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The Right to Health Protection in the Estonian Constitution[*1]

Introduction

In April 2002, the headlines in the Estonian newspapers were dominated by a story about a woman suffering from a rare form of leukaemia. There was a medicine which had good, although not guaranteed, prospects for curing her. The problem, however, was that she could not afford the medicine, and the Estonian Health Insurance Fund refused to compensate for the expensive medicine. This case stirred considerable debate. During this debate, also the constitutionality of the refusal was raised as an issue.[*2]

The right to "health"[*3], the right to "health protection"[*4], or the right to "health care"[*5] has been included in the human rights discussion already for a considerable time. The possibility of a person to live a healthy life is a necessary precondition for a dignified life and for enjoying many other fundamental rights. It is no wonder that the fight for a healthy life is one of the most important activities of human rights organisations —

[1] The authors would like to thank Ms. Berit Aaviksoo for her helpful comments on an earlier draft of the article. The research was partly funded by the Estonian Science Foundation grant No. 4532.

[2] *E.g.* T. Koch. Verevähi juhtum näitab ebaõiglust raviraha jagamisel (The Case of Leukaemia Demonstrates the Injustice in Distributing Health Care Finances). – Eesti Päevaleht, 10 April 2002. Available at: http://www.epl.ee/leht/artikkel.php?ID=201161 (15.04.2002) (in Estonian).

[3] B. Toebes. The Right to Health. – A. Eide, C. Krause, A. Rosas (eds.). Economic, Social and Cultural Rights: A Textbook. 2nd ed. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 2001, pp. 169–190; B. Toebes. The Right to Health as a Human Right in International Law. Antwerpen *et al.*: Intersentia, 1999; S. D. Jamar. The International Human Right to Health. – S.U. L. Rev., 1994, p. 1; V. Leary. The Right to Health in International Human Rights Law. – Health and Human Rights, 1994, Vol. 1, No. 1, p. 24.

[4] *E.g.* The Revised European Social Charter (hereinafter: ESC), article 11 is entitled "The right to protection of health."

[5] A. Exter, H. Hermans (eds.). The Right to Health Care in Several European Countries. The Hague, London, Boston: Kluwer, 1999; T. J. Bole III, W. B. Bondeson (eds.). Rights to Health Care. Dordrecht *et al.*: Kluwer Academic Publishers, 1990.

one cannot enjoy political liberties if one is critically ill.*[6] The right to health protection is tightly connected to many other rights, such as the right to food, shelter, healthy working conditions, healthy environment and access to health information.

The right to health protection has found its way into the Estonian Constitution — § 28 provides that "everyone has the right to health protection". At the same time, the right to health protection and social rights in general have so far drawn little attention in the Estonian legal literature. For instance the most comprehensive legal analysis of the Constitution prepared under the auspices of the Ministry of Justice*[7] does not contain guidelines on furnishing the scope of the right to health protection.

We base our discussion on two main sources. Firstly, we show how the social rights in the Constitution have been applied by the Estonian courts and interpreted by the Estonian scholars in general. The interpretation of the right to the protection of health should fit into the general understanding of the nature and importance, and especially the justiciability of social rights. Secondly, we discuss how the international obligations Estonia has entered into influence the understanding of the social rights in general and specifically the right to the protection of health.*[8]

As the Constitutional right to health has not been an object of legal battles, we show how the courts should interpret this provision and whether and to what extent rights in the field of health protection actually do exist.

1. Historical and international background of the right to health protection

1.1. Constitutional history

The Constitutions of 1920 and of 1938 contained several provisions related to social rights*[9], although their general application and enforceability in the courts was doubtful. In this respect, the provisions of the Constitution of the Soviet Union were radically different, providing for the maintenance of a net of health care facilities (article 24) and for the right to health care (article 42). This right was assured in practice in several ways, including the provision of qualified health care services for free in state-owned health care facilities, implementation of comprehensive disease prevention programs, *etc*. The ability to provide services for free had to do with the communist economy system, which kept salaries of doctors low, set forth fixed prices for infrastructure services rendered to health care facilities and allowed to use mainly only low-priced domestic pharmaceuticals and medical equipment.*[10]

In contrast, the inclusion of social rights in the post-Soviet constitutions has not been easy in any Eastern European country. The need to abandon the socialist system has also meant the tendency to neglect anything "social." Civil and political rights that people were deprived of under the previous regime seemed to claim priority.*[11]

However, some social rights do exist in the current Estonian Constitution. Besides the most important section, namely § 28 (guaranteeing also the right to health protection), several other rights such as the right to education and several work-related rights are ensured. Section 10 of the Constitution enshrines the principle of the social state and one may easily say that the specific social rights give clear content to the general principle. As the Constitution also determines that the Estonian State is founded on justice and human

[6] Among the most important international organisations, the World Health Organisation is devoted to the single issue of health. In recent years, however, even Amnesty International, known for its struggle for civil and political rights, has broadened its sphere of activity and promotes the protection of health, see http://web.amnesty.org/rmp/hponline.nsf (15.04.2002).

