ISSN: 2358-1824

Cadernos Ibero-Americanos de Direito Sanitário
Cuadernos Iberoamericanos de Derecho Sanitario

Article

The weak constitutional guarantee of the right to health protection in Spain: a reform proposal

A frágil garantia constitucional do direito à proteção da saúde na Espanha: uma proposta de reforma

La débil garantía constitucional del derecho a la protección de la salud en España: una propuesta de reforma

José María Porras Ramírez [1]
Universidad de Granada, Granada, Andalucía, Spain
https://orcid.org/0000-003-1573-0738
jmporras@ugr.es

Received: 12/15/23
Revision: 02/08/24
Accepted: 02/08/24

Abstract
Objective: To discuss the right to health protection in Spain and its non-inclusion in the category of fundamental rights. **Methodology:** Critical review of Spanish and international normative documents - Constitution, laws, and international treaties - from the perspective of analyzing health as a fundamental right. **Results:** The guarantee and effectiveness of the right to health in Spain are not satisfactory, as from the legislative and often administrative regulation of the topic, well-defined and enforceable legal claims arise before judicial bodies, as individual subjective rights. This allows the legislator to introduce significant setbacks in determining the scope of the right to health. **Conclusion:** A constitutional reform is necessary to reconfigure a right and include it in the list of those considered fundamental in Section 1 of Chapter II of Title I of the Constitution, in order to endow it with an essential content, binding for the legislator, and so that it itself benefits from direct and maximum jurisdictional guarantee, both ordinary and extraordinary, before the Constitutional Court.
Keywords
Right to Health. Constitution. Government Regulation.

Resumo
Objetivo: discutir o direito à proteção da saúde na Espanha e o seu não enquadramento na categoria de direito fundamental. **Metodologia:** revisão crítica de documentos normativos espanhóis e internacionais – Constituição, Leis e tratados internacionais na perspectiva de análise da saúde como um direito fundamental. **Resultados:** a garantia e efetividade do direito à saúde na Espanha não são satisfatórios visto que a partir da regulamentação legislativa e, muitas vezes, administrativa do tema, surgem reivindicações jurídicas bem definidas e exigíveis perante os órgãos judiciais, como direitos subjetivos individuais. Isso permite ao legislador introduzir retrocessos significativos na determinação do alcance do direito à saúde. **Conclusão:** Impõe-se uma reforma constitucional que signifique a reconfiguração de um direito e sua inclusão na lista daqueles considerados fundamentais na Seção 1ª do Capítulo II do Título I da Constituição, a fim de dotá-lo de um conteúdo essencial, vinculativo para

[1] Doctor en Derecho por la Universidad de Granada, Andalucía, Spain. Catedrático de Derecho Constitucional de la Universidad de Granada.

o legislador e para que ele mesmo seja beneficiário de uma garantia jurisdicional direta e máxima, tanto ordinária quanto extraordinária perante o Tribunal Constitucional.
Palavras-chave
Direito à Saúde. Constituição. Regulamentação Governamental.

Resumen
Objetivo: Discutir el derecho a la protección de la salud en España y su no inclusión en la categoría de derecho fundamental. **Metodología:** Revisión crítica de documentos normativos españoles e internacionales - Constitución, leyes y tratados internacionales - desde la perspectiva del análisis de la salud como un derecho fundamental. **Resultados:** La garantía y efectividad del derecho a la salud en España no son satisfactorias, ya que a partir de la regulación legislativa y, a menudo, administrativa del tema, surgen reclamaciones jurídicas bien definidas y exigibles ante los órganos jurisdiccionales, como derechos subjetivos individuales. Esto faculta al legislador introducir retrocesos significativos en la determinación del alcance del derecho a la salud. **Conclusión:** Se impone una reforma constitucional que signifique la reconfiguración de un derecho y su inclusión en la lista de aquellos considerados fundamentales en la Sección 1ª del Capítulo II del Título I de la Constitución, a fin de dotarlo de un contenido esencial, vinculante para el legislador y para que él mismo sea beneficiario de una garantía jurisdiccional directa y máxima, tanto ordinaria como extraordinaria ante el Tribunal Constitucional.
Palabras clave
Derecho a la Salud. Constitución. Regulación Gubernamental.

1. The starting point: inadequate constitutional recognition

It is by no means common for European Constitutions, newly drafted or partially reformed after World War II, to even expressly recognize the “right to health protection”. The need to give priority to guaranteeing the rights that are considered indispensable in a liberal democracy, recently reconstituted after a period of questioning or denial of its own existence, explains this omission. In this sense, the Bonn Basic Law of 1949 stands as the most representative paradigm of the above (1). However, this phenomenon is not unanimously appreciated, since, in a very relevant, albeit exceptional way, the Italian Constitution of 1947, in its art. 32, protects health “as a fundamental right of the individual and in the interest of the community”.

