Czech Conmstitutional Court, Pl. ÚS 1/08, Stabilization of Public Budget - Health Care Fees

The petitioners sought to annul a statutory provision which imposed an obligation of a patient to pay 30 CZK „regulation fee" when seeing a doctor. They argued it violated the right to free health care (based on a systém of public health insurance) under art. 31 of the Czech Charter of Fundamental Rights and Freedoms.

(…)

97.

Social rights, or rights connected with the provision of medical care, were not introduced in European constitutions until the 20th century. It first happened in the so-called Stalinist Constitution of the Unions of Soviet Socialist Republics, adopted by the 8th Extraordinary Congress of Soviets of the USSR on 5 December 1936, or in Chapter X, Art. 120. Under that article, "Citizens of the USSR have the right to materiál security in old age, as well as in case of illness and invalidity. This right is secured by the extensive development of social insurance of workers and employees on the state account, payment free doctor's help for workers, and an extensive network of spas that are available for use by the working people." (Cf. the translation in K. Malý, Prameny ke studiu dějin státu a práva socialistických zemí I. SSSR 1917-1945 [Sources for the Study of the History of the State and Law in Socialist Countries I. USSR 1917-1945], Praha 1987, p. 128) The cited Stalinist Constitution from 1936 also enshrined the principle that "In the USSR, work is the obligation and honor of every citizen capable of work, on the principle: 'He who doesn't work, let him not eat!'" Legal history judges the provisions of the Constitution on Social Rights from 1936 to the effect that "it was an expression of the endless insolence of communist propaganda, which successfully confused the world's democratic and, especially, anti-fascist public (including through this constitution, promoted as a true picture of the Soviet environment). None of these provisions had an appropriate real effect; everything was cruelly inconsistent, not only with the reality of practice, but mostly also with the relevant statutory or sub-statutory regulations" (cf. D. Pelikán, Dějiny ruského práva [History of Russian Law], C.K. Beck [sic, should be C.H.] , Praha 2000, p. 77). In the Czech lands the right to protection of health was first enshrined in § 29 par. 13 of the Constitution of the Czechoslovak Republic no. 150/1948 Coll. (the "1948 Constitution").

The cited § 29 of the 1948 Constitution read: (1) Everyone has a right to protection of health. All citizens have a right to medical care and for security in old age as well as during incapacity to work and inability to support themselves. (3) These rights are ensured by laws on national insurance, as well as by public health and social care. The adoption of this provision was preceded by formulation of the principles of health care policy in the Košice government program and the program of the government created in the 1946 elections. "The health care policy of the most influential party (the Communist Party) was in large part based on projects developed during the war by communist doctors. It vehemently promoted Soviet models, although in a form modified in the spirit of central European traditions of social medicine (cf. Svobodný, Hlaváčková, Dějiny lékařství v českých zemích [History of Medicine in the Czech Lands], p. 219). Finally, from the regulations preceding the current legal framework we must mention Art. 23 of the Constitution no. 100/1960 Coll., under which:

> (1) All workers have the right to protection of health and to medical care, as well as the right to material security in old age and during incapacity to work.
>
> (2) These rights are ensured by the care taken by the state and social organizations to prevent illness, the entire organization of healthcare, the network of medical and social facilities, the continually expanding payment-free medical care, as well as organize care for safety at work, sickness insurance, and retirement security."

However, in the year when Act no. 20/1966 Coll., on Care for the Health of the People, was adopted "the proclamation that "the right to health care is one of the fundamental civil rights" expressed, more than the real situation, only the wishes "of the party and the government." In further balancing in 1970 the leading figures in our health care recognized a number of problems that, according to them, arose from long-term neglect of investment, the "inheritance" from the capitalist economy, surviving features in the relationship between doctor and patient. It is characteristic that most of the problems in the new health care systém were seen in the sphere of economics, not politics (cf. Svobodný, Hlaváčková, Dějiny lékařství v českých zemích [History of Medicine in the Czech Lands], p. 221). Expert medical literature considers the situation in health care in the 1980s to have been critical, with reference to the fact that this was know by official representatives and critics outside and inside the regime, including the speakers of Charter 77, in documents on health care from the years 1983-1985.