[7] Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (The Final Report of the Constitutional Expert Commission). Available at: http://www.just.ee/index.php3?cath=1581 (15.04.2002) (in Estonian).

[8] There are a couple of bibliographies available on the topic of health and human rights. At the UC, Berkeley, Molly Ryan has compiled a bibliography as of fall 1997, see http://globetrotter.berkeley.edu/humanrights/bibliographies (15.04.2002). Amnesty International provides a bibliography also as of 1997. Available at: http://www.web.amnesty.org/ai.nsf/index/ACT750031997 (15.04.2002).

[9] For example, § 25 of the Constitution of 1920 provided that the regulation of economic life should be based on the principle of justice, which aims to secure decent maintenance in case of youth, old age, incapacity for work and accident.

[10] I. Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. – A. Exter, H. Hermans (eds.) (Note 5), p. 103.

[11] C. Taube. Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law. Uppsala: Iustus Förlag, 2001, p. 230 *ff*.; W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des öffentlichen Rechts, N.F. Vol. 50, 2002, p. 481.

dignity[*12], the Constitution receives a certain social accent besides the generally liberal tone.[*13] However, a clear-cut choice between liberal, conservative or social democratic welfare models[*14] has not been made in Estonia, with all three models being prominent in the political discussions.

The Constitution provides for a dignified life for everyone. According to § 14, "guaranteeing rights and liberties shall be the responsibility of the legislative, executive, and judicial powers, as well as of local government". The Estonian Constitution deliberately does not distinguish between "positive" and "negative" obligations, or civil/political rights and social rights. These rights are universal, indivisible, interdependent and interrelated.[*15]

1.2. Impact of international law on the right to health protection

An important source of interpretation of the right to health protection derives from the international law. Its role in interpreting the Estonian constitutional provisions, especially the human rights provisions, has been considerable.[*16] Most often, the Constitutional Court has used the European Convention on Human Rights[*17], some references to the ICCPR[*18] and the Convention on the Rights of Child[*19] have been made as well. Besides the fact that the international human rights law has direct domestic applicability in the Estonian courts, the treaty had often been used for interpretation of the Estonian Constitution and other legal provisions. Considering the "friendliness" of the court towards international law, the use of social rights treaties is highly probable.

Estonia has recently ratified several international documents regulating more or less directly the right to health protection. Such provisions are included in the 1948 Universal Declaration of Human Rights (article 25 (1))[*20], the International Covenant on Economic, Social and Cultural Rights (article 12 (2) d)[*21] and the European Social Charter (articles 11, 12 and 13), as well as in more specific human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (article 12), Convention on the Rights of the Child (article 24) and the Convention on Human Rights and Biomedicine (article 3).[*22] Estonia is also a member of the World Health Organisation, whose Constitution states that the "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being".[*23] The most recent human rights instrument, the Charter of Fundamental Rights of the European Union, also provides for the right to health care (article 35).[*24]

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[12] According to the preamble, the Estonian State is founded on "liberty, justice and law" and shall "protect internal and external peace, and is a pledge to present and future generations for their social progress and welfare." Human dignity as a value is protected by § 10.

[13] For the liberal interpretation of the basic rights see R. Alexy. Põhiõigused Eesti Põhiseaduses (Basic Rights in the Estonian Constitution). – Juridica 2001 eriväljaanne, 2001 (in Estonian).

[14] G. Esping-Andersen. The Three Worlds of Welfare Capitalism. Cambridge: Polity Press, 1990.

[15] For the inseparability of civil/political and social rights see United Nations, World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I, paragraph No. 5.

[16] Generally on the role of international law in the Estonian domestic system. See H. Vallikivi. Domestic Applicability of Customary International Law in Estonia. – In the present issue, pp. 28–38; H. Vallikivi. Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (Treaties in the Estonian Legal System: The Domestic Validity and Applicability of Treaties Concluded under the Constitution of 1992). Tallinn: Õiguskirjastuse OÜ, 2001.

