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CURRENT THEORETICAL AND PRACTICAL ASPECTS REGARDING THE PROTECTION AND LIMITS OF THE RIGHT TO PROTECTION OF HEALTH

O. ŞARAMET

Oana ŞARAMET

Department of Law, Faculty of Law

Transylvania University of Brasov

E-mail: oana.saramet@unitbv.ro

ORCID: 0000-0001-6862-9436

Abstract

The right to the protection of their health is one of the fundamental rights of every human being, a right which considers both the individual's right to health, but also one's right to benefit from state measures taken to ensure public health and hygiene. As a consequence, the international community, but especially states, have the obligation to facilitate the accomplishment of this right, especially during times of pandemic, when we can consider, also on a legislative level, limitations in the exercise of this right. Through this article, we aim to identify the characteristics of this right in the present sanitary context, by making appreciations from the perspective of international and regional regulations, including the declarations and comments of some international bodies with duties in public health. We will also provide short appreciations in regard to national laws which are relevant given the connection to the respect of the right to the protection of health. Thus, we will point out the limitations of this right especially in regard to its exercise.

Keywords: ight, health, solidarity, gradual steps, right-premise

INTRODUCTION

The Romanian Constitution, by the provisions of article 34, regulated the right to the protection of one's health, by expressing the social character of the Romanian state, as is stated in article 1 third alignment of this text. The social state is and must be „a participant who must intervene, must have initiative and especially, must undertake measures which ensure the achievement of common good (...) must ensure the functioning of public protection and social intervention services” (Muraru, Tănăsescu, 2019, page 11)*.

The Romanian Constitutional Court regulated that the social status represents „the ensemble of measures which entail the economic and social policy and which

prioritizes the economical social regulations with positive consequences on the social status of the citizens" (Romanian Constitutional Court, Decision no 1594/2011, point I, para. 2). The Romanian Constitutional Court also pointed out that, given the virtue of constitutionally regulating this measure, the state must ensure „both the economical and social welfare of the citizens, as well as the social cohesion, without denying the public authorities' right to establish the specific conditions of achieving this purpose" (Romanian Constitutional Court, Decision no 1594/2011, point I, para. 2). Such an understanding of what the social status entails considers the „constitutional obligation (...) to intervene in favor of the citizen" (Romanian Constitutional Court, Decision no 1594/2011, point I, para. 5), as the state is obliged to take action, to have a positive attitude (see Romanian Constitutional Court, Decision no 1594/2011 point I, para. 5); however, the degree, the level of intervention of the state will be left to the appreciation of the state, as it can be different „depending on the political vision and the economic conditions of the state at a certain time" (Romanian Constitutional Court, Decision no 1594/2011, point I, para. 5).*

The existence and development of a state also depends on the health of its citizens and when the constitution of that state, as is the case of our state and Constitution, regulates the right to the protection of health, it is all the more obvious, in our opinion, that the state undertook the respect and fulfillment of some obligations which create the premise and necessary conditions so that each citizen ensures or preserves „the highest possible standard of health" (*the Preamble of the World Health Organization Constitution, paragraph 2*)*.

However, the obligations which a state can and will take, their exact extent, varies, as stated by the Constitutions Court of Romania, which shows, as we have previously mentioned, by the discretionary power of its authorities that the state can decide on its politics, actions, mechanisms, tools thorough which it can fulfill the constitutional obligations it undertook in order to ensure the protection of health.

The discretionary power of the state, exercised by its authorities, can be all the more visible in the present context of a pandemic, when, acting or needing to act in order to diminish and eventually eliminate the effects it produces, the state will have to take measures, to impose procedures, limitations in the exercise of the right to the protection of health, unpopular decisions, but which must ensure the public health of its citizens. However, we wonder how wide can the margin of appreciation of the state can be, in exercising its discretionary power in ensuring the right to the protection of health of its citizens in such a situation of a crisis in public health? Does the state have the right to act discretionary and, in the course of protecting the right to health, to impair on other fundamental rights and freedoms, maybe even this right of other citizens?

