

# **JUS ET CIVITAS**

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## THE RIGHT TO PROTECTION TO HEALTH OR THE RIGHT TO HEALTH? – CONSTITUTIONAL APPROACHES

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### Abstract

*In Romania, by article 34 of the Constitution, was enshrined the right to health care. The Universal Declaration of Human Rights does not explicitly provide the right to health or the right to health care, but settles, by article 25 paragraph (1), that everyone has the right to a standard of living adequate even for the health and well-being of himself and of his family, right that includes also medical care and the right to security in event of sickness and disability. But, by article 12 of International Covenant on Economic, Social and Cultural Rights, the signatory states, including Romania, have recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. On the other hand, The Charter of Fundamental Rights of European Union, by article 35, enshrines the right to health protection under the conditions established by national laws and practices, but explicitly specifies that a high level of human health protection is ensured in defining and implementing of all Union policies and activities. The approaches of the above mentioned international and regional regulations regarding the consecration of a right to health are different. Starting from these, we intend to analyze several regulations, especially constitutional ones, in order to identify the juridical view of the different legislators. Thus, we will be able to ascertain whether it is preferable to enshrine a fundamental right to health or such a right regarding the protection or care of health. In our opinion, we cannot speak about the identity between the right to health and the right to health care or protection, a point of view that we will argue in this paper.*

**Keywords:** health, health protection or care, fundamental right, constitutional regulation.

**Introduction:** World Health Organization (WHO) has defined the health of every human being as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"<sup>1</sup>. This definition was not modified since 1948, best summarizing, at least in our opinion, what we should meant by health. However, we appreciate that it is increasingly difficult for every human being to achieve the content of this definition, especially now, although even in the same Preamble of the WHO

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<sup>1</sup> Preamble to the Constitution of WHO that was adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of WHO, no. 2, p. 100) and entered into force on 7 April 1948, available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>, accessed on: 02.07.2020.

Constitution it is provided 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"<sup>2</sup>.

As we already mentioned above, even though the right to health was not enshrined expressis verbis, distinctly, by the Universal Declaration of Human Rights (UDHR), but as a dimension of the right to an adequate standard of living, it was nevertheless provided by the International Covenant on Economic, Social and Cultural Rights, a covenant that develops the provisions of the UDHR, and was also provided by the constitutive act of the World Health Organization (WHO). WHO underlines the importance of the right to health by enshrining it in an act entitled the Constitution, thus highlighting its importance in the fundamental rights recognized to any human being. In fact, if we analyse these international acts of the general or specific field of human rights, we can see that "soon after the WHO Constitution was formulated, the right to health was affirmed by the Universal Declaration of Human Rights"<sup>3</sup>, UDHR limiting itself only to recognizing this right.

The relevance of the right to health among the fundamental rights of any human being is also demonstrated by the countless international or regional documents in this field through which it has been enshrined.

In this context, at the international level, we could mention, for: Article 5 letter (e) point (iv) of International Convention on the Elimination of All Forms of Racial Discrimination<sup>4</sup>, where it is considered as one of the economic, social and cultural rights, or Article 11 paragraph 1 letter (f) and Article 12 of Convention on the Elimination of All Forms of Discrimination Against Women<sup>5</sup>, or Article 24 paragraph (1) of Convention on the Rights of the Child<sup>6</sup>.

At regional level, in Europe, we could mention, in addition to the Charter of Fundamental Rights of the European Union, at European Union level, Article 11 of European Social Charter<sup>7</sup>, act of the Council of Europe.

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<sup>2</sup> Ibidem

<sup>3</sup> Judith Asher, *The Right to Health: A Resource Manual for NGOs*, published by the Commonwealth Medical Trust, London, 2004, p. 17, available at: [https://www.aas.org/sites/default/files/s3fs-public/RT\\_Health.pdf](https://www.aas.org/sites/default/files/s3fs-public/RT_Health.pdf), accessed on: 02.07.2020.

<sup>4</sup> The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, and entered into force 4 January 1969, in accordance with Article 19, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, accessed on: 02.07.2020.

<sup>5</sup> The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18 December 1979. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. This convention is available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, accessed on: 02.07.2020.

<sup>6</sup> The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force 2 September 1990, in accordance with article 49. This convention is available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed on: 02.07.2020.

