The Protection of the Right to Health Under Article 2 of the European Convention on Human Rights

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Abstract: *In the case LCB v United Kingdom the European Court of Human Rights (Court) noted that: "the first sentence of Article 2 (of European Convention on Human Rights) 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." In the case Cyprus v Turkey the Court observed 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 follows that the obligation to protect life has been extended in the sphere of health care by the Court. In this regard, the paper attempts to determine the existence, scope and breach of the positive obligation regarding provision of health care under Article 2 of the ECHR based on the jurisprudence (case-law) of the Court.*

Key words*: ECHR, Article 2, Right to health, European Court of Human Rights.*

1. Introduction

Described in the literature as "the most advanced and effective among the world's systems of human rights" (Goldhaber, 2007), the European Court of Human Rights (ECtHR or Court) is always an appealing subject of scholary interest.Over the years the ECtHR has developed a considerably body of case law by interpreting and implementing the European Convention on Human Rights (ECHR). In the field of the ECHR an interesting issue concerns the positive state obligations recognized by the ECtHR. The Court's case law related to positive obligations according to the scholars "has contributed to the partial erosion of the generational gap between Convention rights and later generations of international human rights" (Mowbray, 2004). In this regard, the paper attempts to prove that the ECtHR has protected the right to health under the Article 2 of the ECHR (right to life) through an expansive interpretation of the this article and the positive obligation to protect life it imposes.

ECHR generally focuses on the protection of civil and political rights as opposed to social, economic and cultural rights. It results there from that social, economic and cultural rights (with few exceptions) are not within the jurisdiction of the ECtHR. However, having in mind the jurisprudence of the ECtHR and its "creativity regarding the interpretation and application of the Convention" (Mowbray, 2005) can we today decisively say that the Court does not provide for any protection of the most of the social rights? In fact, to what extent is it possible today to speak of fully isolated and independent sets of rights? As Landman (2006) observes "significant sections of the human rights community have challenged these traditional distinctions between 'generations' of human rights and have sought to establish the general claim that all rights are indivisible and mutually reinforcing. Such challenge according to him "suggests that it is impossible to talk about certain sets of human rights in isolation, since the protection of one right may be highly contingent on the protection of other rights" (Landman, 2006) as well as that "there is a false dichotomy between negative and positive rights that tends to privilege civil and political rights over economic and social rights" (Landman, 2006). The ECtHR (though without the required consistency) seems to be in line with the positions on the indivisibility of human rights. As Nifosi-Sutton concludes "the absence of most ESCR [economic, social and cultural rights] in the text of the ECHR has not prevented the Court from protecting social rights through expansive interpretations of Convention rights and the positive obligations they impose" (Nifosi-Sutton, 2010). For instance, the ECtHR in the case *Ariey v Ireland* considers 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 ECtHR addopted integrated approach of interpretation of the ECHR which "recognizes that, on one hand, the enjoyment of civil and political rights requires respect for and promotion of social rights, and on the other hand, that social rights are not second best to civil and political rights" (Ovey, White, 2006).This approach is "welcomed by some scholars as another way to give teeth to socio-economic rights by affording them indirect legal effect (Manotouvalou,Voyatzis, 2010).

Bearing in mind what has been said above; the paper argues that the right to health is protected under the Article 2 of the ECHR through expending of the positive obligation to protect life in the health care sector by the Court. This thesis is not a novelty in the human rights theory. An increasingly great number of authors (though some of them very cautiously) advocate the thesis that the State's positive obligation to protect life also applies in the health care sphere (Wicks, 2010; Mowbray, 2007; Akandji-Kombe, 2007; Harris, O'Boyle, Bates & Buckley, 2009; Croft, 2007) that is, that the right to health or health care has been indirectly protected by the ECtHR in several instances, including under the Article 2 of the ECHR (Brems, 2007). As I have mention above the paper supports this thesis and underlines the new developments in this area through analysis of the case law of the ECtHR on the Article 2 of the ECHR and reviews of the relevant literature. The main focus of this paper is: what is the content of the positive obligation regarding provision of health care under Article 2 of the ECHR? What are the forms of actions required of states under this Article in the health care sphere?

The paper is divided into three sections, all containing references to Court's case law. The first section of the paper considers the legal basis of the positive obligation to protect life under the Article 2 of the ECHR. The second section of the paper is the main part of the paper. It identifies the forms of positive action (obligations) required of the state under the Article 2 of the ECHR in the health care sphere. The paper concludes that that the ECtHR has protected the right to health under the Article 2 of the ECHR (right to life) through an expansive interpretation of the positive obligation to protect life it imposes. Furthermore, in this section it attempts to predict the future developments of the state obligation regarding provision of health care under Article 2 of the ECHR, bearing in mind the new body of Court' case law and limited resource of the state.