**I. ASPECTS REGARDING THE RIGHT TO THE PROTECTION OF HEALTH FROM
THE PERSPECTIVE OF INTERNATIONAL AND CONSTITUTIONAL REGULATIONS**

The right to the protection of health is regulated in international documents, such as: article 25 of the Universal Declaration on Human Rights, article 12 of the International Pact on economic, social and cultural rights, article 11 and 13 of the revised European Social Charter, article 35 of the Charter of Fundamental Rights of the European Union.

Through its preamble, the Constitution of the World Health Organization of 1946 proclaimed the right to health, by stating that „*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition*” (Preamble of the Constitution of the World Health Organization, paragraph 2)*.

The achievement of this right by each of us is possible if we are given the necessary legal background, as this is one of „*the positive rights (...) in the exercise of which the state must actively get involved in*” (Deaconu, 2011, p. 206)* in order for this right to exist and be exercised.

The legal regulation of this right on an international level is obvious, as we have shown above. However, in present times, we notice that the dimension of achieving this right depends on the financial possibilities of each individual; considering all these, the state is obliged to take measures in order to ensure hygiene and public health, as stated by article 34 second alignment of the Romanian Constitution. In our opinion, this obligations, must allow each person the access the prevention measures in matters of health, as well as medical care, as stated in article 35 of the Charter of the Fundamental Right of the European Union.

The right to the protection of health, given the fact that it entails involvement of the state in identifying and configuring measures, policies which are adequate for its optimal achievement, as well as the organizing of the medical system and some basic medical services, but services which are essential to each individual, is a second generation right This appreciation entails the fact that this is a right acknowledged to the individual „*based on the virtue of his quality of member of a social community with certain needs*” (Deaconu, 2011, page 206). On the other hand, given the fact that such positive rights are in the duty of the state, it can also be considered as a claim-right (See Muraru, Tănăsescu, 2019, page 280), as the state is obliged to act in order to guarantee the effective exercise of this right (See Muraru, Tănăsescu, 2019, page 280).

Given the previous appreciations, but also by considering the international and European regulations regarding the right to the protection of health and which regulate the state’s positive obligation indispensably needed to achieve this right, article 35 of the Charter for the Fundamental Rights of the European Union states that this right is determined „*by the conditions established by the national laws and practices*”; thus, we can conclude that the degree of achievement of this right exclusively depends on each state.

However, we believe the present COVID-19 pandemic has demonstrated that:

- even if only the right to health is regulated, as in this case, the state attempts to ignore the obligations it would have to ensure the necessary background for the exercise of this right

or

- even if the right to the protection of health is legally regulated, the state is obliged by the fundamental law to configure the guarantees needed so that each individual benefits from a perfect state of health

the right to the protection of health must be seen as a solidarity right as *„its existence requires a solidarity from all individuals of a society”* (Deaconu, 2011, page 206), as the beneficiary of this right is not only the holder of the right – each individual, but the whole human community (See Deaconu, 2011, page 206).

During this time of pandemic, it was more than obvious that *„all human rights are indivisible and interconnected”* (United Nations, 1993).

It is obvious that health, without which no human being can live to the best of its competence, can't be ignored and it must be made a priority to the detriment of other fundamental rights which allow each human being to enjoy it. Doctrine has pointed out that *„health and human rights are inextricably connected”* (Mann, Gruskin, Grodin, Annas, 1999, quoted by Forman, Kohler, 2020, page 548). Such a claim was based also on the *„recognition of WHO (2020a), the United Nations (UN OFFICE of the High Commission for Human Rights 2020), and the Council of Europe for Human Rights (2020), among others, that a human rights approach is crucial to an effective public health response to COVID-19”* (Forman, Kohler, 2020, page 548)*.

In the Statement of Interpretation on the Right to Protection of Health in Times of Pandemic, passed on April 21st, 2020, the European Committee of Social Rights also pointed out that *„the right to protection of health guaranteed in Article 11 of the charter complements the fundamental rights enshrined in Articles 2 and 3 of the European Convention of Human Rights, and 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 Leagues (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 3 November 2004, §31”* (European Committee of Social Rights, 2020, pages 5-6)*.