[17] H. Vallikivi. Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas (Use of the European Convention on Human Rights in the Practice of the Supreme Court). – Juridica, 2001, No. 6, p. 399 (in Estonian).

[18] For example, the decision of the Criminal Chamber of the Supreme Court, 24 September 2001 (3-1-3-11-01). – Riigi Teataja (The State Gazette) I 2002, 2, 12 (concerning the right to be present during the court proceedings) (in Estonian).

[19] The decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996 (3-4-1-1-96). – Riigi Teataja (The State Gazette) I 1996, 35, 737 (concerning the right of minors to form unions) (in Estonian).

[20] "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[21] "States shall take steps, including the creation of conditions which would assure to all medical service and medical attention in the event of sickness, to achieve the full realisation of everyone's right to the enjoyment of the highest attainable standard of physical and mental health."

[22] "Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality."

[23] WHO Constitution. Preamble. Available at: http://www.who.int/ism/mis/WHO-policy/index.en.html (15.04.2002).

[24] "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."

These international provisions have been interpreted by the relevant treaty enforcing institutions. Two important institutions should be mentioned here. Firstly, in May 2000 the UN Committee on Economic, Social and Cultural Rights issued General Comment No. 14, interpreting the right to the highest attainable standard of health. Secondly, the European Committee of Social Rights has developed a considerable case-law on the health protection rights.

The Estonian Supreme Court has not yet referred to a treaty guaranteeing social rights, including the ESC. Part III of the Appendix to the ESC contains the clause that it "is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof". However, the court is by no means prevented from interpreting the domestic constitutional provisions by including the ESC case-law in its considerations.[*25]

2. Justiciability of the right to health protection

The enforceability of social rights in the courts (justiciability) is clearly controversial.[*26] The court system and court procedures are usually designed to protect the interests represented before it. Health care financing decisions are called "polycentric", which means that they involve a number of different competitive and antagonistic interests and in a common legal procedure, where a single plaintiff faces a single defendant it would be difficult to ensure that all these interests were adequately represented before the court.[*27] It is accepted that the legislator has considerable margin of appreciation in determining the adequate measures for protecting social rights and that the courts must not excessively interfere with social policy making.[*28] This is especially important in the transition process from a socialist to a market-based economic system.[*29] At the same time, the justiciability is not *a priori* impossible. Whenever the social rights provisions are clear enough and enable the courts to apply them to concrete cases, they are fully entitled to do so.[*30] The European Committee of Social Rights has taken a similar position and demanded that states provide for a justiciable right to health protection.[*31]

The Estonian Supreme Court has rarely considered social rights in its decisions so far. However, it has clearly obliged the state to engage in positive action to protect family life.[*32] The Civil Chamber of the Supreme Court has gone quite far and demanded that a municipality must not evict insolvent and indebted tenants from municipal buildings even when they have not paid rent for a considerable time period. If the tenants are qualified for social assistance because of unsatisfactory income, the municipality must provide for housing.[*33] From these few decisions we see that the court is willing to enforce at least some social rights. Therefore, the rights to health protection should also be justiciable in principle.

The most important consideration behind not recognising justiciability of the right to health protection is the financial one.[*34] The level of protection might depend on the availability of resources. For example, the CESCR provides for "progressive realisation" of social rights, accepting that full realisation of all eco-

[25] In fact, several courts have applied the charter in the domestic practice. See D. Harris, J. Darcy. The European Social Charter. Ardsley: Transnational Publishers, 2001, pp. 395–396.

[26] R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Review). Tallinn: Juura, 1997, p. 100 (in Estonian). Generally see T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura, 2001, p. 92 (in Estonian).

[27] See *e.g*. N. W. Barber. Prelude to the Separation of Powers. – Cambridge Law Journal, 2001, Vol. 60, No. 1, p. 75.

[28] Decision of the German Constitutional Court Bundesverfassungsgericht. – Neue Juristische Wochenschrift, 1971, p. 366 (in German).

[29] A. Sajo. How the Rule of Law Killed Hungarian Welfare Reform. – East European Constitutional Review, 1996, Vol. 5, No. 1, p. 31; generally in Eastern Europe after transition see H. Schwartz. The Struggle for Constitutional Justice in Post-Communist Europe. Chicago and London: University of Chicago Press, pp. 63–65, 91–94, 154–156, 232–233; B. Bugaric. Courts as Policy-Makers: Lessons from Transition. – Harvard International Law Journal, 2001, Vol. 42, p. 247.