2. Positive obligation to protect life under Article 2 of the European Convention on Human Rights

The Article 2 (para.1) of the ECHR provides that "everyone's right to life shall be protected by law."In the case L.C.B. v United Kingdom the ECtHR found that the "first sentence of Article 2 § 1 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" (LCB v UK, 1998). In this way the Court has established a positive obligation of the state to protect the life of each individual within its jurisdiction. Such obligation as the ECtHR in the case Osman v United Kingdom observes "extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions" (Osman v UK,1998). A great number of researchers in this area such as Mowbray, 2004; Janis, Key & Bradley, 2008, Korff, 2006; Londono, 2009; Harris, O'Boyle, Bates & Buckley, 2009; Gordon & Ward, 2000; have recognised the existence of the State's positive obligation to protect life under Article 2 of the ECHR. Today, in the human rights theory, almost no one denies the existence of the positive obligation to protect life under Article 2 of the ECHR. However, serious disputes have escalated over its scope and contents. As Greer (2006) considers (in general) "even when a positive obligation has been officially recognized, its scope may be difficult to predict."

Simultaneously with the increased number of cases pertaining to Article 2 of the ECHR, the scope of the State's obligation to take the necessary steps and to protect the life of each individual within its jurisdiction

also expanded. The ECtHR applies an extensive interpretation of the right to life in relation to the State's obligation to protect it. As the Court acknowledged in the case *Ciechońska v Poland* "such positive obligation has been found to arise in a range of different contexts examined so far by the Court"(*Ciechońska v Poland*, 2011). For instance, Article 2 implies the State's positive obligation to undertake preventive measures with the purpose to protect the life of an individual against a real and immediate risk deriving from the criminal activities by a third party of which risk it knew or should have known (see *Osman v UK*, 1998) or even to undertake preventive measures to protect the life of persons deprived of their liberty against themselves (see *Renolde v France*, 2008). The Court does not stop there. The State's positive obligation under Article 2 has also been found to be engaged in many other sectors (in the health sector, in relation to protection against environmental hazards, in respect of the management of dangerous activities), so that in the case *Öneryıldız v. Turkey* the ECtHR established "this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake" (*Öneryıldız v. Turkey*, 2004). However, as the case *Ciechońska v Poland* points out the ECtHR imposed some boundaries on this obligation. Therefore, "bearing in mind in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources" (*Ciechońska v Poland*, 2011) the ECtHR established that "the positive obligation to protect life should be interpreted "in such a way as not to impose an excessive burden on the authorities" (*Ciechońska v Poland*, 2011). Second,"the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation" *Ciechońska v Poland*, 2011).

3. Right to health under Article 2 of the European Convention on Human Rights

In the case *Cyprus v Turkey* the applicant Government (Greece), inter alia, complained that the restrictions on the ability of the enclaved Greek Cypriots and Maronites to receive medical treatment and the failure to provide or to permit receipt of adequate medical services constitutes violation of the right to life safeguarded under Article 2 of the ECHR. Based on the material evidence provided, the ECtHR could not find an established practice of denying access to medical services to Greek Cypriots and Maronites in Northern Cyprus. Therefore, the ECtHR did not find violation of Article 2. Although in this case the Court found no violation of Article 2 of the ECHR, the case has a pioneering importance for the subject matter of interest to this paper. In this case the ECtHR undoubtedly points out "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" (*Cyprus v Turkey*, 2001) noting in this connection the state positive obligation to protect life (to take steps to safeguard the lives of those within its jurisdiction). In this way the Court made its first more significant step towards the expansion of the State's positive obligation to protect life in the health care sphere. Simultaneously with the development of the jurisprudence under Article 2 of the ECHR, the Court's position strengthened that such an obligation of the State also applies to the health care sphere. As Wicks (2010) recognized "the relatively extensive case law under the ECHR on the issue of the positive obligations to preserve life has made clear that such obligations apply in the health care context."