In this context, we can identify another trait of the right to the protection of health, namely that it is a premise-right for the exercise of other rights, such as: the right to free circulation, the right to study, the right to work, the right to have access to culture, the access to justice, the right to physical and mental health and so on. In the present pandemic context, such rights, as the above stated ones, would not be exercised if the individual would not benefit from his health, by proving he is not infected with COVID-19. Or, without the states' contribution, namely the specific measures passed by the competent authorities and institutions, as well the support of international communities, through its competent structures, the human being can be vulnerable to any challenge of the pandemic which can affect his health and the achievement of other fundamental rights.

In supporting the statements made above, we could also argue that the right to the protection of health is a social, economic and cultural right. The social character of this right is determined by its beneficiaries – human beings, but also by the society from which he is a part of and which, in case of a pandemic, is identified with the international community (See *Deaconu, 2011, page 259*). The economic character considers „the costs it entails” (*Deaconu, 2011, page 259*), costs which in our opinion, in case of a pandemic, should be split between the entire society, as the state can only support such costs within limits which ensure the protection of the population, the prevention of the spread of the pandemic and the necessary means for the medical system in order to enable it to face the diverse challenges of the pandemic.

The limitation or even the reduction of these costs is possible, from our point of view, if the authorities would realize the cultural character of the right to the protection of health. This cultural character considers that fact that „*the maintain of health means educating the citizens in regard to the need for health*” (*Deaconu, 2011, page 259*).

In case of any pandemic, the true information and education of the members of society in regard to the causes, means of prevention and protection, possible real and effective treatments which are more than necessary. The state authorities are forced to ensure hygiene and public health especially during times of pandemic and to actively get involved and correctly inform and educate its citizens in order to remove or even avoid the use of scientifically inaccurate sources of information. Additionally, we believe the right to the protection of health is a right connected to the environment as regulated by the American Convention for Human Rights, by article 26 and as is established by „*the Inter-American Court of Human Rights in the case Poblete Vilches and Others v. Chile*” (*Hathaway, Stevens, Preston, 2020, page 4*). The health of the environment is influenced by our health. Even if the global lockdown of spring 2020 allowed the Planet to catch its breath, the limitation of the exercise of some fundamental rights and freedoms for a determined period of time, however long or short, or for an undetermined period of time would affect any human being, and their reactions would eventually reflect on the environment.

On the other hand, given the state’s reaction to the pandemics, a reaction which resulted in measures, actions and procedures which have affected the exercise of some fundamental rights and freedoms, including the right to the protection of health, in a different manner, for shorter or longer amounts of time, it is obvious that there is „*the urgent need for clearer rules about legitimate restrictions of the right to health in responding to the pandemic and for safeguarding global health policy initiatives in its aftermath*” (*Forman, Kohler, 2020, page 550*).

The need for such rules is valid, even if by the Declaration of April 2020, the UN Committee on Economic, Social and Cultural Rights emphasized that in „*responding to the pandemic and protected, a minimum core obligations imposed by the Covenant (International Covenant on economic, Social and Cultural Rights, s.n.) should be prioritized*” (*UN Committee on Economic, social and Cultural Rights, 2020, para 12*). Thus, the states have to „*adopt appropriate regulatory measures to ensure that health-*

care resources in both the public and private sectors are mobilized and shared among the whole population to ensure a comprehensive, coordinated health-care response to the crisis” (UN Committee on Economic, social and Cultural Rights, 2020, para 21), and, also, the states have to „devote their maximum available resources for the full realization of all economic, social and cultural rights, including the right to health ...[and] mobilize the necessary resources to combat Covid-19 in the most equitable manner, in order to avoid imposing a further economic burden on these marginalized groups” (UN Committee on Economic, social and Cultural Rights, 2020, para 14).*

