LIMITING PUBLIC HEALTH CARE RIGHTS – COMPLIANCE WITH THE DOCTRINE OF POSITIVE OBLIGATIONS OF THE STATE?

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Right to health (care)

- Achieving the highest attainable standard of physical and mental health
- A system of public, collective and individual activities, measures and services for strenghtening health, disease prevention, timely treatment, care and rehabilitation of the ill and injured
- Understanding the content of the right; cultural, historical and socio-economical conditions
- Establishing a comprehensive and effective system of health protection must be at the core of state’s obligations

THE DOCTRINE OF POSITIVE OBLIGATIONS OF THE STATE

- Undertaking active measures in order to ensure the best quality of legal protection of fundamental rights reasonably achievable
- The nature of social (health care) rights requires active state intervention
- Level of state intervention regarding health care is (predominantly) dependent on state's political and social orientation

THE DOCTRINE OF POSITIVE OBLIGATIONS OF THE STATE

- Developed through positive activism of the European Court of Human Rights
- The state is not only legaly responsible for violating or infringing the rights of individuals with its activities, but also for those violations that occure because the state has not acted in the expected manner
- Binding on all branches of government; the judiciary also determines whether the other two branches fulfilled their obligations

DEFINING THE CONTENT OF RIGHT TO HEALTH

- A dinamic right; content varies, depending on financial capabilities, political and social values
- Specifying the content of public health care rights is a political question; state's freedom is restricted by international human rights instruments, constitutional provisions and principles of the doctrine of positive obligations
- UN International Convenant on Economic, Social and Cultural Rights, European Social Charter, etc.
- Wording of this provisions is highly abstract and does not constitute specific rights
- Court adjudication is highly restricted; the legislator has a wide "margin of appreciation"

DEFINING THE CONTENT OF RIGHT TO HEALTH – Constitutional provisions

- Article 2 – social and legal state
- Article 50 – right to social security
- Article 51 – right to health care
- Other provisions dealing with specific aspects of right to health and health care

DEFINING THE CONTENT OF RIGHT TO HEALTH – Constitutional provision

- Article 5 establishes the positive obligations of the state: “In its own territory, the state shall protect human rights and fundamental freedoms.”
- Art. 51: (1) Everyone has the right to health care under provisions provided by law. (2) The rights to health care from public funds shall be provided by law.

DEFINING THE CONTENT OF RIGHT TO HEALTH – Constitutional provisions

- The nature of the right unables full prescription of rights within the Constitution; individuals are not intitled to legal protection based directly on the constitutional provisions
- Legislator is allowed a wide field of discretion when determining specific health care rights
- Bound to establish a mandatory public health insurance, but a wide margin of appreciation in determining who must be included in it, the kinds of rights and responsibilities of the insured etc.
- Similarly to ECHR , the Constitutional Court’s review in health care cases is restrained

TRENDS IN HEALTH CARE PROTECTION

- Specifying rights within the Constitution would represent a too high risk and unaffordable investment for the state
- Public health care developed beacuse of changed social and political landscape of the 19th century industrial revolution
- Based on principles of *solidarity*, *social cohesion* and (destributive) *justice*
- *Past: unconditional*, *universal* coverage, *unlimited* access

TRENDS IN HEALTH CARE PROTECTION

- Social, cultural, economical changes altered the preception of welfare rights – from the concept of unconditional rights to “conditional welfare”
- Concept of active citizenship – individual responsibility, reducing socialization of health risks, conditioning rights by compliance with legal duties
- From “redistributing wealth” to “redistributing opportunity”

TRENDS IN HEALTH CARE PROTECTION

- *ARE THESE TRENDS COMPLIANT WITH THE DOCTRINE OF POSITIVE OBLIGATIONS?!*
- Analizing judicial decisions of Slovenian Constitutional Court
- "*The scope of (cumpulsive) health care rights differs. The scope was determined by law depending on the level of social intrest for solidary coverage of various programs and hazards and depending on the effort for insuring individuals for health risks they can, at least in part influence on*." (U-I-154/92)
- "*According to Art.51, everyone has the right to health care under conditions provided by law. The content and scope of this right is therefor determined by law, but the question weather the reduction of funds...is perhaps unconstitutional...is a matter of Constitutional Court's deliberation in a specific case.* (U-I-11295)

FINAL REMARKS

- Social, cultural and economical changes altered the percepiton of social rights
- The doctrine itself does not compel the states to act in a spefic manner, it mearly requires states to take (some) action
- Acceptable limitations must be: 1. Reasonable,

  2. Distributed through time, 3. Necessary and minimal
- The ultimate decision lies with the legislator and is a political question
- The state should do the very maximum it reasonably can to protect and preserve human rights