The Court has undoubtedly closed the dilemma whether the Article 2 of the ECHR in relation to its positive aspect applies also to the health care sphere. However, there are serious dilemmas in relation to the scope of the State's positive obligation to protect life regarding the provision of medical care. Is the State obliged to provide a minimum level of health care available to the population generally? Is the State obliged to provide medical care only to the persons within its immediate jurisdiction (for example, those in custody), that is, can a State be held responsible under Article 2 of the ECHR only in the areas where it directly undertakes responsibility? Or, is the State, in the ultimate instance, obliged to provide medical care free of charge to each individual within its jurisdiction? What is the State's responsibility in case of death occurred as the result of negligence, or an error by the medical staff?

3.1. The provision of a minimum level of health care by member states

The State may be held responsible if the life of an individual within its jurisdiction is at risk by the inability to access medical treatment which the State has envisaged to be made available to the population generally. However, does the Court define the extent of health care that the State is obliged to provide and make generally available under Article 2? Does the Court prescribe any minimum standards that the State should meet in the health care sphere? The formulation "health care which they [authorities] have undertaken to make available to the population generally"(*Cyprus v Turkey*, 2001) used by the ECtHR in the case *Cyprus v Turkey* implies that the states – signatories to the ECHR – enjoy certain discretion in determining the level of health care which they define as being available to the population generally. In the case *Cyprus v Turkey* the applicant criticizes the level of health care made available to the people of the northern part of Cyprus. However, the Court decided to leave the issue open and not to get involved in explicit debates.The Court "does not consider it necessary to examine in this case the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care" (*Cyprus v Turkey*, 2001). Such a position taken by the Court leads to the conclusion that, still, under Article 2, there should be certain standard of health care made available generally (see for instance Harris, O'Boyle, Bates & Buckley, 2009) to the population in certain state. As Mowbray (2007) observes "the Court went on tantalizingly to suggest that Article 2 may also require the provision of a minimum level of health care by Member States." The Court's cautiousness and the indirect suggesting in relation to this is expected, and even desired, having in mind the specificity of the subject matter, the States' limited resources, and the great economic differences among the European states.

3.2. Obligation to protect the health and well-being of detainees

In the case *Makharadze and Sikharulidze v Georgia* the ECtHR acknowledged that "the obligation to protect the life of individuals in custody also implies an obligation for the authorities to provide them with the medical care necessary to safeguard their life" (*Makharadze and Sikharulidze v Georgia*, 2011). Such a consideration by the Court is fully understandable having in mind the specific situation these persons are in, which makes it objectively difficult for them or prevents them from protecting their rights and satisfying their needs on their own initiative, including the provision of the required health care. As the ECtHR stated "the persons in custody are in a particularly vulnerable position and the authorities are under an obligation to account for their treatment" (*Kats and others v Ukraine, 2009*). According to the Court "a sharp deterioration in a person's state of health in detention facilities inevitably raises serious doubts as to the adequacy of medical treatment there" (*Makharadze and Sikharulidze v Georgia,* 2011). Therefore "where a detainee dies as a result of a health problem, the State must offer a reasonable explanation as to the cause of death and the treatment administered to the person concerned prior to his or her death" (*Makharadze and Sikharulidze v Georgia,* 2011).

The main characteristic of the right to health in custody or in prison is the timely access to doctors. So, in the case *Anguelova v Bulgaria* the Court found violation of the right to life with regards to the failure by the authorities to provide timely medical care to the applicant's son who died in police custody. The Court in this case in particular criticises the delay in providing the medical care to the detainee, that is, complete absence of reaction of any kind by the authorities in a given period (from 3 to 5 a.m.), when it was obvious that the person's state of health was deteriorating. Besides timely, the State is obliged to also provide adequate medical care to the persons in its immediate jurisdiction.So, in the case *Makharadze and Sikharulidze* the Court was faced not with the issue whether the first applicant was not provided with medical care generally, but whether the provided medical service was adequate. Whether the medical care provided to the detainees by the authorities is adequate or not is a very complex issue for the Court. Therefore, the Court reserves, "in general, sufficient flexibility, defining the required standard of health care, which must accommodate

legitimate demands of imprisonment but remain compatible with the human dignity and the due discharge of its positive obligations by the State, on a case-by-case basis." (*Makharadze and Sikharulidze v Georgia,* 2011). Thus, in the case *Dzieciak v Poland* the Court had considered that "the lack of cooperation and coordination between the various state authorities, the failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment" (*Dzieciak v Poland*, 2008). Therefore, it found the violation of the Article 2 of the ECHR. Although the Court enjoys certain discretion as to the definition of the required standard of health care in custody (pursuant to ECHR) and its final decision depends on the circumstances of each individual, the Court is not willing to accept the following omissions in the medical treatment of detainees: inconsistency in detainee's medical records (*Tararyeva v Russia*, 2007); basic treatment of detainee who suffers from serious disease such as HIV (*Kats and others v Ukraine, 2009*); omission in supervision.