[30] Among many authors, see G. J. H. van Hoof. The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. – P. Alston, K. Tomaševski (eds.). The Right to Food. Dordrecht: Martinus Nijhoff Publishers, 1984, pp. 97–110.

[31] M. Scheinin. Economic and Social Rights as Legal Rights. – A. Eide *et al.* (eds.) (Note 3), p. 43.

[32] Decision of the Constitutional Review Chamber of the Supreme Court, 5 May 2001 (3-4-2-1-01). – Riigi Teataja (The State Gazette) III 2001, 7, 75 (in Estonian).

[33] Decision of the Civil Chamber of the Supreme Court, 18 October 2000 (3-2-1-104-00). – Riigi Teataja (The State Gazette) III 2000, 25, 278 (in Estonian).

[34] Of course, civil and political rights cost as well. Therefore, the specificity of social rights is not as great as often claimed. See S. Holmes, C. Sunstein. The Cost of Rights: Why Liberty Depends on Taxes. New York *et al.*: Norton, 1999.

nomic, social and cultural rights is not possible immediately or even in short term.[*35] To this corresponds the "dynamic" interpretation of certain provisions of the ESC, where "dynamic" represents the idea that the level of protection is dependent on the level of resources available.[*36]

The Estonian Constitution does not explicitly provide for the dynamic or progressive character of social rights, but it allows for restrictions in the fundamental rights as long as they are necessary in the democratic society (§ 11). Long-term economic stability and the balance of economic development might certainly be goals that justify the limitations for providing free health care to everyone. Also, the social rights must not mean that some groups in the society become privileged at the expense of others by demanding certain free services from the state. Under limited resources, all public welfare services need sufficient attention.[*37]

The dynamic nature of the social rights does not mean, of course, that the rights exist only at the will of the state. Certain "core rights" should be guaranteed immediately.[*38] The inactivity of the state must not mean that no constitutional objections could be presented. International law demands that the state has to move as expeditiously as possible towards the full realisation of the rights. The state has to have at least a "plan of action" to achieve higher standards of health protection.[*39]

3. Elements of the right to health protection

The obligations of the state with respect to the right to health protection can be divided into the obligation to respect, to protect and to fulfil. The obligation to respect prevents the state from damaging one's health; the obligation to protect demands action from the state to prevent interference from third parties. The obligation to fulfil forces the state to adopt various measures to protect the health of the individuals.[*40] We do not follow this widely used distinction, but discuss three types of the most common rights concerning the health protection: the liberal right to non-interference by the state, the right to "underlying conditions"[*41] for healthy life and the right to health care.

It is inevitable that no state can guarantee a healthy life for everyone.[*42] As health "is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[*43], reasons for lacking health can be various. Socio-economic reasons such as unhealthy nutrition, unsanitary living conditions and unhealthy working practices certainly play a role. For many diseases, the unhealthy person is responsible himself or herself, for example due to smoking or too little exercise. It is obvious that the state cannot be responsible for each and every health-related problem. Also, the state cannot be held responsible for curing all health-related problems. Therefore, it is not necessary and from the economic point of view also impossible to interpret and furnish the right to health protection and its elements as comprehensively as possible.

3.1. Right to be free from invasion of health

The right to health protection includes traditional liberal self-determination rights. R. Alexy points out that the Constitution does not explicitly include the obligation of the state to abstain from causing hazards to the health of people calling this a serious gap within the catalogue of the basic rights under the Constitution.[*44] However, the obligation of the state to refrain from interfering with health and bodily integrity has never

[35] M. Craven. The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development. Oxford: Clarendon Press, 1995, pp. 128–134. See also CESCR General Comment No. 3, UN Doc. E/1991/23, 1990.

[36] D. Harris, J. Darcy (Note 25), p. 27.

[37] On the example of higher education, see BVerfGE 33, 303, 334 *f.* (Numerus Clausus I).

[38] B. Toebes 2001 (Note 3), pp. 175–177; UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14 (Note 39), pp. 43–45. Such core rights include maternal and child health care, immunization, provision of essential drugs, education concerning health prevention and adequate supply of water and sanitation.

[39] UN CESCR General Comment 14 (Note 38), p. 43 (f).

