Հոդված 11-ի Նախադեպային իրավունքը
https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80

Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

The right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights – as interpreted by the European Court of Human Rights - by imposing a range of positive obligations designed to secure its effective exercise. The rights relating to health embodied in the two treaties are inextricably linked, since "human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights - and health care is a prerequisite for the preservation of human dignity".

Respect for physical and psychological integrity is an integral part of the rights to the protection of health guaranteed by Article 11.

11.1 With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia to remove as far as possible the causes of ill health.

Right to the highest possible standard of health.

Article 11 enshrines the right to the highest possible standard of health and the right of access to health care. Under Article 11, health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in accordance with the definition of health in the Constitution of the World Health Organisation (WHO), which has been accepted by all Parties to the Charter.

Article 11 imposes a range of positive and negative obligations. The title of the article – 'the right to protection of health' – makes clear that States' obligations under that provision are not solely limited to ensuring enjoyment of the right to benefit from any positive, proactive State measures enabling enjoyment of the highest possible standard of health attainable (such as ensuring equal access to quality health care). Nor are States' duties limited to the taking of those measures highlighted in Article 11 of the Charter. Rather, the notion of the protection of health incorporates an obligation that the State refrain from interfering directly or indirectly with the enjoyment of the right to health. In this context it refers to the definition of health cited above.

This interpretation of Article 11 is consistent with the legal protection afforded by other important international human rights provisions related to health.

Under Article 11, health means physical and mental well-being, in accordance with the definition of health in the Constitution of the World Health Organisation (WHO), which has been accepted by all to Parties to the Charter.

States Parties must ensure the best possible state of health for the population according to existing knowledge. Health systems must respond appropriately to avoidable health risks, i.e. ones that can be controlled by human action. The main indicators are life expectancy and the principal causes of death. These indicators must show an improvement and not be too far behind the European average.

Avoidable risks include those which result from environmental threats. Article 11§1 guarantees the right to a healthy environment.

Any kind of medical treatment which is not necessary can be considered as contrary to Article 11, if obtaining access to another right is contingent upon undergoing it.

Infant and maternal mortality are good indicators of how well a particular country's overall health system is operating. These are avoidable risks and every step should be taken, particularly in highly developed health care systems, to reduce these rates to as close to zero as possible. A recurring problem of non-conformity under this provision are the high infant and maternal mortality rates in several countries, which when examined together with other basic health indicators, point to weaknesses in the health system.

Right of access to health care

The health care system must be accessible to everyone. States Parties enjoy a wide margin of appreciation in deciding when life begins. It is therefore for each State Party to determine, within this margin of appreciation, the extent to which the foetus has the right to health.

Restrictions on the application of Article 11 may not result in impeding disadvantaged groups' exercise of their right to health. This approach calls for a strict interpretation of the way the personal scope of the Charter is applied in conjunction with Article 11 on the right to protection of health, particularly with its first paragraph on access to health care.

Pursuant to paragraph 1 of the Appendix, the persons covered by Articles 1 to 17 and 20 to 31 of the Charter include foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.

The restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity.

Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European

Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.

Legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.

The right of access to care requires that:

– the cost of health care should be borne, at least in part, by the community as a whole;

– the cost of health care must not represent an excessively heavy burden for the individual. Out-of-pocket payments should not be the main source of funding of the health system. Steps must be taken to reduce the financial burden on patients from the most disadvantaged sections of the community;

– The conditions governing access to care should take into consideration Parliamentary Assembly Recommendation 1626 (2003) on “the reform of health care systems in Europe: reconciling equity, quality and efficiency”, which invites member States to take as their main criterion for judging the success of health system reforms effective access to health care for all, without discrimination, as a basic human right.

– Arrangements for access to care must not lead to unnecessary delays in its provision. The management of waiting lists and waiting times in health care are considered in the light of Committee of Ministers Recommendation (99)21 on criteria for such management. Access to treatment must be based on

– transparent criteria, agreed at national level, taking into account the risk of deterioration in either clinical condition or quality of life;

– the number of health care professionals and equipment must be adequate. In the case of hospitals, the objective laid down by WHO for developing countries of 3 beds per thousand population should be strived at. A very low density of hospital beds, combined with waiting lists, could be an obstacle to access to health care for the largest possible number of people. Conditions of stay in hospital, including psychiatric hospitals, must be satisfactory and compatible with human dignity.