However, it is common to observe the declaration of the right of reference in the Constitutions of the States of Southern Europe, such as those of Greece, Portugal and Spain, which were drawn up, certifying their access to democracy, in the seventies of the last century. Not in vain, during that historical period it was already considered, in Europe, consubstantial to the democratic form of State the obligation to protect the so-called "rights of justice and solidarity" (2,3), taking into account the close link that they maintain with the social dimension that constitutionalism assumes during that period, favoring the understanding of the constitutional State as a material State of law (4,5).

Less than two decades later, at the turn of the century, this recognition of the right to health was echoed in the Constitutions of Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Ukraine and Albania, and, somewhat later, in the Constitutions of the States that, in earlier times, made up the former Yugoslavia, such as Slovenia, Montenegro, Croatia, Bosnia-Herzegovina, Serbia, North Macedonia and, most recently, Kosovo. More recently, the 1999 Constitution of Switzerland adds to

this recognition, although it considers health protection not as a right but as an objective to guide the policies to be developed by the Confederation (6).

Moreover, the international context is particularly favorable. It is no coincidence that the right to health protection is insistently recognized at the United Nations. Thus, Article 25.1 of the Universal Declaration of Human Rights (7) refers to this right, together with others, such as the right to food, clothing, housing and other necessary social services, as essential to ensure "an adequate standard of living" for all. More specifically, Article 12.1 of the International Covenant on Economic, Social and Cultural Rights (8) recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"; therefore, States are urged to adopt specific measures to ensure the full realization of this right.

For its part, within the Council of Europe, it should be noted that Art. 11 of the European Social Charter emphasizes that the States shall adopt the measures necessary for the implementation of the European Social Charter:

> […] appropriate measures for, among other purposes: to eliminate, as far as possible, the causes of poor health; to establish educational and consultative programs directed toward the improvement of health and to stimulate a sense of individual responsibility for health; and to prevent, as far as possible, epidemic, endemic and other diseases. (9)

In the European Union, Article 35 of the Charter of Fundamental Rights (10) proclaims that: “Everyone has the right of access to preventive health care and the right to benefit from health care under the conditions established by national laws and practices”. It therefore adds that “A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities” (10). Consequently, since the Union has no powers of its own in this area, it is up to the Member States to determine the material content of the health care to be provided, and it will therefore be up to them to lay down the conditions for access to such benefits. However, the Charter establishes health protection as a universal subjective right. Hence, it does not establish restrictions derived from the condition of citizen or from the specific administrative situation in which the person requesting assistance finds himself. But the reference to the fact that the exercise of the right must take place “in accordance with the conditions laid down by national laws and practices" (10) shows that its operability is limited to being a principle inspiring the actions of the European Union and the Member States, and not to acting as an individual right that can be invoked before the Court of Justice of the Union (11).

Well, it is in this context that the Spanish Constitution of 1978 necessarily moves (12), in which, according to article 43, paragraph 1: *“*The right to health protection is recognized" (12); adding paragraph 2 of the aforementioned article: "It is the responsibility of the public authorities to organize and protect public health through preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect” (art. 43.2) (12). Finally, paragraph 3 states that “The public authorities shall promote health education, physical education and sports. Likewise, they shall facilitate the appropriate use of leisure” (12).

First of all, it should be noted, as a characteristic feature of the constitutional recognition indicated, that the right to health protection is not considered a fundamental right in Spain, nor in practically any other European State, with the exception, more semantic than real, of Italy and Portugal. Hence, as it does not have this determining condition, it does not bind all public authorities in a

reinforced manner, nor is its direct and immediate effectiveness assured. Nor is its regulation reserved to the organic law, with the guarantee that its essential content can be applied, not only against, but even in the absence of the appropriate and, moreover, usually necessary legislative development (13,14). Moreover, its possible violation cannot be challenged through a preferential and summary procedure before the ordinary courts, nor by resorting, in a subsidiary and extraordinary way, to an appeal for protection before the Constitutional Court.

This is due to the fact that the right to health protection is located in Chapter III of Title I of the Constitution, which implies, in accordance with the provisions of art. 53.3 of the Constitution (12), lesser guarantees that, however, do not imply its lack of protection. Thus, the status attributed to it as a guiding principle of social and economic policy does not entail, as STC 139/2016 came to emphasize, that its effectiveness is only that of a merely programmatic rule, empty of content, without references that inform it, especially in relation to the legislator. It is not in vain that the latter, whether State or autonomous, must configure the right in accordance with the mandate included in the second paragraph of art. 43, specifying the necessary benefits that guarantee its materialization, as, by the way, the former has done, in a particularly intense manner (15).