To the same purpose, the European Committee of Social Rights of Council of Europe also issued a Statement of Interpretation of the Right to Protection of Health in Times of Pandemic, in April 2020, which stated that *„in times of pandemic, during which the life and health of many people are under serious threat, guaranteeing the right to protection of health is of crucial importance, and governments should take all necessary steps to ensure that it is effectively guaranteed” (European Committee of Social Rights of Council of Europe, 2020, para 2).*

By this declaration, it was emphasized that *„States Parties must ensure that the right to protection of health is given the highest priority in policies, laws and other actions taken in response to a pandemic” (European Committee of Social Rights of Council of Europe, 2020, para 3),* by actions such as:

- *„taking all necessary emergency measures in a pandemic, including also adequate implementation of measures to prevent and limit the spread of the virus, measures like: testing and tracing, physical distance and self-isolation, the provision of adequate masks and disinfectant, as well as the imposition of quarantine and „lock-down” arrangements, but in accordance with relevant human rights standards” (European Committee of Social Rights of Council of Europe, 2020, para 3);*
- *„taking all necessary measures to treat those who fall in a pandemic, including ensuring the availability of a sufficient number of hospital beds, intensive care units and equipment” (European Committee of Social Rights of Council of Europe, 2020, para 5);*
- *„taking all necessary measures to educate people about the risks posed by the disease in question” (European Committee of Social Rights of Council of Europe, 2020, para 6).*

The same declaration states that the Parties States *„must take all possible measures (...) in the shortest possible time, with the maximum use of available financial, technical and human resources, and by all appropriate means both national and international in character, including international assistance and cooperation” (European Committee of Social Rights of Council of Europe, 2020, para 14)*

**II. GENERAL APPRECIATIONS ON SOME LEGAL PROVISIONS PASSED IN ROMANIA
IN ORDER TO PREVENT AND FIGHT THE EFFECTS OF THE COVID-19 PANDEMIC- A TRUE
AND EFFECTIVE GUARANTEE OF THE RIGHT TO THE PROTECTION OF HEALTH?**

Based on constitutional provisions and considering international and regional regulations we have succinctly mentioned above, national authorities have passed specific regulations after the state of emergency was proclaimed, but also after it was prolonged by Decree no 195/16.0.2020, namely by Decree no 240/14.04.2020, both issued by the Romanian President and sanctioned by the Parliament.

First of all, we must mention that the lawmaker specified, in article 2 of Law no 95/2006 regarding the health reform, with subsequent changes, that “public health assistance is the organized effort in order to protect and promote the health of the population and is achieved by: political-legislative measures, programs and strategies for those who decide in regard to the health status, organization of institutions for providing all necessary services”.

In this contest, the Romanian Parliament passed Law no 55/2020 regarding some measures for the prevention and fight against the effects of the COVID-19 pandemic, in order to respond to “*the need to legislatively create mechanisms to adequately and with priority protect the conventional, union and constitutional rights to life, physical integrity and protection of health*” (Law no 55/2020, preamble, para 4), but also to respect “*the obligation of the state, regulated by the fundamental law to take measures to ensure hygiene and public health of the citizens*” (Law no 55/2020, preamble, para 4), as well as the provisions of article 53 of the Constitution regarding the exceptional character of the limitation of the exercise of fundamental rights and freedoms.

In identifying the object of regulation of this law, it is mentioned that “*it entails temporary and gradual measures taken to protect the right to life, to physical integrity and the protection of health, including by the restraint of the exercise of other fundamental rights and freedoms*” (Law no 55/2020, article 1, first alignment).

Defining, in article 2 of this law, the state of alert emphasizes the temporary character of these measures which can be taken in order to respond to a complex situation of emergency, as well as its proportionality in regard to “the seriousness of the situation, the need to prevent and remove imminent threats to the life and health of the people, the environment, the important material and cultural values and property” (Law no 55/2020, article 2).