As part of the positive obligations that arise by virtue of the right to the protection of health, States Parties must provide appropriate and timely care on a nondiscriminatory basis, including services relating to sexual and reproductive health. As a result, a health care system which does not provide for the specific health needs of women will not be in conformity with Article 11, or with Article E of the Charter taken together with Article 11.

In addition the Committee considers that any medical treatment without informed consent necessarily raises issues under Article 11 of the 1961 Charter. Informed consent has been defined by the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental health (UN

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report 2009, 1 August 2009, A/64/272) as follows: “informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers. Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being.”

The Committee considers, (noting in particular the Council of Europe’s Convention on Human Rights and Biomedicine (Oviedo Convention) 1997, and the wellestablished position of other human rights bodies) that any medical treatment without free informed consent (subject to strict exceptions) cannot be compatible with physical integrity and necessarily with the right to protection of health. Medical treatment without free informed consent breaches physical and psychological integrity, and may in certain cases be injurious to health both physical and psychological. Guaranteeing free consent is fundamental to the enjoyment of the right to health, and is integral to autonomy and human dignity and the obligation to protect the right to health. In respect of abortion, once States Parties introduce statutory provisions allowing abortion in some situations, they are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are legally entitled under the applicable legislation.

Furthermore, Article 11 does not impose on States a positive obligation to provide a right to conscientious objection for healthcare workers.

11.2 With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.

There are two obligations under this provision:

Education and awareness raising

Public health policy must pursue the promotion of public health in conformity with the objectives fixed by the WHO. National rules must provide for informing the public, education and participation. States Parties must demonstrate through concrete measures that they implement a public health education policy in favour of the general population and population groups affected by specific problems.

Informing the public, particularly through awareness-raising campaigns, must be a public health priority. The precise extent of these activities may vary according to the nature of the public health problems in the countries concerned. Measures should be introduced to prevent activities that are damaging to health, such as smoking, alcohol

and drugs, and to develop a sense of individual responsibility, including such aspects as a healthy diet, sexuality and the environment.

Health education must be carried out throughout school life and form part of school curricula. After the family, school is the most appropriate setting for health education because the general purpose of education is to impart the knowledge and skills necessary for life. In this respect, the Committee of Ministers' Recommendation No R(88)7 on school health education and the role and training of teachers is taken into account.

Health education in school must be provided throughout the entire period of schooling and that it cover the following subjects: prevention of smoking and alcohol abuse, sexual and reproductive health education, in particular with regard to prevention of sexually transmitted diseases and AIDS, road safety and promotion of healthy eating habits.

Sexual and reproductive health education is regarded as a process aimed at developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behaviour.

It is acknowledged that cultural norms and religion, social structures, school environments and economic factors vary across Europe and affect the content and delivery of sexual and reproductive health education. However, relying on the basic and widely accepted assumption that school-based education can be effective in reducing sexually risky behaviour, States Parties must ensure:

- that sexual and reproductive health education forms part of the ordinary school curriculum;

- that the education provided is adequate in quantitative terms, i.e. in respect of the time and other resources devoted to it (teachers, teacher training, teaching materials, etc.).

- that the form and substance of the education, including curricula and teaching methods, are relevant, culturally appropriate and of sufficient quality, in particular that it is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health;

- that a procedure is in place for monitoring and evaluating the education with a view to effectively meeting the above requirements.

The obligations under Article 11§2 as defined above do not affect the rights of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents own religious or philosophical convictions (see European Court of Human

Rights, Case of Kjeldsen, Busk Madsen and Pedersen v. Denmark, Judgment of 7 December 1976).

Doctor's consultations and screening

There must be free and regular doctor's consultation and screening for pregnant women and children throughout the country.