The fact that it does not have the character of a fundamental right is usually justified by reference to the considerable structural difficulty, expressed in the norm that declares this right, of asserting it on its own, prior to any legislative intervention to regulate it. The manifest openness of the constitutional norm that enunciates it, leads it to express a constitutional program, “prima facie”, of distribution of goods and services, which requires an unavoidable development, normally very intense, by the Legislature and the Executive, which will have the margin of self-determination deduced from the Constitution, so that it will never be full, being controllable as far as its excesses are concerned (14,16). Such a configurative development implies the creation of complex organizational structures and the necessary opening of channels of active participation to the subjects and groups concerned, in order to allow the subsequent intervention or granting of benefits to their potential claimants and access to effective judicial protection. From this will derive rights that can be invoked before the courts, albeit conditioned to the realization by the public authorities of the factual assumption of the same (17-19).

Therefore, it can be said, in short, that the right to health protection is configured in Spain as a right deferred to the law, that is, properly speaking, as a “mandate to legislate”, which requires the gradual actions of the public authorities, expressed in rules of competence, tending to realize, “under the reservation of what is possible or reasonable”, in the now classic words of the German Federal Constitutional Court, the generically prefigured program determined by the constitutional clause that recognizes it. Hence, it is only from the legislative and, often, administrative regulation, that well-defined and enforceable legal claims are born before the courts, as individual subjective rights, that is, giving shape to authentic “legal positions of benefit”, in the strict sense of the term (20).

This important freedom of configuration available to both the state and regional legislators (21), within the framework of the Constitution, empowers the former to extend or restrict the specific rights and benefits that make up the protection of health, without having to respect or safeguard an “essential content” that does not exist here. Even so, certain basic contents that the constitutional precept expressly incorporates will act as express limits that will limit its possibilities of action. Consequently, the legislator will have to establish, in any case: a set of “preventive measures”; a list or portfolio of “necessary benefits and services”; a list of “rights and duties”; and a set of actions or initiatives that promote "health education". And indeed it has done so, to the point of being able to affirm that, despite

the weak constitutional consistency of the right to health protection in Spain, as is the case in most European countries, the scope or extension acquired by this right has become, today, very considerable. Quite the opposite of what happens in many Latin American countries, where, despite having, apparently, a stronger constitutional guarantee of the right, in practice, its materialization is surrounded by limitations. Hence, in too many cases, only the control of conventionality, carried out by the Inter-American Court of Human Rights, has filled, in part, these gaps, thus giving body or content to a right of rather reduced or weakened effectiveness (22).

In any case, it must be stressed that the fact that the right to health protection does not merit the recognition of a fundamental right generates an important risk: it allows the legislator to introduce significant regressions in the determination of a scope that is thus far from being consolidated. Therefore, even if the involutive or regressive action of the legislator, often protected in situations of economic crisis, cannot entail the stripping of the minimum or basic content of the right prefigured in the constitutional norm, the fact is that the wide margin of self-determination it enjoys has led it to make "in pejus" redefinitions, sometimes very significant, of the, in excess, indeterminate contents of a benefit nature that appear to be linked to the right (23). In order to avoid these actions, it is only possible to propose a reform of the Constitution, so that the right to the protection of health is eventually incorporated into the list of those that deserve the outstanding guarantees set forth in arts. 53.1 and 53.2 EC (12). For this reason, a constitutional reform is urged. Thus, it is proposed to include it in the list of those considered fundamental in Section 1 of Chapter II, Chapter II of Title I of the Constitution, in order to provide it with an "essential content", binding for the legislator and in order to make it the beneficiary, in itself, of a direct and maximum jurisdictional guarantee, also before the Constitutional Court. To this end, the wording of the precept could remain the same as that of the current art. 43, although it would be placed in a new paragraph, the 2nd, of art. 15 of the Constitution.

Insofar as, in the Spanish case, it can be seen how, in order to alleviate the insufficient protection affecting this right, as is the case with most of those considered to be of benefit, the Statutes of the Autonomous Communities, which are materially, if not formally, comparable, given the function they perform in any case, to the Constitutions of the member states in federal systems (24), have proceeded to recognize it more precisely and specifically, in the framework of charters declaring new rights, duties and guiding principles. In any case, these additional references, associated with the right to health protection, are necessarily linked to the area of competence assumed by the respective Autonomous Community. In this way, they are positively and negatively binding on the territorial legislator, since, on the one hand, they encourage actions aimed at developing the right, in accordance with the specific content attributed to it in the corresponding statutory regulation; and, on the other, they limit its freedom of configuration, which implies a prohibition of retrogression with respect to the basic nucleus of additional benefits thus consolidated (25).

Thus, it is worth noting the detailed recognition of the right to health protection and its specific extension, especially in the Statutes of Autonomy of Andalusia(26) and Catalonia(27); These regulations are not intended to reiterate what the Constitution already provides, but to advance with respect to what is established therein, consolidating subjective legal positions, claiming specific interventions or benefits, either from the public authorities or from third parties, which thus find effective legal coverage and guarantees in the autonomous order, which reinforce what is initially and more weakly provided for in the Constitution. Hence, they are projected in directives of legal regulation

that must be the object of express and positive legislative development and efficient administrative execution.