Although the lawmaker discusses gradual steps in taking measures in case of the state of alert, Law no 55/2020 does not mention any objective criteria which would establish these gradual steps. The measures which can be taken entail several areas, namely: economy, health, employment and social protection, transportation and infrastructure, education and research, youth and sport, culture and so on, but without indicating criteria which must be considered by the authority which sanctions the state of alert and the specific identification of these measures, namely the Government, as the order and number of these measures is entirely up to the Government. Thus, in our opinion, the premise for a discretionary behaviour of the

Government was created, which makes us question the respect of two main obligations of the state in regard to the protection of health, namely “*abstain from impairing the health of the person by violent/non violent actions (negative obligation) and ensuring the necessary background to protect this right (positive obligation)*” (Romanian Constitutional Court, Decision no 498/2018, point 39).

Such a regulation is all the more necessary and pertinent, given our appreciation, according to which, in the present pandemic context, the right to the protection of health must be seen as a right of solidarity. Thus, the measures passed by the Romanian state, the time during which they apply must be in accordance with international measures. We believe this statement is more accurate as, according to article 3 letter m) of Law no 136/2020 regarding measures in public health for situations of epidemic and biologic risk, the international public health emergency considers “*an unusual event which, according to the International Sanitary Regulation 2005, passed by the General Assembly of the world Health Organization and enforced by Government’s Decision no 758/2009, represents a risk for public health, by the international spread of the disease and demands a coordinated response*” and according to article 3 letter o of the same law “*the spread of the disease throughout multiple continents*”.

CONCLUSIONS

As stated in article 2 alignment 10 of Law no 95/2006 with subsequent changes “public health assistance represents the society’s organized effort to protect and promote the health of the population”. From our point of view, this “organized effort” also entails clarity, predictability in configuring specific national laws so as the measures and actions taken by the competent administrative authorities are concentrated, gradual, predictable, proportional, responsible. Doctrine also stated that “*[t]his period was crucial for preparedness and the adoption of principles such as availability, accessibility, acceptability, and quality of health services, as well as non-discrimination, participation, and accountability of the state in its public health response*” (Montel, Kapilashrami, Coleman, Allemani, 2020, page 228).

Thus, we believe the lawmaker should regulate such objective and transparent criteria based on which the authorities tasked with enforcing the law can build scenarios and adapt them to the specific reality of a certain time, but which can also be combined with measures stated in Law no 55/2020 for different domains. Thus, the risk of affecting the fundamental rights and freedoms of a person are diminished, including the right to the protection of health by legislative measures or even abusive or arbitrary measures of enforcement.

Also, such a legislative approach would valorise multiple characteristics of the fundamental right to the protection of health, namely: a right of second generation, a right of solidarity, a social, economic and cultural right which also entails the environment, a premise-right for other rights, a claim right.

Such a regulation would diminish the discretionary power of authorities tasked with the specific enforcement of measures during the pandemic, including the

Government, but it would be easier for the courts of law to control these measures, in regard to their lawfulness and necessity.

Configuring this rather wide and generous legal frame for authorities tasked with the passing and enforcement of measures taken to prevent and diminish the effects caused by the pandemic, can indirectly determine limitations in the exercise of some fundamental rights and freedoms.

The legislative measures, but also the specific enforcement of these measures meant to configure a coherent background by national state authorities would allow for a real protection of the right to the protection of health, without creating discrimination between individuals who wish to exercise this fundamental right. To excessively prioritize the measures destined to diminish and remove the effects of the pandemic to the detriment of other measures meant to protect the health of the population, as opposed to other health problems, even serious ones, represents a discretionary and even abusive decision of our state. To decide that certain surgical procedures and treatments must not be performed in order to free hospital rooms and spaces for the exclusive treatment of those infected with the SARS-COV-2 infection, we believe it is also a discretionary and even abusive measure which not only limits but also violates the right to the protection of health of those who are not infected with the SARS-COV-2 virus or even variants of this virus.

The almost complete lack of predictability in regard to the measures, including legislative ones, taken by the Romanian authorities, the direct and spontaneous action dictated only by specific and actual circumstances, the lack of interest or even the contempt publicly manifested by some of these authorities in regard to the exercise of the right to the protection of health even by people with serious health issues, have caused the state, through its authorities involved in the management of the current pandemic, in the situation of being unable to fully exercise the positive and negative obligations it has.