98.

The Constitutional Court also considered the petitioners' argument, presented at the hearing on 1 April 2008, that the framers of the Constitution, before adopting the Charter, weighed whether to expressly include "payment-free" in Art. 31 of the Charter or not. According to the petitioners, because the "payment-free" alternative was chosen, Art. 31 cannot be interpreted against its meaning, in the spirit of the alternative that was, in the end, not chosen by the framers of the Constitution.. The Constitutional Court notes that, especially in the area of social rights, under certain conditions a conflict could arise between the will of the framers of the Constitution and the political reality of the time. "If, in certain countries, a constitution does not correspond to political reality, it is not because one or another institution or one or another form are not viable, but because the spirit of that constitution is (temporarily) foreign to the political conditions of a given country." (B. Mirkine-

Guetzevitch, Les Constitutions de l' Europe nouvelle, II. édition [The Constitutions of Modern Europe, 2nd edition], Paris 1930, p. 53).

99.

The Constitutional Court cannot fully agree with the petitioners' claim that a number of constitutions from European states enshrine the right to …health care in various degrees. A comparative study shows that this right tends to be constitutionally guaranteed in various degrees in the constitutions of states that joined the European Union in 2004. The right is not guaranteed, e.g., in the Netherlands or Sweden; in other countries, e.g., France or Belgium, only a right to a doctor's assistance is guaranteed, but not a right to payment-free doctor's assistance. In this regard, mention is often made of the Italian Constitution of 1947, which, in Art. 32 "guarantees free medical treatment to the poor" (cf. the translation in: V. Klokočka, E. Wagnerová, Ústavy států Evropské unie [The Constitutions of European Union States], LINDE Praha 1997, p. 191). From a comparative standpoint, the closest example to this matter is undoubtedly the Slovak one, which, of course, the petitioners themselves point to, though with the emphasis on the dissenting opinions of Judges Ludmila Gajdošíková and Eduard Bárány. In the cited judgment, file no. Pl. ÚS 38/03 of 17 May 2004, no. 396/2004 Coll. with an analogous version of Art. 40 of the Slovak Constitution and Art. 31 of the Czech Charter, the Constitutional Court of the Slovak Republic ruled on an analogous petition concerning "requiring payment for a certain part of the provision of health care provided on the basis of health insurance, such as services and activities which are closely related to health care provided on the basis of health insurance, but are not an immediate component of it."
The Constitutional Court notes that in the comparative law part the cited judgment of the Constitutional Court of the Slovak Republic also

considered the arguments in the judgment of the Constitutional Court of the Czech Republic no. Pl. ÚS 14/02. The Constitutional Court of the Slovak Republic finally, in the statement of law of its judgment Pl. ÚS no. 14/94 (promulgated as no. 396/2004 Coll.) stated the assumption that "payment free care under Art. 40 of the Constitution has its "scope," i.e. that not everything is provided payment-free."

100.

For legal philosophy considerations, the Constitutional Court turned primarily to the field of medical ethics. Here it first states that the Hippocratic oath addresses the ethical aspects of the exercise of the medical profession, and the oath does not contain an obligation to provide medical care payment-free. The Constitutional Court is aware of the difference between ideal medicine, i.e. medical procedures in accordance with the newest developments in science and technology and available medicine, i.e., the situation in practical medicine. The specialized literature states that in centuries of science and technology the distance between ideal and available medicine has increased. It concludes "we cannot assume that the mathematics of mercy could permanently solve the conflict between ideal and available medicine. This is because the initial weighing exchanged economic problems for ethical ones …. The state's economy is a limiting factor on available medicine, not the only one, but unquestionably a significant one. A wealthy state simply has the resources to reduce the conflict between ideal and available medicine to the lowest possible level …. The problem of ideal and available medicine really does not affect 'only' patients on dialysis, but in various forms and levels of urgency affects absolutely everyone …. The society-wide permeation of this issue and the required level of information are prerequisites for the purposeful and effective engagement of healthy citizens to the benefit of the needy" (cf. H. Haškovcová, Lékařská etika [Medical Ethics], Galén Praha 1994, pp. 81-89).

101.