[40] On these categories, see A. Eide. Economic, Social and Cultural Rights as Human Rights. – A. Eide *et al.* (eds.) (Note 3), p. 13 *ff*. In the field of health protection, see UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14. Un. Doc. E/C.12/2000/4, pp. 34–37; and B. Toebes 2001 (Note 3), pp. 178–180.

[41] Either "underlying determinants" or "underlying preconditions" is used. For former, see UN CESCR General Comment No. 14 (Note 38), p. 4; for the latter, see B. Toebes 2001 (Note 3), p. 174.

[42] UN CESCR General Comment No. 14 (Note 38), p. 8.

[43] WHO Constitution (Note 23), preamble.

[44] R. Alexy (Note 13), p. 77.

been set in doubt by the courts[*45] and R. Alexy adheres to the point of view that it would be inconsequent to argue that the state has an obligation to finance the protection of health but has no obligation to abstain from invading the health of its inhabitants.[*46]

Additionally, the state is obliged to secure proper protection of different aspects of self-determination rights such as right to informational or bodily self-determination in case of providing health care services by third parties. The principle *voluntas aegroti suprema lex est* (patient's will is supreme) is somewhat controversially protected under Estonian law.[*47]

The state has duties to protect people from the invasion of health by third parties also when medical treatment is not involved. Probably the most well-known situation when the state has neglected such duties involves direct environmental risk. For example, the European Court of Human Rights saw the violation of the right to privacy in the fact that the government failed to protect inhabitants from the high night noise level of Heathrow Airport, operated by a private enterprise. The court was clearly motivated also by health considerations, accusing the government of conducting too little research on the "impact of the increased night flights on the applicants", especially in the areas of "the nature of sleep disturbance and prevention".[*48] As to the access to health information, the ECHR has found that the state has to provide advice to people if they are under risk to their health. This obligation arises for example when the risk has been created by the state in weapons testing[*49] or by private enterprise through pollution.[*50]

Closely connected to the liberal right to bodily integrity is the principle of non-discrimination in provision of health services. The ECHR has additionally declared that depriving a person of medical care by expelling him or her while the person is suffering from a terminal and incurable illness, might violate article 3 of the Convention, protecting from inhuman and degrading treatment.[*51]

3.2. Rights to "underlying determinants for health"

The "underlying determinants" for health are conditions such as "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health".[*52] The interpretation of the ESC article 11[*53] has shown that vaccination and epidemic control[*54], AIDS prevention[*55] and environmental protection[*56] all play a role. Such measures are more or less protected by the Public Health Act[*57] and the Health Care Services Organisation Act.[*58] These rights are rather general, and it is quite hard to find individually guaranteed subjective rights for a specific individual in a specific case, especially as regards to treatment on demand.

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[45] The Criminal Chamber of the Constitutional Court has explicitly stated that the right to bodily integrity is protected by the Constitution, Decision of 30 May 2000 (3-1-1-63-00). – Riigi Teataja (The State Gazette) III 2000, 19, 202 (in Estonian).

[46] R. Alexy (Note 13), p. 77.

[47] This principle has been recognised in the Law of Obligations Act (Võlaõigusseadus. – Riigi Teataja (The State Gazette) I 2001, 81, 487 (in Estonian)). This is a contractual obligation of a service provider. Medical treatment without informed consent is, however, not considered as a criminal offence according to the new Penal Code (Karistusseadustik. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian)).

[48] *Hatton and Others v. the United Kingdom*, 2 October 2001, application 36022/97, at paragraph No. 103.

[49] *L.C.B. v. The United Kingdom*, 9 June 1998, application 23413/94. In this case, the court did not find a violation, as it was not foreseeable during the nuclear testing that the health of the daughter of the person tested might have been endangered. Under similar circumstances, the state has to provide access to available information about the radiation levels, see *McGinley and Egan v. The United Kingdom*, 9 June 1998, applications 21825/93; 23414/94.

[50] *Guerra and Others v. Italy*, 19 February 1998, application 14967/89. The State did not inform inhabitants for several years before advising them of risks associated with a chemical factory.

[51] *D. v. The United Kingdom*, 2 May 1997, Application No. 30240/96.

[52] UN CESCR General Comment No. 14 (Note 38), p. 11. See also B. Toebes 2001 (Note 3), p. 174.

[53] "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

[54] C I, p. 60.

[55] C X-1, p 109.

[56] C IX-2, p 13; C X-1, p. 110 (air pollution in Italy).

[57] Rahvatervise seadus (Public Health Act). – Riigi Teataja (The State Gazette) I 1995, 57, 978; 2002, 32, 187 (in Estonian).