Free medical checks must be carried out throughout the period of schooling. The assessment of compliance takes into account the frequency of school medical examinations, their objectives, the proportion of pupils concerned and the level of staffing. There should be screening, preferably systematic, for all the diseases that constitute the principal causes of death. Where it has proved to be an effective means of prevention, screening must be used to the full.

11.3 With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Precautionary principle

In terms of preventive measures, States Parties must apply the precautionary principle: when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the State must take precautionary measures consistent with the high level of protection provided for in Article 11, to prevent those potentially dangerous effects.

Healthy environment

Under the Charter overcoming pollution is an objective that can only be achieved gradually. Nevertheless, States Parties must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal. The measures taken by States Parties are assessed with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations and in terms of how the relevant law is applied in practice.

Air pollution

In this respect the guarantee of a healthy environment requires that States Parties:

– develop and regularly update sufficiently comprehensive environmental legislation and regulations;

– take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level and to help to reduce it on a global scale . In the case of global pollution, emission control is assessed with reference to the objectives set for implementation of the United Nations Framework

Convention on Climate Change (UNFCC) of 9 May 1992, and of the Kyoto Protocol to the UNFCC of 11 December 1997;

– ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery, effective and efficient, that is comprising measures which have been established to be sufficiently dissuasive and have a direct effect on polluting emission levels;

– assess health risks through epidemiological monitoring of the groups concerned.

Water management In order to comply with this provision States Parties have to take preventive and protective measures concerned with water. A situation where availability of drinking water is still a problem for a significant proportion of the population is in breach of the Charter.

Nuclear hazards for communities living in the vicinity of nuclear power plants

The dose limits should be in accordance with the 1990 recommendations of the International Commission for Radiation Protection. The assessment will vary depending on the extent to which energy production is based on nuclear power. All countries are required to protect their population against the consequences of nuclear accidents taking place abroad and having an effect on the country concerned.

Risks relating to asbestos

Article 11 entails a policy that bans the use, production and sale of asbestos and products containing it. There must also be legislation requiring the owners of residential property and public buildings to search for any asbestos and where appropriate remove it, and placing obligations on enterprises concerning waste disposal.

Food safety

States Parties must establish national food hygiene standards with legal force that take account of relevant scientific data, establish and maintain machinery for monitoring compliance with these standards throughout the food chain, develop, implement and regularly update systematic prevention measures, particularly through labelling, and monitor the occurrence of food-borne diseases.

Preventive and protective measures concerned with noise pollution are also required under this provision and - in the case of States Parties that have not accepted Article 31 (right to housing) – the enforcement of public health standards in housing.

Tobacco, alcohol and drugs

Anti-smoking measures are particularly relevant for the compliance with Article 11 since smoking is a major cause of avoidable death in developed countries. The WHO has set a target for European countries of raising the proportion of nonsmokers in the population to at least 80% and protecting non-smokers against involuntary exposure to

tobacco smoke. WHO indicators and the Framework Convention on Tobacco Control are taken into consideration for the assessment.

To be effective, any prevention policy must restrict the supply of tobacco through controls on production, distribution, advertising and pricing. In particular, the sale of tobacco to young persons must be banned, as must smoking in public places, including transport, and advertising on posters and in the press.

The effectiveness of such policies on the basis of statistics on tobacco consumption is assessed.

This approach also applies mutatis mutandis to anti-alcoholism and drug addiction measures.

Immunisation and epidemiological monitoring

States Parties must operate widely accessible immunisation programmes. They must maintain high coverage rates not only to reduce the incidence of these diseases, but also to neutralise the reservoir of the virus and thus achieve the goals set by WHO to eradicate several infectious diseases.

Countries must demonstrate their ability to cope with infectious diseases, such as arrangements for reporting and notifying diseases, special treatment for AIDS patients and emergency measures in case of epidemics.

Accidents

States Parties must take steps to prevent accidents. The main sorts of accident covered are road accidents, domestic accidents, accidents at school, accidents during leisure time, including those caused by animals,802 and accidents at work. Trends in accidents at work are considered from the standpoint of health and safety at work (Article 3).