The Swiss essayist Jürgen Thorwald wrote on this topic that "doctors must give politicians the correct numbers" (see J. Thorwald, Pacienti [Patients], Osveta, Bratislava 1975). "The fundamental contradiction of health care in the Czech Republic today is the ability to provide a patient care at an international standard, but strongly limited by financial possibilities" (see Svobodný, Hlaváčková, Dějiny lékařství v českých zemích [The History of Medicine in the Czech Lands], p. 222).
The report "Economic Survey of the Czech Republic 2008" published by the Organization for Economic Cooperation and Development (OECD) states that "in the first phase of reform, small regulatory fees were introduced, a step that the OECD recommended in its previous evaluation, and which should help limit the need for health care" (see Policy Brief, OECD, April 2008).

102.

For the foregoing reason, the Constitutional Court concluded that the reasonableness test in the case of social law is methodically different from a test that evaluates proportionality with fundamental rights, "because social-economic aspects play a much greater role here." The rationality test, especially in a situation where the Constitutional Court concluded that a judgment [sic – petition?] could be denied for reasons of maintaining restraint, has a more orientational and supportive role here.

103.

In combination with the requirements arising from Art. 4 par. 4 of the Charter we can describe 4 steps leading to a conclusion that a statute implementing constitutionally guaranteed social rights is or is not constitutional:

1) defining the significance and essence of the social right, that is a certain essential content. In the presently adjudicated matter, this core of a social right arises from Art. 31 of the Charter in the context of Art. 4 par. 4 of the Charter.

2) evaluating whether the statute does not affect the very existence of the social right or its actual implementation (essential content). If it does not affect the essential content of the social right, then

3) evaluating whether the statutory framework pursues a legitimate aim; i.e. whether it does not arbitrarily fundamentally lower the overal standard of fundamental rights, and, finally

4) weighing the question of whether the statutory means used to achieve it is reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest.

104.

Only if it is determined in step 2) that the content of the statute interferes in the essential content of a fundamental right should the proportionality test be applied; it would evaluate whether the interference in the essential content of the right is based on the absolutely exceptional current situation, which would justify such interference.

105. Thus, it follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.

106.

The essential content (core) of Art. 31, second sentence of the Charter is the constitutional establishment of an obligatory system of public health insurance, which collects and cumulates funds from individual subjects (payers) in order to reallocate them based on the solidarity principle and permit them to be drawn by the needy, the ill, and the chronically ill. The constitutional guarantee based on which payment-free health care is provided applies solely to the sum of thus collected funds.

107. As indicated by the evidence presented, the fees introduced by the Act regulate access to health care that is paid from public insurance, whereby they limit excessive use of it; the consequence is to increase the probability that health care will reach those who are really ill. Thus, through the fees, the legitimate aim of the legislature is met, without the means used appearing unreasonable.

108. Therefore, the contested legal framework did not deny the essential content of the constitutionally guaranteed fundamental right, as it was described above, and the statutory framework did not deviate from pursuing a legitimate aim, and is not obviously unreasonable. Therefore, we can conclude that the contested legal framework did not exceed the given criteria.

109. The Constitutional Court, applying the rationality test, evaluated the relationship between Art. 31, which includes the right to protection of health and payment-free health care, with the aims and purposes that the legislature held up for itself by adopting the contested legal framework. In evaluating the suitability of the chosen institutions "one must conclude that the state has an obligation to provide citizens sufficient protection from factors that endanger their health and public health care" (see K. Klíma and collective of authors, Komentář k Ústavě a Listině [Commentary on the Constitution and the Charter], March 2005, p. 861). "The state's obligation to protect health and everyone's right to protection of health also corresponds to everyone's obligation to respect measures adopted to protect health" (see V. Pavlíček and collective of authors., Ústava a ústavní řád České republiky II. Práva a povinnosti, [The Constitution and Constitutional Order of the Czech Republic II. Rights and Obligations] 2nd ed., Praha 1999, p. 251). The rationality test evaluates whether the contested legal framework does not bring disproportionate, even if – as will be explained below – constitutional interference in the relationships between the patient, the health care facility, and the health insurance company, to which these parties became accustomed in the period before the present legal framework went into effect.