The competent authorities should dedicate special attention to the persons (detainees) who are prone to suicide as a particularly vulnerable category. As the ECtHR observes "there are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy" (*Renolde v France, 2008*).

Based on what has been said above, the question is raised whether ECHR generally demands that a detainee be freed on the grounds of health condition. Based on the Court's case law one can conclude that ECHR in general does not impose such an obligation on the State. However, "although the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance" (*Dzieciak v Poland*, 2008). The Court is quite clear that "whenever authorities decide to place and maintain a seriously ill person in detention, they must demonstrate special care in guaranteeing such conditions of detention as correspond to his special needs resulting from his illness"(*Dzieciak v Poland*, 2008).

3.3. Duty to take steps to prevent health risks to individuals

In the case L.C.B. v United Kingdom the applicant complained "that the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970 had given rise to a violation of Article 2 of the ECHR" (*L.C.B. v UK*, 1998). Namely, the applicant claim that the State did not do all that could have been required of it to prevent its life from being avoidably put at risk (through exposure of her father on radiation during the United Kingdom's nuclear test on Christmas Island).The Court among others things examines "whether, in the event that there was information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question, to provide advice to her parents and to monitor her health" (*L.C.B. v UK,* 1998). The ECtHR does not find causal link between the exposure of a father on radiation and applicant disease. However, the Court attitude in this case suggests that the Article 2 of the ECHR requires the authorities to prevent health risks to individuals, including advising them how to avoid the treats to health.

Duty to take steps to prevent health risks also includes state's obligation "to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients 'lives." (*Byrzkowski v Poland*, 2006). The Court's case law shows that "the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2" (*Byrzikowski v Poland*, 2006). However, as scholars observe "to impose the identical obligations, as required by Article 2, on health care professionals as are imposed on state agents when carrying out, *inter alia*, terrorist operations, is surely to impose unreasonable burdens?" (Cevalier-Watts, 2010). The Court

addressed the same dilemma and in the case *Byrzkowski v Poland* established that where a state "has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life"(*Byrzkowski v Poland*, 2006).

3.3.1. Effective investigation in case of death of an individual under the care and responsibility of health professionals

The ECtHR in the case *McCann and others v United Kingdom* stated that "the obligation to protect the right to life under this provision (art. 2), read in conjunctionwith the State's general duty under Article 1 (art.2+1) of the Conventionto 'secure to everyone within their jurisdiction the rights and freedomsdefined in [the] Convention', requires by implication that there should become form of effective official investigation when individuals have been killedas a result of the use of force by, inter alios, agents of the State" (*McCann and others v UK*, 1995). Later, in the case *Ülkü Ekinci v. Turkey*, the Court established "that this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State" (*Ülkü Ekinci v. Turkey*, 2002). In this way, the Court expanded this obligation also to situations where the State is not directly responsible for the deprivation of life of a person within its jurisdiction. Simultaneously with the development of the jurisprudence the scope of the State's obligation to conduct an efficient investigation under Article 2 of the ECHR also expanded. The Court has expanded the State's obligation to conduct an official efficient investigation into all cases of deprivation of life (regardless of whether it is deprivation of life by agent of the State or not, or whether it is intentional or unintentional murder), even "to situation where it has not been conclusively established that a person has been killed" (Mowbray, 2007). Such developments raise an issue whether the State's positive obligation to conduct an efficient investigation also covers the situations when a person dies in a hospital, that is, under the care and responsibility of health professionals. The ECtHR answered this question affirmatively.

If we are to analyse the relevant Court practice (for example, *Calvelli and Ciglio v Italy*, 2002; *Šilih v Slovenia*, 2009; Vo v France, 2004) we shall reach several conclusions in relation to the State's obligation to conduct an efficient investigation in the health care sector:

-the State is obliged to conduct an efficient investigation when a person dies under the care and responsibility of health professionals (both in state-run and privately owned hospitals). As the ECtHR concluded the state obligation "to take appropriate steps to safeguard the lives of those within its jurisdiction also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession whether in the public or the private sector, can be determined and those responsible made accountable"(*Vo v France*, 2004).

-in case of medical error, that is, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 shall not require obligatory conduct of criminal investigation. In this context, in the case *Calvelli and Ciglio* the ECtHR held that "in the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. In addition it noted that "disciplinary measures may also be envisaged" (*Vo v France*, 2004).