In particular, the Andalusian Statute establishes, as an institutional guarantee of the right to health protection, the existence of a "universal public health system" (art. 22.1 EAA) (26). At the same time, it specifies the derived rights which attend, inevitably and as a minimum, patients and users of the public health system in the territory of the Autonomous Community, who are thus guaranteed access to all the benefits provided by the system, among which the rights to free choice of doctor and health center stand out; to receive information on the services and benefits offered; to be adequately informed about the processes of the disease being suffered; and, before giving consent to undergo medical treatment, to be treated with respect for the patient's personality, human dignity and privacy; to genetic counseling and predictive medicine; to the guarantee of not exceeding a maximum time limit for access to services and treatments; to have a second medical opinion; to benefit from palliative care; to confidentiality of health data, genetic characteristics and access to medical records; to receive specialized geriatric care; and to be the recipient of special and preferential programs and actions, in the event of suffering from a mental, chronic or disabling illness or belonging to a recognized risk group (arts. 22.3 and 22.4 of the Spanish Constitution). 22.3 and 22.4 EAA) (26). Thus, the law shall determine the terms, conditions and requirements for the exercise of these rights, thus guaranteed in their basic content (art. 22.4 EAA) (26,28). This undoubtedly contributes to the generalization of a more intense and complete multilevel system of protection of rights, of a social or welfare nature, which undoubtedly improves their effectiveness, advancing towards their full realization.

It is also worth highlighting the effort made to protect, in the various ordinary jurisdictional orders, health as a collective interest, sometimes considered diffuse, claimed by a sometimes vast and undifferentiated mass of subjects. Thus an active legal situation is recognized, expressive of a genuine legitimate interest, which entails, on the one hand, a right of participation of the groups involved in its configuration; and, on the other hand, given the potential harmful effect that, caused by an act or provision, may be suffered, to the detriment of those who are its particular beneficiaries, the reactional right of access of those affected, articulated individually or as a group, to the ordinary jurisdiction, although not to the constitutional jurisdiction, in order to obtain reparation of the damage caused. To this end, all the members of the affected community are given procedural legitimacy for the exercise of the action, so that they can deduce a claim common to all of them, which, if accepted, even if expressed by only one member or a part of the interested group, will benefit all the members of the group, since the effects of the judicial decision will be projected, not only on the plaintiff or plaintiffs, but on the whole community of subjects concerned (29,30).

2. A questioned ownership and content of the right

Together with that of its guarantee, an issue to which we will return later, the main problem that has arisen in Spain to date has to do with the ownership of the right. That is, it concerns the determination of who the beneficiaries of the right are. The impersonal formula used by the Constitution (12), in the first paragraph of Art. 43: "The right to health protection is recognized", together with the provision of the second paragraph, which refers to "...the rights and duties of all", leads initially to think of the indiscriminate and universal nature implied by its recognition (31). The claim of access to the exercise of the right by any person, whether or not they enjoy the status of citizen,

is thus explained by the fact that the Constitution makes no distinction when it comes to limiting or circumscribing the ownership of the right to Spaniards and not to foreigners.

This interpretation was confirmed by the creation, through Law 14/1986 General de Sanidad (32), of a public health system guaranteeing free and universal health care, while at the same time declaring, in art. 1.2, that "the right to health protection and health care is held by all Spaniards and foreign citizens who have established their residence in the national territory". However, in accordance with art. 1.3, it was determined that "foreigners not residing in Spain, as well as Spaniards outside the national territory, will be guaranteed this right in the manner established by laws and international agreements" (32), a consideration that opens up the legal possibility of including them, excluding them or restricting access to the exercise of the right. Even so, the tendency and the spirit of the legislator, culminating in Law 33/2011 (33), of October 4, 2011, General Law on Public Health, was none other than, in line with the spirit of the Constitution, international conventions and the important foundational law of the system, to universalize the right, thus refusing to consider the advantages it entails as a consideration for what has been contributed (34), but rather as another manifestation of the will to guarantee to all people, indiscriminately, the enjoyment of a right associated with a decent quality of life.

However, Royal Decree 16/2012 (35), of April 20, 2012, on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its benefits, issued under the protection of the serious economic-financial crisis that began in 2008, questioned this interpretation. Thus, it came to restrict the scope of public health care, depriving members of certain groups of access to it. As a result, it was stipulated that in order to be a beneficiary, it was necessary to have the restrictive condition of being insured or to be a Spanish national or a national of a European State with authorization to reside in Spain, who could prove that they did not exceed the income limit determined by regulation. Thus, foreigners in an irregular situation or in a temporary stay situation, not having an administrative residence permit in the country, were excluded from the system, unless they took advantage of the “special situations” described by the law, which allowed them, at least: to receive emergency health care for serious illness or accident; for pregnancy, childbirth and postpartum; and, in any case, if they were under eighteen years of age.