[58] Tervishoiuteenuste korraldamise seadus (Health Care Services Organisation Act). – Riigi Teataja (The State Gazette) I 2001, 50, 284 (in Estonian).

3.3. Rights to health care

The rights to health care are the most controversial area[*59], as considerably more resources are needed and spent in this area of health protection.[*60] At the same time, they are the most important ones to the people. It is in human nature not to think so much on protecting of underlying determinants of health, but worrying about getting help in case of illness. Considering the opportunities and costs of modern medicine it is clear that the state cannot provide for free all health care services anyone wants or needs. It would therefore be more appropriate to speak about the responsibility of the state to guarantee the availability of health care services. This includes the question of financial availability, concerning both regular health care as well as treatment in extraordinary or emergency situations, where the right to life plays an important role in interpreting the constitutional guarantees.[*61]

3.3.1. Availability of health care services

The Constitution does not oblige the state to provide health care services by itself. Privatisation of hospitals is not prohibited in principle, as is similarly not prohibited the organisation of the medical profession based on the liberal professions tradition. As a result of a recent major reform Estonia has established a system of private general practitioners for primary health care, with hospitals which major shareholder is in most cases the state or local government on the second and third level. All health care providers in Estonia are independent legal persons in private law, enjoying considerable independence from the state and local governments.

The state still has the obligation to ensure that an adequate number of hospitals and other health-related buildings exist.[*62] This means that the state has to ensure that necessary legislation to carry out control over health care providers is enacted and that the hospitals comply with it. Such legislation should regulate establishing of hospitals, borrowing limits, certificates of need, state's step-in rights in case of failure to operate a hospital or on bankruptcy of a hospital, pre-emptive rights on transfer of hospitals, *etc*. Currently, these issues are not regulated in Estonia and the situation does clearly not correspond to the state duties in ensuring the availability of health care.

Besides hospitals and other buildings, the number of qualified doctors receiving a competitive salary must be sufficient. This includes a need for a sound education and training system for the medical staff, when no private universities provide these services.[*63] Another unsolved issue is the remuneration of medical students working in hospitals during their last stage of studies.

The right to health protection does not require only the availability of any kind of health care services, but services of reasonable quality.[*64] This can be secured by setting forth certain requirements for professional competence of doctors, medical equipment, medicines, hospital buildings, *etc*. Additionally, there has to be a mechanism for supervising and monitoring the quality. Both sides of the quality of health care services are well regulated under Estonian law.[*65] There is a special agency being founded under the Health Care Services Organisation Act which has the purpose licensing hospitals. Receiving a licence depends on the quality of rendered services and adherence of quality management guidelines. Recently a Bill on Patient's Rights was submitted to the Estonian Parliament. This Bill sets up a mechanism for how patients can submit their complaints about the quality of health care services to a patients' ombudsman. Protection of patients' rights is one important instrument in assuring the quality of health care services.

Probably the more important aspect of availability of health care is the financial availability. The Constitution does not explicitly oblige the state to introduce a universal health protection system. However, under article 12 of the ESC the state is obliged "to establish or maintain a system of social security". This

[59] For example, see R. Epstein. Mortal Peril: Our Inalienable Right to Health Care? Reading: Addison-Wesley, 1997 and the reports of the symposium on this book published in University of Illinois Law Review, 1998, pp. 683 *ff*.

[60] For example, the 2002 health insurance budget was 4.85 billion kroons. At the same time, funds for disease prevention and health promotion programs were only 63.5 million kroons.

[61] On different dimensions of the right to health care see H. Leenen. The Right to Health Care and its realisation in the Netherlands. – A. Exter, H. Hermans (eds.) (Note 5), p. 34.

[62] UN CESCR General Comment (Note 38), p. 12 (a). From the case law of ESC, see C XIII-3, p. 343 (Portugal). Access to services has to be guaranteed without losing excessive amount of time. A hospital master-plan approved by the Estonian government sets forth that specialised medical care should be available from every place in Estonia within 60 minutes, *i.e*. a hospital shall not be farther away than 70 kilometres. Available at: http://www.tervishoiuprojekt.ee/index.php?page=2,9 (15.04.2002).

[63] UN CESCR General Comment (Note 38), p. 12 (a).

[64] See UN CESCR General Comment No. 14 (Note 38), p. 12 (d).