<sup>7</sup> European Social Charter (ETS No. 35), adopted in 1961 and entered into force in 1965, was adopted by the Council of Europe, being the counterpart of the European Convention on Human Rights in the sphere of economic and social rights, and it was revised in 1996, and entered into force in 1999. The original Charter is available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed on:

Also at regional level, of Africa, we could mention Article 16 of African Charter on Human and Peoples' Rights<sup>8</sup>, or Article XI of American Declaration of the Rights and Duties of Man<sup>9</sup>.

We have to underline that "the right to health is relevant to all States: every State has ratified at least one international human rights treaty recognizing the right to health. Moreover, States have committed themselves to protecting this right through international declarations, domestic legislation and policies, and at international conferences."<sup>10</sup>

In this context of international and regional regulation, it was almost natural for states to recognize and consecrate this fundamental right through their own constitutions as we will see below.

**Concepts presentation:** Although even in the title of the article we referred to the right to health, it is, in fact, "[the] short-form for the right to the highest attainable standard of physical and mental health"<sup>11</sup>. We are also agreeing that "the right to health is not the right to be healthy or the right to health care, but a more complex and nuanced understanding of the right to health"<sup>12</sup>.

By the way this right is settled it is obviously a complex right that "[i]ncludes a wide range of factors that can help us lead a healthy life"<sup>13</sup>, factors which "the Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these the "underlying determinants of health"<sup>14</sup>.

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02.07.2020, and the revised one is available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>, accessed on: 02.07.2020.

<sup>8</sup> African Charter on Human and Peoples' Rights was adopted 27 June 1981 by the Organization of African Unity - OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), and entered into force 21 October 1986. It is available at: <https://www.achpr.org/legalinstruments/detail?id=49>, available at: 02.07.2020.

<sup>9</sup> American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948. It is available at: [https://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf), accessed on: 02.07.2020.

<sup>10</sup> Office of the United Nations High Commissioner for Human Rights & World Health Organization, *The Right to Health, Factsheet no. 31*, 2008, p. 1. It is available at: <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, accessed on: 02.07.2020.

<sup>11</sup> FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *Health and Human Rights Resource Guide*, 2013, p. 6. It is available at: <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/25/2014/03/HHRRG-master.pdf>, accessed on: 02.07.2020.

<sup>12</sup> Ibidem

<sup>13</sup> Office of the United Nations High Commissioner for Human Rights & World Health Organization, *op. cit.*, p. 3.

<sup>14</sup> Ibidem. See also Office of High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), p. 3, paragraph 11. It is available at: <https://www.refworld.org/pdfid/4538838d0.pdf>, accessed on: 02.07.2020.

In this context it is said about the right to health that it is "an inclusive right"<sup>15</sup> because it includes many and different components as: safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information; gender equality. On the other hand, the right to health contains freedoms, as the right to be free from non-consensual medical treatment<sup>16</sup>, but also entitlements which include: the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment and control of diseases; access to essential medicines; maternal, child and reproductive health; equal and timely access to basic health services; the provision of health-related education and information; participation of the population in health-related decision making at the national and community levels<sup>17</sup>. Another key aspect of the right to health is non-discrimination according to which the health services, goods and facilities must be provided to all without any discrimination<sup>18</sup>.

According to the above mentioned international and regional provision regarding the right to health, we can identify "[a] list of essential elements applicable to all aspects of the right to health, including the underlying determinants, and to all countries, "the precise application of which will depend on the conditions prevailing in a particular" country"<sup>19</sup>. These elements are: availability; accessibility with its dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), information accessibility; acceptability; and quality<sup>20</sup>.

Therefore, the right to health is and must be regulated as "a right-claim"<sup>21</sup>, states, but, in our opinion, even the international community, through the organizations and bodies created and invested with competences in this respect, having "the general positive obligation to guarantee it effectively"<sup>22</sup>.

Therefore, the right to health impose to all the states, first of all, "several different obligations and different levels of obligations"<sup>23</sup>, obligations which have to be identified by interpreting the legal norms, unless expressly provided for in fundamental texts, like: non-discrimination, seen as immediate obligation; progressive realization; presumption

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<sup>15</sup> Office of the United Nations High Commissioner for Human Rights & World Health Organization, *op. cit.*, p. 3 and next.

<sup>16</sup> *Ibidem*

<sup>17</sup> *Ibidem*

<sup>18</sup> *Ibidem*

<sup>19</sup> FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *op. cit.*, p. 7.