In acting in this way, the legislator came to favor a clear involution in the protection of people's health, reversing the gradual and progressive orientation that, from the beginning, marked, in this aspect, the development of the Constitution. It thus took away the ownership of the right and the consequent condition of beneficiaries of health benefits from certain groups of people, distinguishing where the Fundamental Rule, in principle, did not do so, on the grounds of nationality or residence[2] . In this way, serious damage or harm was caused to numerous groups, some of them particularly vulnerable, such as undocumented migrants, who were largely deprived of the right, simultaneously causing a potentially harmful effect on public health. Not in vain, by removing a sector of the population from ordinary health care, the population as a whole was placed at risk, while at the same time hospital emergency services were saturated.

Years later, Royal Decree-Law 7/2018 (36), of July 27, on universal access to the National Health System, eliminated, to a large extent, these restrictions, once again considering as holders of the right to health protection and healthcare all persons with Spanish nationality and foreigners who

[2] Even so, Article 13.1 of the Constitution (12) determines that foreigners shall enjoy in Spain the public liberties guaranteed by Title I "under the terms established by treaties and the law".

have established their residence in Spanish territory. Likewise, foreigners who do not have legal residence in Spain will also be entitled to this right, provided that they meet a series of requirements[3] . Likewise, those foreigners who are in a situation of temporary stay (i.e., for less than ninety days) will also have access to the benefits that the exercise of the right entails, provided that a prior favorable report is issued by the competent social services of the Autonomous Communities. Thus, even though progress is being made towards its universalization, the fact is that the continuation and establishment of certain administrative restrictions cast a shadow over the recovery of the original conception of the right to health protection, since they hinder its realization.

Furthermore, it should not be forgotten that the controversial STC 139/2016, of July 21, endorsed, considering it in accordance with the Constitution, the legislator's claim, duly justified, to narrow or reduce the subjective scope of the right, when the legislator deems it necessary or appropriate, by attributing to it a broad capacity of configuration with regard to the organization of public health and to provide for its procurement through the measures, benefits and services that are essential. In turn, the Constitutional Court limited itself to identifying, in a questionably restrictive manner, as the minimum content of the right to be recognized for all persons, emergency care with serious risk to health and life. But beyond that, it did not establish limits to the reversibility of the protection with respect to the scope of general health care. This interpretation ignores the fact that the risk or serious damage to the life and integrity of the person will be generated, in the medium and long term, by the restriction of access to healthcare services. Therefore, the application of a legislative policy such as the one developed between 2012 and 2018, far from contributing to the intended sustainability of the system, certainly favors the reduction of expenses in the short term, although at the cost of causing a more than likely increase in those over time (38). In any case, the result of such policies is none other than to project the lack of protection of a right, inextricably associated with the dignified quality of life of individuals, to particularly vulnerable sectors of the population, in a way that is neither proportional nor reasonable (39).

In any case, the Health Equity, Universality and Cohesion Bill (40) seeks to guarantee universal access to public health care, improving and extending the rights of its users. In this way, the still persistent restrictions that linked access to the health system to the requirement of paying Social Security contributions have been eliminated. In this way, the groups of non-nationals whose situation in Spain was not regularized and that of Spaniards living abroad and their families, who until then had been deprived of unrestricted and unconditional access to health care, will be fully incorporated into the system. The aim is to recover the spirit of the General Health Law of 1986 (32), extending the right to health protection to all. And a single, common portfolio of services is established throughout the national territory so that all those entitled to the right can benefit from it, regardless of the Autonomous Community in which they demand its provision.

Certainly, the COVID-19 pandemic has underscored the importance of guaranteeing the universal, free and homogeneous extension of the right to health protection, given the need that has become so present today to strengthen health systems to deal with situations such as the one we have experienced. It also shows how necessary supranational efforts are to coordinate the response to unforeseeable and extraordinary threats, such as the one experienced, which has required providing

[3] Such requirements are, according to the provisions of Article 3 ter of Law 16/2003 (37): a) not having the obligation to prove the mandatory coverage of the health benefit by another means; b) not being able to export the right to health coverage from their country of origin or provenance; c) not having a third party obliged to pay.

hospital care to a very significant number of people, together with the need to provide vaccines to practically the entire population. This shows how globalization has also burst into the field of the right to health protection, revealing the powerlessness of States to confront, on their own, situations that exceed their individual capacity to act.