[65] There is a number of regulations adopted under the Health Care Services Organisation Act regulating the quality of services.

includes the obligation to establish or maintain a health insurance system.*[66] Moreover, the system has to be maintained at a level "at least equal to that necessary for the ratification of the European Code of Social Security" and even more importantly, the states have "to endeavour to raise progressively the system of social security to a higher level". The health insurance system has to be based on the solidarity principle, meaning that it must include people who are not able to contribute themselves, *e.g.* minors and retired persons.*[67]

Similar demands are also part of the constitutional principle of the social state. This principle demands that the state must protect people from risks, in case they are unable to do that themselves. This protection is effective only if there is some security for everybody that in case of need they will receive assistance. This is possible only through a public health insurance system that is based on the solidarity principle.*[68] Such a national compulsory tax financed system based on solidarity of insured people already exists in Estonia, with more than 90% of the people having insurance cover. This, however, does not determine to what extent the payments to the insured are guaranteed.

3.3.2. Reducing the availability of health care services

It has been argued that the constitutional right to health protection does not allow for co-payments by the insured patients. Such payments could put a heavy burden on those people with a lower income. There are several arguments why this practice is necessary and constitutional, however. First of all, there is a systematic argument that contrary to the first paragraph of § 37 of the Constitution, which sets forth the right to education for juveniles free of charge, the first paragraph of § 28 of the Constitution does not state that health protection has to be completely free of charge to inhabitants. Secondly, the complete responsibility of the state does not motivate people to protect their own health by abandoning unhealthy practices, for example. Patients' contributions may be considered as a kind of self-liability. Thirdly, the financial burden might be unbearable for the state and prevent the state from engaging in other necessary policies.*[69]

The adoption of legislation introducing self-liability and responsibility to contribute towards the payment of health care services can be set under question also in the light of the obligation to raise the health insurance system progressively to a higher level. This means that reducing benefits, increasing the contributions of the patients for the services and restricting financing for certain services demands clear justification. However, there is no absolute prohibition of such measures. The European Committee of Social Rights has in principle accepted such practice, as far as it is "necessary to ensure the maintenance of the social security system and provided that any restrictions still allow members of society to be effectively protected against social and economic risks and do not tend to gradually reduce the social security system to one of minimum assistance".*[70] The need to consolidate public finances and the goal of preserving balanced health insurance budgets therefore allow to restrict payments from the Health Insurance Funds.

Another mechanism for reducing availability of health care are waiting lists, which are commonly used to reduce the financial burden on the Estonian Health Insurance Fund's budget. The maximum waiting periods are not set forth by any legislative document. Moreover, criteria providing for preconditions to be fulfilled in order to be entered into the list or moved upwards on the list are not regulated. This causes a clear constitutional problem — the availability of health care services is not guaranteed sufficiently well as the procedures for decision-making are not well elaborated. However, this problem shall be solved by the new Act on Health Insurance, which shall enter into force on 1 October 2002.

3.3.3. Provision of emergency and extraordinary care

In case a person has no resources to bear his or her burden of the services, or if the person is not insured, the state still has to provide social assistance as guaranteed by the second paragraph of § 28 of the Constitution. Article 13 of the ESC provides that the state has to undertake "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in

[66] C XIV-1, p. 160 (Cyprus), p. 222 (Finland), p. 534 (Malta).

[67] C XIV-1, p. 308 (Germany), pp. 561–562 (the Netherlands).

[68] Certainly, this can also be achieved by the national health service model as in the United Kingdom. However, when the insurance model is already introduced, those unable to pay for insurance must also be entitled to health care services.

[69] The introduction of co-payments has been one of the main methods of cost-containment in the health care sector in all democracies, see *e.g.* M. Harrop. Health Policy. – M. Harrop (ed.). Power and Policy in Liberal Democracies. Cambridge: Cambridge University Press, 1992, p. 162.

[70] *E.g.* as regards to France, Conclusions XIV-I, pp. 260–265; Germany XIV-I, pp. 305–312. Reference omitted. See also general observation on article 12 (3), C XIII-4, p. 143.

case of sickness, the care necessitated by his condition".[71] For those not covered by compulsory or voluntary insurance in Estonia, the right to receive emergency care for free is granted by the Health Care Services Organisation Act. Against that background it might be argued that the state has created a system which guarantees financial availability of health care services for all.

The controversial issue here is however, to what extent must the state provide for the services for the poor or uninsured; and to what extent must the state provide for care involving extraordinary costs for treatment, such as in the case mentioned in the beginning of this section. The Health Care Services Organisation Act understands under emergency care such services "which are provided by health care professionals in situations where postponement of care or failure to provide care may cause the death or permanent damage to the health of the person requiring care".