BIBLIOGRAPHY

- Muraru, Ioan, Tănăsescu, Elena-Simina, *Romanian Constitution. Comments on articles*, 2019, Bucharest: C.H. Beck Publishing House, Romania.
- Romanian Constitutional Court, *Decision no. 1594/2011 regarding the objection of unconstitutionality of the provisions of the Social Assistance Law, as a whole, as well as, in particular, of art. 14, art. 31 para. (5), art. 56 para. (1), art. 60 para. (1), art. 81 para. (1) - (3) of the law*, Bucharest: Official Gazette of Romania no. 909/December 21, 2011, Part I.
- World Health Organization, *WHO Constitution*, 1946, Available at: https://www.who.int/governance/eb/who_constitution_en.pdf, accessed on: 15 Nov. 2021.
- Deaconu, Ștefan, *Constitutional Law*, 2011, Bucharest: C.H. Beck Publishing House, Romania.
- United Nations, *Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights*, 25 June 1993, Geneva: United Nations, Switzerland, Available at: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>, accessed on: 15 Nov. 2021.

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- Forman, Lisa, Kohler, Jillian Clare, *Global Health and human rights in the time of COVID-19: Response, Restrictions, and legitimacy* in *Journal of Human Rights*, Volume 19, NO 5:547-556, 2020, <https://doi.org/10.1080/14754835.2020.1818556>, Available at: <https://www.tandfonline.com/doi/epub/10.1080/14754835.2020.1818556?needAccess=true>, accessed on: 15 Nov. 2021.
- Mann, Johnatan, Gruskin, Sofia, Grodin, Michael A., and Annas, George J., *Health and Human Rights: A Reader*, 1999, New York: Routledge Publisher, USA, quoted by Forman, Lisa, Kohler, Jillian Clare, *Global Health and human rights in the time of COVID-19: Response, Restrictions, and legitimacy* in *Journal of Human Rights*, Volume 19, NO 5:547-556, 2020, <https://doi.org/10.1080/14754835.2020.1818556>, Available at: <https://www.tandfonline.com/doi/epub/10.1080/14754835.2020.1818556?needAccess=true>, accessed on: 15 Nov. 2021.
- European Committee of Social Rights, *Statement of interpretation on the right to protection of health in times of pandemic*, 2020, Available at: <https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>, accessed on: 15 Nov. 2021.
- Hathaway, Oona, Stevens, Mark, Preston, Lim, *COVID-19 and International Law Series: Human Rights Law – Right to health* in *Just Security series, Covid and International Law*, 2020, Available at: <https://www.justsecurity.org/73447/covid-19-and-international-law-series-human-rights-law-right-to-health/>, accessed on: 15 Nov. 2021
- UN Committee on Economic, Social and Cultural Rights, *Statement on Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural rights*. UN Doc. E/C.12/2020/1, Geneva: United Nations, Switzerland, Available at: <https://digitallibrary.un.org/record/3856957#record-files-collapse-header>, accessed on: 15 Nov. 2021.
- Romanian Parliament, *Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic*, amended, Bucharest: Official Gazette of Romania no. 396/May 15, 2020, Part I.
- Romanian Constitutional Court, *Decision no. 498/2018 regarding the admission of the exception of unconstitutionality of the provisions of art. 30 para. (2) and (3), as well as the phrase “electronic patient health record system” from art. 280 para. (2) of Law no. 95/2006 on health care reform*, Bucharest: Official Gazette of Romania no. 650/July 28, 2018, Part I.
- Montel, Lisa, Kapilashrami, Anuj, Coleman, Michel P., Allemani, Claudia, *The Right to Health in Times of Pandemic. What can we learn from the UK's Response to the COVID-19 Outbreak*, *Health and Human Rights Journal*, Volume 22(2):227-241, 2020; Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7762905/pdf/hhr-22-02-227.pdf>, accessed on: 15 Nov. 2021.