3. Limited progress in the extraordinary jurisdictional protection of rights.

In addition to the problem of ownership, the non-consideration of the right to health protection as a fundamental right, subject to the guarantees it entails, has meant that individuals cannot resort to the extraordinary remedy of amparo to articulate any immediate or direct claim for restitution (13). However, in order to fill this gap, the right to the protection of health has been linked to others that do deserve this qualification, which allows the former to contribute decisively to the determination of the contents of the latter. However, in such cases, the right to health must be subordinated to the peculiarities of those fundamental rights, whose infringement is presumed to have occurred by application of the law (41).

Underlying this interest in maximizing its jurisdictional protection is the understanding that health, even though it does not enjoy a maximum level of protection in the Constitution, has become in our culture a right inherent to human dignity (42), an unavoidable requirement for achieving an adequate standard of living, as a “prius” or “conditio sine qua non” indispensable for the exercise of other rights. This expresses the desire that every human being should have the right to have his or her health protected, regardless of whether or not he or she enjoys the status of citizen, and regardless of his or her specific administrative situation. This entails the requirement to ensure access both to prevention and to sufficient restorative care for their physical, mental and social well-being. And to the establishment of controls by the public authorities, so that he is not endangered by any threat.

Based on this reality, that is, on the fact that we are witnessing a process, albeit imperfect or unfinished, of recognition and, above all, of full guarantee of the right to health protection, the European Constitutional Courts, among which the German and Spanish Courts stand out, have insisted on emphasizing the "connections" existing between the mandate of health protection and some indisputably fundamental rights with which it enters into relation. This highlights the expansive and radiating force that it has acquired at the same time.

Some of these connections are direct or immediate, such as those seen in relation to the right to physical integrity and the right to effective judicial protection; while others are more mediate or indirect, including those with the right to equality and the right to privacy. This does not prevent other potential links from being established. However, it is the aforementioned that have benefited, to date, mainly from the development of constitutional jurisprudence in Europe, in general, and in Spain, in particular.

4. Conclusions and reform proposal

The pandemic crisis caused by the spread of COVID-19 has focused attention on the constitutional guarantee of the right to health protection. A right whose assurance and full effectiveness are, however, far from satisfactory today, as it lacks the consideration of a fundamental right. It is not in vain that the right to health protection is configured in Spain as a right deferred to the law, that is, properly speaking, as a “mandate to legislate”, which requires the gradual actions of the public authorities, expressed in rules of competence, tending to carry out, “under the reservation of what is

possible or reasonable", the generically prefigured program determined by the constitutional clause that recognizes it. Hence, it is only from the legislative and, often, administrative regulation, that well-defined and enforceable legal claims are born before the courts, as individual subjective rights. This empowers the legislator to introduce significant setbacks in determining the scope of a right that is thus far from being consolidated. Even so, in the Spanish case, some Statutes of the Autonomous Communities have introduced, within the scope of their competencies, supplementary references that broaden the guaranteed content of the right, thus binding the legislator, both positively and negatively. In turn, the significant renewal and improvement of the ordinary jurisdictional protection of health, as a collective interest worthy of protection, is evidenced by the fact that any person or group is entitled to bring an action, thus deducing a common claim, in request for compensation for any damage suffered.

In any case, we are currently witnessing the struggle for the full extension of the right to free and universal access to public health care, and the improvement and expansion of the services from which its users benefit. The aim is to incorporate into the system the groups of foreigners whose situation in Spain has not yet been regularized, as well as Spaniards living abroad and foreigners in a temporary stay situation, in order to ensure that no one, whatever their administrative situation, is left without the necessary protection.

It should also be noted that the extraordinary jurisdictional guarantee of the right has made considerable progress, despite the fact that individuals are still unable to access the extraordinary remedy of amparo to articulate any immediate or direct claim for restitution. Thus, in order to fill this significant gap, the right to the protection of health has been linked to other rights that do deserve to be classified as fundamental, which allows the former to contribute decisively to the determination of the contents of the latter.

In any case, even admitting this progress, it is necessary to overcome the existing obstacles, given the ever-present risk of regression with respect to what has been achieved. For this reason, a constitutional reform is called for that would entail the reconfiguration of a right that is still weak. Thus, it is proposed to include it in the list of those considered fundamental in Section 1 of Chapter II, Chapter II of Title I of the Constitution, in order to provide it with an "essential content", binding for the legislator and in order to make it the beneficiary, in itself, of a direct and maximum jurisdictional guarantee, both ordinary and extraordinary before the Constitutional Court. The wording of the precept could continue to be the same as the current art. 43, although it would be placed in a new paragraph, the 2nd, of art. 15 of the Constitution. Underlying this proposal is the clear awareness that we are in the presence of a right inherent to the dignity of every human being. Hence the effort to achieve its full realization.

Conflict of interest
The author declares that there is no conflict of interest.