<sup>20</sup> For details about each of these elements, it can be seen: FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *op. cit.*, p. 7, or Office of the United Nations High Commissioner for Human Rights & World Health Organization, *op. cit.*, p. 4, or Office of High Commissioner for Human Rights, *op. cit.*, p.4.

<sup>21</sup> Ioan Muraru, Elena Simina Tănăsescu, coordinators, *Constituția României. Comentariu pe articole*, C. H. Beck Publishing House, București, 2019, p. 280.

<sup>22</sup> *Ibidem*

<sup>23</sup> FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *op. cit.*, pp. 8-10.

against retrogressive measures; minimum core; maximum available resources; priority obligations<sup>24</sup>; respect, protect, fulfil<sup>25</sup>; implementation at the national level.

Each of us wants to be healthy, just as he or she wants his or her family members and all his or her loved ones to be able to enjoy health, and when his or her health is affected, he or she wants, more than ever, to enjoy the right to health in its fullness. Certainly the right to health must be recognized, also at national level, as a fundamental right of every person, but "it will be helpful to be viewed as having two basic components: *a right to health care* and *a right to healthy conditions*"<sup>26</sup>. Such a perspective of constitutional configuration at the national level, not only international and regional, of the right to health will allow it "to be understood as a right to the enjoyment of a variety of facilities and conditions which the state is responsible for providing as being necessary for the attainment and maintenance of good health"<sup>27</sup>. Thus every person will have the opportunity and the possibility "to enjoy the highest attainable level of health"<sup>28</sup>, and the state would at least fulfil its obligation to build a minimum fundamental legislative framework regarding this right.

Analyzing the provisions of several constitutions, we were able to identify the diversity in the constitutional consecration of this right to health.

Thus, through the constitutional provisions, some states enshrine the right to health care, and some of them enshrine in a synthetic form this right, while others in a more developed form which emphasizes the correlative obligations of the state, but also highlights the complexity of this right by mentioning other fundamental rights of the human being. Thus, by article 55 of Constitution of Albania<sup>29</sup>, "the citizens of this country enjoy in an equal manner the right to health care from the state, and everyone has the right to health insurance pursuant to the procedure provided by law". Constitution of Croatia<sup>30</sup>, by article 58, established that "everyone shall be guaranteed the right to health care, in conformity with law", and also, the Constitution of Slovenia<sup>31</sup>, by article 51 entitled "right to health care" provided that everyone has "the right to health care under conditions provided by law, and the rights to health care from public funds shall be provided by law, and also that no one may be compelled to

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<sup>24</sup> The five priority obligations, which are identified by the CESCR, are: Ensure reproductive, maternal and child health care, Provide immunization against major infectious diseases in the community, Take measures to prevent, treat and control epidemic and endemic diseases, Provide education and access to information on the main health problems, Provide appropriate training for health personnel, including education on health and human rights. FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *op. cit.*, p. 9.

<sup>25</sup> For details, see FXB Center for Health and Human Rights and Open Society Foundations – Harvard School of Public Health – Harvard University, *op. cit.*, p. 9

<sup>26</sup> Judith Asher, *op. cit.*, p. 17.

<sup>27</sup> *Ibidem*

<sup>28</sup> Office of High Commissioner for Human Rights, *op. cit.*, p.3.

<sup>29</sup> This constitution was adopted in 1998 and revised in 2016. This document is available at: [https://www.constituteproject.org/constitution/Albania\\_2016?lang=en](https://www.constituteproject.org/constitution/Albania_2016?lang=en), accessed on: 02.07.2020.

<sup>30</sup> This constitution was adopted in 1991 and revised in 2013. This document is available at: [https://www.constituteproject.org/constitution/Croatia\\_2013?lang=en](https://www.constituteproject.org/constitution/Croatia_2013?lang=en), accessed on: 02.07.2020.

<sup>31</sup> This constitution was adopted in 1991 and revised in 2016. This document is available at: [https://www.constituteproject.org/constitution/Slovenia\\_2016?lang=en](https://www.constituteproject.org/constitution/Slovenia_2016?lang=en), accessed on: 02.07.2020.

undergo medical treatment except in cases provided by law". Almost similarly, the Constitution of Republic of Macedonia<sup>32</sup>, by article 39, established that "every citizen is guaranteed the right to health care", this fundamental law underlines the rights and the duties of citizens by saying "citizens have the right and duty to protect and promote their own health and the health of others". Unlike these constitutions, the Constitution of Belarus<sup>33</sup> settled also the right to health care, but it contains consistent provisions regarding the duties of the state and the connexions with other rights. So, by article 45 of this constitution, "citizens of the Republic of Belarus shall be guaranteed the right to health care, including free treatment at state health-care establishments. The State shall make health care facilities accessible to all of its citizens. The right of citizens of the Republic of Belarus to health care shall also be secured by the development of physical training and sport, measures to improve the environment, the opportunity to use fitness establishments and improvements in occupational safety."