- an efficient investigation in case of individual death in a hospital would contribute for a greater safety in using health care services by the population generally. As the ECtHR in the case *Šilih v Slovenia* observes "knowledge of the facts and of possible errors committed in the course of medical care are essential to

enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors"(*Šilih v Slovenia*, 2009).

3.4. Resource constraints versus right to health

In the case *Nitecki v Poland* the applicant who was not in the position to pay the required 30% of the price of the drug which was necessary for his life complained that by failing to refund the full amount of the drug price the State is in violation of Article 2 of the ECHR. The Court did not dispute that the State's positive obligation expands also in the health care sphere or that certain infringements by the authorities in the sphere of health care policies under certain circumstances may hold the State responsible. However, the Court, taking into consideration all the specific circumstances in the case (the applicant has access to a standard of health care offered by the service to the public; under the standard of care available to all patients, the drug refund scheme provided for a 70% refund of drug price, etc.) has found the application ungrounded and therefore dismissed it. Thereby the Court pointed out that "bearing in mind the medical treatment and facilities provided to the applicant, including a refund of the greater part of the cost of the required drug, the Court considers that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price" (*Nitecki v Poland*, 2002). The Court took similar position in the case Pentiacova and 48 others v Moldova where the applicants complained, inter alia, at the violation of the violation of the right to life by the State as the State failed to provide all the drugs necessary for haemodialysis at the State's expense, and also provided poor economic support to the dialysis sector in the hospital where they were being treated. The Court did not grant the application under Article 2. Based on this it can be concluded that the Court fails to demonstrate willingness to get involved in issues related to insufficient public funding for the medical treatment or allocation of resources within the health care system. As some scholars observe "allegations that poor or negligent health care have resulted in death may thus give rise to Article 2 issues, but as the Court made clear in its decision in Pentiacova and Others v Moldova (2005), it is recognized that the allocation of scarce health care resources is not an area an international tribunal can readily interfere with." (Murdoch, Straisteanu, Vedernikova, 2008). The State enjoys a wide margin of appreciation in this area. As it is mentioned above the State's positive obligation to protect life (in general) is interpreted in such a way as not to impose an excessive burden on the authorities. The operational measures for its realisation (in relation to which the country enjoys margin of appreciation) depend on the priorities and resources available to the State. In this regard, Wicks (2010) identifayed some important considerations:

"It should be remembered; however, that any positive obligation to preserve life under Article 2 is restricted to what is reasonable and it may be the view of what is reasonable is an issue that an international court wishes to leave on national authorities. It will be vital, however, that the discretion given to the states on this issue is not absolute. What is reasonable should be determined on objective basis, albeit, taking into account the specific situation pertaining in the respondent state (for example the scarcity of public resources)."

4. Conclusion

In order to prove that the right to health is protected under the Article 2 of the ECHR the paper analysed the case law of the ECtHR with regard to this article. The analysis showed that ECtHR has protected the right to health under the Article 2 of the ECHR (right to life) through an expansive interpretation of this article and the positive obligation to protect life it imposes. The State's positive obligation to protect life applies in the health care sphere too. Positive obligation to provide health care under the Article 2 includes requirement upon state to provide timely and adequate health care to detainees, as well as to prevent health risks to individuals (including to advise individuals how to avoid treats to health and to impose regulations that provide high professional standards among health professionals and the protection of the lives of patients in the hospitals).

It also includes requirement upon the authorities to conduct effective investigation when individual dies under the care and responsibility of health professionals.

The Court' attitude in the case *Cyprus v Turkey* implies that the state is obliged to provide a certain standard of health care that is available generally. However, it does not define the extent of health care that the State is obliged to provide and make generally available under Article 2. The states (signatories to the ECHR) enjoy certain discretion regarding this issue. The case law of the ECtHR points out that the Court, also, fails to demonstrate willingness to get involved in issues related to insufficient public funding for the medical treatment or allocation of medical care resources. The State enjoys a wide margin of appreciation in this area. In the future an expansion of applications can be expected from persons who, facing the brutal reality that they cannot (financially) afford the medical treatment which they desperately need, will seek their final resort in the Court and its possibility to apply expanded interpretation of the positive obligation to protect life under Article 2. From this point of view is hard to predict how far the ECtHR will develop the positive obligation regarding provision of health care under the Article 2 without putting excessive burden on the state, bearing in mind, particularly limited state resources.

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