References

1. Hesse K. Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland. 3ª ed. Heildelberg: C.F. Müller; 1983.

2. Riedel EH. Theorie des Menschenrechtsstandards. Berlin: Duncker & Humblot; 1986.

3. Luño AEP. Las generaciones de derechos humanos. Revista del Centro de Estudios Constitucionales [Internet]. 1991 [Cited on Dec. 12, 2023];(10):203-217. Available from: https://dialnet.unirioja.es/servlet/articulo?codigo=1050933.

4. García-Pelayo M. Las transformaciones del Estado contemporáneo. Madrid: Alianza; 1977. 189 p.

5. Böckenförde EW. Entstehung und Wandel des Staatsrechtsbegriff. In: Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschigte. Frankfurt am Main: Suhrkamp; 1991. p. 143-169.

6. Häberle P. Verfassungsentwicklungen in Osteuropa – aus der sicht der Rechtsphilosophie und der Verfassungslehre. In: Europäische Rechtskultur. Frankfurt am Main: Suhrkamp; 1997. p. 75-113.

7. Organización de las Naciones Unidas. Declaración Universal de los Derechos Humanos. 1948 [Cited on Dec. 12, 2023]. Available from: Available from: https://www.un.org/es/about-us/universal-declaration-of-human-rights.

8. Organización de las Naciones Unidas. Pacto Internacional de Derechos Económicos, Sociales y Culturales. 1966 [Cited on Dec. 12, 2023]. Available from: https://www.ohchr.org/es/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

9. Council of Europe. Carta Social Europea. 1996 [Cited on Dec. 12, 2023]. Available from: https://rm.coe.int/168047e013.

10. Parlamento Euopeo. Carta de los Derechos Fundamentales de la Unión Europea. 2000 1996 [Cited on Dec. 12, 2023]. Available from: https://www.europarl.europa.eu/charter/pdf/text_es.pdf.

11. Escudero LM. Artículo 35: protección de la salud. In: Martín AM, director. Carta de los Derechos Fundamentales de la Unión Europea. Comentario artículo por artículo. Madrid: Fundación BBVA; 2008. p. 594-606.

12. España. Constitución (1978). Constitución española [Internet]. [S. l: Junta de Castilla y León];1978 [Cited on Dec. 12, 2023]. Available from: https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/CEportugu%C3%A9s.pdf.

13. Campo JJ. Derechos fundamentales: concepto y garantías. Madrid: Trotta; 1999. 136 p.

14. Sarlet IW. A eficácia dos Direitos Fundamentais. 10ª ed. Porto Alegre: Livraria do Advogado; 2009. 493 p.

15. Martínez FR. Protección de la salud, atención primaria y derechos fundamentales. Teoría y Realidad Constitucional [Internet]. 2018 [Cited on Dec. 12, 2023];(41):881-296. Available from: https://dialnet.unirioja.es/servlet/articulo?codigo=6438512.

16. Böckenförde EW. Die sozialen Grundrechte im Verfassungsgefüge. In: Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht. Frankfurt am Main: Suhrkamp; 1992. p. 146-158.

17. Häberle P. Grundrechte im Leistungsstaat. In: Die Verfassung des Pluralismus: Studien zur Verfassungstheorie der offenen Gesellshaft. Regensburg: Athenäum; 1980. p. 163-186.

18. Alexy R. Teoria de Los Derechos Fundamentales. Madrid: Centro de Estudios Constitucionales; 1993. 601 p.

19. Hesse K. Abschnitt. Bestand und Bedeutung. In: Benda E, Maihofer W, Vogel HJ, Hesse K, Heyde W, editores. Handbuch des Verfassungsrechts der Bundesrepublik Deutschland. Madrid: Marcial Pons; 1996. p. 83-124.

20. Porras Ramírez JM. Caracterización y garantía de los derechos de prestación en el Estado constitucional. In: Callejón FB, coordinador. Derecho Constitucional y Cultura. Estudios en homenaje a Peter Häberle. Madrid: Tecnos; 2004. p. 659-674.

21. Mendazona EC. Artículo 149.116º. In: Rodríguez-Piñero M, Ferrer B, Baamonde MEC, directores. Comentarios a la Constitución Española. XL aniversario. Tomo II. Madrid: Fundación Wolters Kluwer; 2018. p. 1355-1367.

22. Ferrer Mac-Gregor E. La exigibilidad directa del derecho a la salud y la obligación de progresividad (a propósito del caso Cuscul Pivaral y otros vs. Guatemala). Bol. Mex. Der. Comp. [Internet]. 2019 [Cited on Dec. 12, 2023]; 52(154):425-455. Available from http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0041-86332019000100425&lng=es&nrm=iso doi: 10.22201/iij.24484873e.2019.154.14149.

23. Müller JP. Soziale Grundrechte in der Verfassung? Zeitschrift für Schweizerisches Recht [Internet]. 1973 Cited on Dec. 12, 2023];92:687-964. Available from: https://www.e-periodica.ch/digbib/view?pid=zsr-001%3A1973%3A92#5.