Other countries have settled by their constitutions the right to the protection of health, and most of them have chosen a simple, synthetic provision. Thus, by article 31, the Constitution of Czech Republic<sup>34</sup> settled that "everyone has the right to the protection of his health, and citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law". In the same sense are the provisions of the Constitution of Latvia<sup>35</sup> which settle, by article 111, that "the State shall protect human health and guarantee a basic level of medical assistance for everyone", as well as those of the Constitution of Montenegro<sup>36</sup> according to whom "everyone shall have the right to health protection, and a child, a pregnant woman, an elderly person and a person with disability shall have the right to health protection from public revenues, if they do not exercise this right on some other grounds" (article 69). Constitution of Slovakia<sup>37</sup>, by article 40, provides also that "everyone has a right to the protection of health, and based on public insurance, citizens have the right to free health care and to medical supplies under conditions which shall be laid down by law."

Constitutions such as that of Estonia<sup>38</sup>, Lithuania<sup>39</sup> or Serbia<sup>40</sup> provide the right to the protection of health, but the content of the right is more complex reaching different

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<sup>32</sup> This constitution was adopted in 1991 and revised in 2019. This document is available at: [https://www.constituteproject.org/constitution/Macedonia\\_2011?lang=en](https://www.constituteproject.org/constitution/Macedonia_2011?lang=en), accessed on: 02.07.2020, and for the recent amendments, see: <https://www.sobranie.mk/content/Odluki%20USTAV/odluka%20amandmani%20ustav-en.pdf>, accessed on: 02.07.2020.

<sup>33</sup> This constitution was adopted in 1994 and revised in 2014. This document is available at: [https://www.constituteproject.org/constitution/Belarus\\_2004?lang=en](https://www.constituteproject.org/constitution/Belarus_2004?lang=en), accessed on: 02.07.2020.

<sup>34</sup> This constitution was adopted in 1993 and revised in 2013. This document is available at: [https://www.constituteproject.org/constitution/Czech\\_Republic\\_2013?lang=en](https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en), accessed on: 02.07.2020.

<sup>35</sup> This constitution was adopted in 1922, reinstated in 1991, and revised in 2016. This document is available at: [https://www.constituteproject.org/constitution/Latvia\\_2016?lang=en](https://www.constituteproject.org/constitution/Latvia_2016?lang=en), accessed on: 02.07.2020.

<sup>36</sup> This constitution was adopted in 2007 and revised in 2013. This document is available at: [https://www.constituteproject.org/constitution/Montenegro\\_2013?lang=en](https://www.constituteproject.org/constitution/Montenegro_2013?lang=en), accessed on: 02.07.2020.

<sup>37</sup> This constitution was adopted in 1992 and revised in 2017. This document is available at: [https://www.constituteproject.org/constitution/Slovakia\\_2017?lang=en](https://www.constituteproject.org/constitution/Slovakia_2017?lang=en), accessed on: 02.07.2020.

<sup>38</sup> This constitution was adopted in 1992 and revised in 2015. This document is available at: [https://www.constituteproject.org/constitution/Estonia\\_2015?lang=en](https://www.constituteproject.org/constitution/Estonia_2015?lang=en), accessed on: 02.07.2020. The article 28 settles that "Everyone has the right to the protection of health. An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories

specific rights for citizens, but also different duties for State. For example, by article 53, the Constitution of Lithuania settles that "the State shall take care of people's health and shall guarantee medical aid and services for the human being in the event of sickness, and the procedure for providing medical aid to citizens free of charge at State medical establishments shall be established by law", but it is also established that "the State shall promote physical culture of society and shall support sport, and also the State, but even each person must protect the environment from harmful influences".