Such measures start from a simple injection of insulin and end with a hearth-lung transplantation and gene therapy. Considering the life-preserving nature of the essential services, the rights seem to be protected by the right to life instead of the right to health protection. The human life has a very high value in the Estonian society, and it does not seem to be justified simply to refer to tight resources when refusing potentially life-saving care. It seems unavoidable that a rational decision-making procedure has to exist, together with rules for making the decision.[72] The right to life must be given enough attention and reasons for refusing treatment have to be well founded, *e.g.* the probability of the treatment to cure the disease might not be high enough to justify the costs (so called principle of cost-effectiveness).

However, in this issue it is very hard for the courts to interfere with the professional judgement of the doctors and health care organisations in a concrete case. In some cases, it is justified to refuse potentially life-prolonging treatment.[73] Cost considerations also play a role. The long-term provision of health care services is possible only if the short-term health budgets correspond to the general economic situation in the country.[74] Therefore, the court should exercise considerable self-restraint in deciding on the issue whether the care must be provided for or not.

Comparative law demonstrates that the rights to high-cost health care in specific cases are in fact rarely enforceable in the courts. Under the English or Scottish law the patients do not have a legal right to receive treatment or any particular standard of health care services. The health care rights are not justiciable.[75] In Canada and the United States the right to receive health care services has not been approved as a constitutional right at all.[76] Despite the fact that the Russian Constitution of 1993 states that health care is provided free-of-charge in public and municipal health care facilities, the state is *de facto* giving up its commitments.[77] Also the provision of the German Basic Law guaranteeing the right to life has been interpreted as giving no right to free medical treatment.

Conclusions

The right to health protection as guaranteed by the Estonian Constitution is a big step towards the realisation of dignified life for everyone. The obligation of the state to take measures in this respect must not be neglected. Also, the state might be under its constitutional duty to provide treatment in order to protect the lives of people. At the same time the level of health protection, especially the provision of health care services, depends on the availability of resources. The debate in the newspapers in connection with the

[71] Similarly, the state has to take care of the health deprived of liberty. See, *e.g. Hurtado v. Switzerland*, *Hurtado v. Switzerland*, Comm. Report 8 July 1993, Series A no. 280, p. 16, § 79; *Ilhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 87; *Keenan v. The United Kingdom*, 3 April 2001, Application No. 27229/95.

[72] For the British practice, also considering the Human Rights Act 1998, see D. Feldman. Civil Liberties and Human Rights in England and Wales. 2nd ed. Oxford University Press, 2002, pp. 228–233.

[73] Here, the decision of the South African Constitutional Court in the case *Soobramoney v. Minister of Health*, Kwa-Zulu Natal is often referred to, *e.g.* in Toebes 2001 (Note 3), p. 188. Generally see also D. O'Sullivan. The Allocation of Scarce Resources and the Right to Life under the European Convention on Human Rights. – Public Law, 1998, pp. 389–395.

[74] For instance the prevailing philosophy of courts of Italy in the 1980s was that all services, which were technologically possible should be provided to citizens. By the beginning of the 1990s the courts were basically forced to alter their point of view, since public health expenditure started to increase dramatically. G. France. The Changing Nature of the Right to Health Care in Italy. – A. Exter, H. Hermans (eds.) (Note 5), p. 43. For a similar change in mind in Germany see H Genzel. Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem. – A. Laufs u.a. (ed.). Handbuch des Arztrechts. München: Beck, 1999, p. 606.

[75] D. Feldman (Note 72), p. 229. It has been speculated that the adoption of the Human Rights Act might change this situation, see D. O'Sullivan (Note 73), p. 391.

[76] D. Sprumont. The Right to Health Care in Swiss, Canadian and American Law. – A. Exter, H. Hermans (eds.) (Note 5), p. 70.

[77] I. Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. – A. Exter, H. Hermans (eds.) (Note 5), p 104–105.

above mentioned leukaemia case clearly showed that the newspapers and members of society are not capable to see the scarcity of resources as an argument to refuse treatment when someone is seriously ill. Even though the courts will face considerable social pressure in making their decisions in such cases, they have to be careful in interfering in these questions having a high impact on health policy. In order to secure a just judgement while allocating resources available for health protection clear guidelines for making such judgements must be adopted by the Parliament.