/00) which had caused them distress and hardship amounting to degrading treatment.

In several decisions the ECtHR also dealt with specific needs of prisoners with mental health issues. In *Renolde v. France* (16 October 2008, app. no. 5608/05), it criticized that a prisoner suffering from acute psychotic disorders capable of resulting in self-harm who had already attempted suicide was not provided with medical treatment corresponding to the seriousness of his condition and instead of placing him in an appropriate cell, he was placed in a punishment cell for 45 days. While being isolated and deprived of visits and all activities, he committed suicide. In *Sławomir Musiał v. Poland* the ECtHR expressed that to hold an applicant suffering from epilepsy, schizophrenia and other mental disorders, in various remand centres without psychiatric facilities was violation of Art. 3 (20 January 2009, app. no. 28300/06).

Another vulnerable group is the people with disabilities. Failure to provide a paraplegic wheelchair-bound detainee suffering from a long list of illnesses with access to medical experts violated Art. 3 (*Amirov v. Russia*, 27 November 2014, app. no. 51857/13) as well as a situation of a wheelchair-bound prisoner who was required to use four flights of stairs in

order to receive life-supporting medical treatment and whenever he needed to visit the medical unit (*Arutyunyan v. Russia*, 10 January 2012, app. no. 48977/09). Vulnerable groups are often overlapping as documented by GC judgment *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania* (17 July 2014, app. no. 47848/08), concerned with young Roma orphan suffering from severe mental disabilities and HIV infection, who had spent his entire life in State care. On reaching adulthood, he was eventually placed in a psychiatric hospital which had no facilities to treat HIV infection and where conditions were known to be appalling, without adequate staff, medication, heating or food, all of this contributing to an advanced state of psychiatric and physical degradation, malnutrition, and finally to an undignified death.

There are many other issues related to health care on the basis of different articles of the European Convention, e. g. forcible medical treatment (*Jalloh v. Germany*, GC, 11 July 2006, app. no. 54810/00), post mortem organ transplantation (*Petrova v. Latvia*, 24 June 2014, app. no. 4605/05), confidentiality of personal information concerning health (*Armonas v. Lithuania*, 25 November 2008, app. no. 36919/02), emergency treatment (*Mehmet and Bekir Şentürk v. Turkey*, 9 April 2013, app. no. 13423/09), abortion (*P. and S. v. Poland*, 30 October 2012, app. no. 57375/08), euthanasia (*Pretty v. the United Kingdom*, 29 April 2002, app. no. 2346/02, *Lambert and Others v. France*, GC, 5 June 2015, app. no. 46043/14), extradition and expulsion of seriously ill individuals (*D. v. U.K.*, 2 May 1997, app. no. 30240/96), exposure to health hazards (*Vilnes and Others v. Norway*, 5 December 2013, app. no. 52806/09) or a general duty of states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives (*Calvelli and Ciglio v. Italy*, GC, 17 January 2002, app. no. 32967/96, concerning liability of health professionals).

Furthermore, the ECtHR included strong messages into a few of its judgments, almost implying a duty to provide individuals generally with a sufficient health care. In interstate case *Cyprus v. Turkey* (GC, 10 May 2001, app. no. 25781/94) ECtHR declared: „219. *The Court observes that an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally. It notes in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It notes, however, that the Commission was unable to establish on the evidence that the 'TRNC' authorities deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment in the south. It observes that during the period under consideration medical visits were indeed hampered on account of restrictions imposed by the 'TRNC' authorities on the movement of the populations concerned and that in certain cases delays did occur. However, it has not been established that the lives of any patients were put in danger on account of delay in individual cases. (...).*”

Does it mean that the ECtHR derives from Arts. 2 and 3 the duty to provide individuals with free health care? While in *Nitecki v. Poland* (21 March 2002, app. no. 65653/01) the ECtHR declared as inadmissible an application of a man having a very rare and fatal disease, who alleged that he did not have the means to pay for his medical treatment and claimed that the authorities' refusal to refund the full cost of his treatment violated Art. 2; in *Panaiteescu v. Romania* (10 April 2012, app. no. 30909/06) the ECtHR held that there had been a procedural violation of Art. 2 on account of the Romanian authorities' failure to provide the applicant's father with the specific anti-cancerous medication he needed for free, in accordance with the domestic courts' judgments acknowledging applicant's father's right to appropriate free medical treatment.

Do these „bricks” labeled with Art. 2 or 3 build together a „building” of a social right to health in European Convention? In my opinion, the perspectives are still different, as documented by the Preamble to the European Social Charter. Although different aspects of civil and political rights guaranteed by Arts. 2 and 3 of the European Convention and which are „*essential for a democratic way of life*” can be violated by not providing health care, especially to vulnerable individuals, the aim of social rights is still very different: „*...to secure to their populations the social rights specified therein in order to improve their standard of living and their social well-being.*”