Other countries such as Greece<sup>41</sup> or South Africa<sup>42</sup> have chosen to include some provisions regarding the right to health when it was configured constitutionally other fundamental right, as a dimension of this. So, regulating about the family and different fundamental rights of this, the Greek constitutional legislator established, by article 21 point 3 that "the State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy". The constitutional legislator from South Africa have chosen the same solution to provide by the fundamental law the right to health, fundamental right which was included in a complex right entitled the right to health care, food, water and social security.

We appreciate that an interesting approach was taken by the Belgian constitutional<sup>43</sup> legislator which included the right to health as a dimension of the fundamental right to lead a life keeping with human dignity.

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and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law. The state shall promote voluntary and local government welfare services. Families with many children and persons with disabilities shall be under the special care of the state and local governments."

<sup>39</sup> This constitution was adopted in 1992 and revised in 2019. This document is available at: [https://www.constituteproject.org/constitution/Lithuania\\_2019?lang=en](https://www.constituteproject.org/constitution/Lithuania_2019?lang=en), accessed on: 02.07.2020.

<sup>40</sup> This constitution was adopted in 2006. This document is available at: [https://www.constituteproject.org/constitution/Serbia\\_2006?lang=en](https://www.constituteproject.org/constitution/Serbia_2006?lang=en), accessed on: 02.07.2020. The article 68, entitled "health care", settles that "Everyone shall have the right to protection of their mental and physical health. Health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law. Health insurance, health care and establishing of health care funds shall be regulated by the law. The Republic of Serbia shall assist development of health and physical culture."

<sup>41</sup> This constitution was adopted in 1975 and revised in 2008. This document is available at: [https://www.constituteproject.org/constitution/Greece\\_2008?lang=en](https://www.constituteproject.org/constitution/Greece_2008?lang=en), accessed on: 02.07.2020.

<sup>42</sup> This constitution was adopted in 1996 and revised in 2012. This document is available at: [https://www.constituteproject.org/constitution/South\\_Africa\\_2012?lang=en](https://www.constituteproject.org/constitution/South_Africa_2012?lang=en), accessed on: 02.07.2020. By article 27, this Constitution established that "Everyone has the right to have access to - health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. No one may be refused emergency medical treatment."

<sup>43</sup> This constitution was adopted in 1831 and revised in 2004. This document is available at: [https://www.constituteproject.org/constitution/Belgium\\_2014?lang=en](https://www.constituteproject.org/constitution/Belgium_2014?lang=en), accessed on: 02.07.2020. By article 23 of Belgium Constitution, "Everyone has the right to lead a life in keeping with human dignity. These rights include among others: the right to employment and to the free choice of an occupation within

**Conclusions:** The international, regional, but also the national constitutional regulations of the states, mentioned above, recognize a fundamental right to health of every human being, without any discrimination. Constitutional legislators at the national level preferred to enshrine either the right to health care, or the right to the protection of health to underline that every human being must enjoy protection of his health which entails the imposition of several correlative obligations on States, more than everything else.

However, the right to health is "a complex, ambivalent right with two components, one substantial and one procedural"<sup>44</sup>, and in our opinion it should be legally enshrined in such a way that, through its content, can reach at least these both dimensions. Thus, the constitutional provisions must include aspects of substantial right to health because "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health"<sup>45</sup>.

In the process of identifying the issues of substantial right, it should not be overlooked the fact, revealed, in particular, by international and regional regulations, that the right to health "was conceived in broad terms that included a right to a standard of living adequate for basic health"<sup>46</sup>. It is such a right because its content is in a permanent and continuous evolution, the health of each of us not being limited only, for example, to the possibility of accessing, in case of need, to certain treatments, but, also for example, to the possibility of living in a healthy environment. The development of the human being and the society in which he lives will also determine the increase of his needs and standard of living so that the conditions and determinants of the right to health will evolve.

As we have seen, the right to health is taking into consideration both "freedoms, which include the right to have control over one's own health and body as well as the right to be free from non-consensual medical treatment and experimentation, and entitlements, which include the right of access to an equitable system of health protection"<sup>47</sup>.

On the other hand, we cannot forget that "the right to health is interrelated with other human rights, such as those to food, housing, education, and safe working....[b]ut also

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the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation; [but also] the right to social security, to health care and to social, medical and legal aid".

<sup>44</sup> Decision of Romanian Constitutional Court no 1252/2010 [R] on the objection of unconstitutionality of the provision of article 208 paragraph (3) first thesis, article 211 paragraph (1) and article 213 paragraph (4) of Law no. 95/2006 on health reform, published in Romanian Official Gazette, Part I, no. 759 from 2010, November 15.