24. Watts RL. Sistemas Federales Comparados. Madrid: Marcial Pons; 2006. 265 p.

25. Villar GC. Derechos, deberes y principios rectores. In: Callejón BF, coordinador. El nuevo Estatuto de Andalucía. Madrid: Tecnos; 2007. p. 29-49.

26. Espãna. Ley Orgánica 2 de 19 de marzo de 2007. Estatuto de Autonomía para Andalucía. [citado em 12 dic. 2023]. Disponible en: https://www.boe.es/buscar/act.php?id=BOE-A-2007-5825.

27. Espãna. Ley Orgánica 6 de 19 de julio de 2006. Estatuto de Autonomía de Cataluña. [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/buscar/act.php?id=BOE-A-2006-13087.

28. Cuenca NMG. Derechos, principios y objetivos relacionados con el derecho a la salud. In: Callejón FB, Álvarez LIO, Villar GC, Martos JAM, coordinadores. Reformas estatutarias y declaraciones de derechos. Sevilla: Instituto Andaluz de Administración Pública; 2008. p. 605-621.

29. Cappelletti M. Access to justice and the Welfare State. Bruxelles: Bruylant; 1981.

30. Cabiedes PG. La tutela jurisdiccional de los intereses supraindividuales: colectivos y difusos. Pamplona, Aranzadi; 1999.

31. Benito JEC. Una reflexión sobre el derecho a la asistencia sanitaria como derecho social y universal con financiación pública. Revista de Derecho UNED [Internet]. 2016 [Cited on Dec. 12, 2023];(18):191-224. Available from: https://dialnet.unirioja.es/servlet/articulo?codigo=5572203.

32. España. Ley 14, de 25 de abril de 1986, General de Sanidad. Madrid, 29 abr. 1986 [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/eli/es/l/1986/04/25/14/con.

33. España. Ley 33, de 4 de octubre de 2011, General de Salud Pública. Madrid, 5 oct. 2011 [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/eli/es/l/2011/10/04/33/con.

34. Rincón LED. El derecho a la asistencia sanitaria de los extranjeros: limitaciones y problemas competenciales [Monografía en internet]. Valencia, Espanã: Tirant lo Blanch; 2019 [Cited on Dec. 12, 2023]. Available from: https://dialnet.unirioja.es/servlet/libro?codigo=739691.

35. España. Real Decreto-ley 16, de 20 de abril de 2012, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones. Madrid, 24 abr. 2012 [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/eli/es/rdl/2012/04/20/16/con.

36. España. Real Decreto-Ley 7, de 27 de julio de 2018, sobre el acceso universal al Sistema Nacional de Salud. Madrid, 30 jul. 2018 [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/eli/es/rdl/2018/07/27/7.

37. España. Ley 16, de 28 de mayo de 2003, de cohesión y calidad del Sistema Nacional de Salud. Madrid, 29 may. 2003 [Cited on Dec. 12, 2023]. Available from: https://www.boe.es/eli/es/l/2003/05/28/16.

38. Pérez AB. El derecho a la salud de los migrantes. In: Porras Ramírez JM, director, Torre MDR, coordinadora. La inclusión de los migrantes en la Unión Europea y España. Estudio de sus derechos. Madrid: Thomson Reuters Aranzadi; 2021. p. 411-442.

39. Torre MDR. La asistencia sanitaria a inmigrantes irregulares y a solicitantes de protección: ¿un derecho universal a la salud? In: Häberle P, Callejón FB, Sarlet IW, Strappazon CL, Calahorro AA, coordinadores. Derechos fundamentales, desarrollo y crisis del constitucionalismo multinivel: libro homenaje a Jörg Luther. Pamplona: Thomson Reuters Aranzadi; 2020. p. 427-443.

40. Anteproyecto de Ley de Equidad, Universalidad y Cohesión Sanitarias, de 15 de noviembre de 2021. [Cited on Dec. 12, 2023]. Available from: https://www.sanidad.gob.es/normativa/audiencia/docs/DG_67_21.pdf.

41. Díaz JRC. Estado social y derechos de prestación. Madrid: Centro de Estudios Políticos Constitucionales; 1989. 294 p.

42. Könemann B. Der verfassungsunmittelbare Anspruch auf das Existenzminimum: Zum Einfluss von Menschenwürde und Sozialstaatsprinzip auf die Sozialhilfe - Softcover. Hamburg: Verlag Dr. Kovac; 2005.

How to cite

Ramírez JMP. The weak constitutional guarantee of the right to health protection in Spain: a reform proposal. Cadernos Ibero-Americanos de Direito Sanitário. 2024 jan./mar.;13(1):11-22
https://doi.org/10.17566/ciads.v13i1.1225