<sup>45</sup> Office of High Commissioner for Human Rights, *op. cit.*, p.3, paragraph 9.

<sup>46</sup> Judith Asher, *op. cit.*, p.18.

<sup>47</sup> Judith Asher, *op. cit.*, pp.18-19.

civil and political rights as well as economic, social and cultural rights<sup>48</sup>, and also "the right to health is essential to the exercise of other rights"<sup>49</sup>.

Building this right, the constitutional legislator must also take into account the obligations incumbent on the state so as to ensure the protection of the health of every person, obligations that are not limited to ensuring public health. On the other hand, if we are "viewing health as an entitlement, rather than as a good provided through the market like any other"<sup>50</sup>, it will be very difficult for each state to identify, in the constitutional provisions, some basic elements in such sense. But it will be their duty to identify and settle a minimum package with rights and measures that could make the right to health available to everyone because we consider that the right to health is, at the same time, a fundamental right and an entitlement.

We cannot help to argue "that access to essential health care should not hinge on one's ability to pay"<sup>51</sup>, but we also think that it is the obligation of each state to adapt, permanently, that minimum package with medical services provided for every person, to its own financial possibilities. In this way, in time, creating the conditions to provide medical care to the public won't be just "an aspirational goal for governments"<sup>52</sup>, and the right of everyone to enjoy the highest attainable standard of physical and mental health will become a real fundamental right<sup>53</sup> for every human being.

Therefore, in our opinion, every constitutional legislator will have to take into consideration three aspects when it will regulate the right to health. Thus, it will have to establish different aspects of substantial right involved by the right to health, then those that are related to health protection, and finally the minimum package of medical services and other rights related to the right to health that must be guaranteed to every person. We also consider that this content of the right to health must also be reflected in the name of the right, and the more appropriate name it should be the right to health and its protection.

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<sup>48</sup> Judith Asher, *op. cit.*, p.19.

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<sup>50</sup> Timothy Goodman, (2005), *Is There A Right to Health?*, article published in *Journal of Medicine and Philosophy*, 30:6, p. 644, available at: <https://www.tandfonline.com/doi/pdf/10.1080/03605310500421413>, accessed on: 02.07.2020.

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<sup>52</sup> Timothy Goodman, *op. cit.*, p. 652.

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## **DREPTUL LA OCROTIREA SĂNĂȚĂȚII SAU DREPTUL LA SĂNĂȚATE? – ABORDĂRI CONSTITUȚIONALE**

### **Rezumat**

*Prin art. 34 din Constituție, în România a fost consacrat dreptul la ocrotirea sănătății. Declarația Universală a Drepturilor Omului nu vorbește explicit despre dreptul la sănătate sau despre dreptul la ocrotirea sănătății, dar prevede, la art. 25 alin. (1) faptul că orice om are dreptul la un nivel de trai care să-i asigure, inclusiv, sănătatea lui și a familiei sale și care cuprinde și îngrijirea medicală, dreptul la aigurare în caz de boală, invaliditate. Însă, prin art. 12 din Pactul internațional privitor la drepturile economice, sociale și culturale, statele semnatare, inclusiv România, au recunoscut dreptul pe care îl are orice persoană de a se bucura de cea mai bună sănătate fizică și mintală pe care o poate atinge. Pe de*

*altă parte, Carta Drepturilor Fundamentale a Uniunii Europene, prin art. 35, consacră dreptul la protecția sănătății în condițiile stabilite de legislațiile și practicile naționale, specificându-se, totuși, în mod expres, faptul că în definirea și punerea în aplicare a tuturor politicilor și acțiunilor Uniunii se asigură un nivel ridicat de protecție a sănătății umane. Abordările reglementărilor internaționale și a celei naționale menționate privitoare la consacrarea unui drept privitor la sănătate sunt diferite. Plecând de la acestea, ne propunem să analizăm mai multe reglementări, cu precădere constituționale, pentru a identifica optica diferiților legiuitori. Astfel vom putea constata dacă se preferă consacrarea unui drept fundamental la sănătate sau a unui asemenea drept privitor la ocrotirea sau protecția sănătății. În opinia noastră nu putem vorbi despre identitate între dreptul la sănătate și dreptul la ocrotirea sau protecția sănătății, punct de vedere pe care îl vom argumenta în lucrarea de față.*