

The right to health care for migrants in Spain from a multilevel perspective

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ABSTRACT: This article analyses the right to health care in Spain from a multilevel perspective. The right to health is guaranteed by the Spanish Constitution, but it has not been interpreted by the Constitutional Court that there is a constitutional obligation to provide free health care to everyone in all cases, which, in the past, led to a situation in which the right to free health care was eliminated, with some exceptions, for some migrants. Spain also has international obligations regarding the right to health, derived from international treaties. The right to free health care is an essential right for the protection of the right to physical integrity and to life and health is a basic need for the lives of peoples without which it is difficult to live and exercise other rights.

KEYWORDS: Right to health; multilevel constitutionalism; Constitutional Law; social rights; migrants

SUMMARY: 1. Introduction – 2. The right to health at the international level – 3. The protection of health in EU – 4. The right to health in the Spanish Constitution – 5. Conclusions.

1. Introduction

When analyzing the right to health of migrants in Spain, it is necessary to do so from a multilevel perspective, focusing not only on the regulation of this right at the State level, but also on the obligations arising from international treaties and the European Union.

The right to health implies not only the right to health care, since health protection is also related to other aspects. However, these aspects will not be addressed in this article, which will focus on the right to health in its sense of right to health care, in the case of migrants.

Although the right to health care is found in the Charter of Fundamental Rights of the European Union, this right is subject to the conditions established by national legislation and practices.¹ In the field of health, the European Union can only coordinate, support, or complement the action of the Member States, except with regard to “common safety concerns in public health matters, for the aspects defined in this Treaty”,² a matter in which competences are shared. As a consequence of the COVID-19

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¹ Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.

² TFEU, art. 4. 2. k.

pandemic, the European Commission has proposed a European Health Union. The Communication by the Commission is accompanied by the proposal, among others, to update the Decision on serious cross-border health threats.³

In addition to the need to strengthen coordination in matters of health emergencies, at Union level the right of everyone to access affordable, preventive and curative healthcare of good quality has been included in the European Pillar of Social Rights.⁴

In the Spanish Constitution, the right to health is found in article 43, which recognizes the right to health, it establishes the obligation of public authorities to protect public health through preventive measures and the necessary benefits and services, and it provides that the law will establish the rights and duties of everyone in this regard.⁵ This right is not considered a fundamental right, due to its location in Chapter III of Title I of the Constitution, which means that health care can be demanded as a right only according to what is established by law. However, its undoubted relationship with other rights that are considered fundamental, as is the case with most social rights, implies the need for this right to be protected for everyone. Rights such as the right to life and physical integrity are directly affected by lack of health care and, indirectly, other rights are affected as well, since poor health has an impact on all areas of a person's life. Thus, although some authors understand that from a formal point of view the right to health is not a fundamental right, they do consider that "in certain cases, due to its complex structure and its relationship with other fundamental rights such as the right to life and physical integrity, it can take on the character of a materially fundamental right with a minimum nuclear content resistant to the actions of the legislative and executive powers and susceptible to judicial control".⁶ On the other hand, it has also been understood that "the right to health presents different constitutional features in that its protection is directly related to the maintenance of the psychophysical state of the citizen and, ultimately, his life. From this point of view, the State's obligation to protect this right is much more intense than in other guiding principles".⁷

³ Communication from the Commission to the European Parliament, the Council, *The European Economic and Social Committee and the Committee of the Regions. Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats*, 2020.

⁴ European Pillar of Social Rights, 16.

⁵ 1. The right to health protection is recognised. 2. It is incumbent upon the public authorities to organise and safeguard public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all concerned in this respect. 3. The public authorities shall promote health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time.

Agencia Estatal Boletín Oficial del Estado, *The Spanish Constitution*, available in: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

⁶ L.E. DELGADO DEL RINCÓN, *Algunas consideraciones sobre el Derecho a la protección de la salud y el bien jurídico de la salud colectiva en tiempos de pandemia*, in P. BIGLINO CAMPOS; F. DURÁN ALBA, *Los Efectos Horizontales de la COVID sobre el sistema constitucional*, Colección Obras colectivas, Zaragoza, 5, citing L.E. DELGADO DEL RINCÓN, *El derecho a la asistencia sanitaria de los extranjeros: limitaciones y problemas competenciales*, Valencia, 2019, 133-134; F. REY MARTÍNEZ, *Protección de la salud, atención primaria y derechos fundamentales*, in *Teoría y Realidad Constitucional*, 41, 2018, 288-291 and J.J. SOLOZÁBAL ECHAVARRÍA, *Una revisión de la teoría de los derechos fundamentales*, in *Revista Jurídica de la Universidad Autónoma de Madrid*, 4, 2001, 112.

⁷ F. M. PINTO PALACIOS, *Consideraciones éticas y jurídicas acerca de la exclusión de la población inmigrante del derecho a la protección de la salud*, in *Dilemata*, año 7, 19, 2015, 103-133, 119-120. From this perspective, it can be stated, following Del Rey Guanter, that it is a subjectivated principle, cf. S. DEL REY GUANTER, *El derecho a la*

In Spain, a public health system was established in 1986 with the General Health Act 14/1986, although the implementation of free health care was gradual.⁸ However, the Act guarantees the right to health care for Spanish and foreign residents and not for non-resident foreigners, for whom the Act refers to law and international conventions.⁹

Although currently the right to health care is guaranteed for all Spanish and foreign people in general,¹⁰ this right has been unprotected in previous years. After a legislative reform carried out in 2012, most of publicly funded health care was limited to part of the migrants, only those who had a residence permit, a situation that remained until 2018.

On the other hand, the obligations of Spain derived from international treaties cannot be ignored. In this sense, the International Covenant on Economic, Social and Cultural Rights stands out, which recognizes the right to health for everyone and establishes the obligation to adopt measures to progressively achieve the effectiveness of the rights recognized by the Covenant.

2. The right to health at the international level

The right to health is protected in some international treaties to which Spain is a party. In the International Covenant on Economic, Social and Cultural Rights this right is found in article 12, which recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The right is formulated as a right of everyone, regardless of their origin or situation. This right is realised through some measures of which we can highlight, in relation to health care, those necessary for creating “conditions which would assure to all medical service and medical attention in the event of sickness”. Spain is bound by the obligations of this Covenant, having ratified it in 1977. Likewise, Spain has accepted the procedure for communications to the Committee on Economic, Social and Cultural Rights, contained in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, although the result of a communication to the Committee, which may be submitted by individuals or groups of individuals under the jurisdiction of a State party,¹¹ to the Committee, is only recommendations by the Committee.¹²

In analyzing the obligations derived from this Covenant, we must take into account article 2, which establishes that each State party undertakes to take steps “to the maximum of its available resources,

protección de la salud: notas sobre su entramado constitucional, in Derechos y libertades. Revista del Instituto Bartolomé de las Casas, 6, 1998, 161-168.

⁸ The preamble states that the application of free healthcare benefits will be progressive.

⁹ *General Health Act 14/1986*, article 1.

¹⁰ Act 16/2003, of May 28, of quality and cohesion of the National Health System.

¹¹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, art. 2.

¹² *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, art. 9:

After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Therefore, although the State does not have the obligation to ensure medical assistance and services to everyone immediately, it does have the obligation to adopt measures to achieve this right. Therefore, it follows that the State should not adopt legislative measures that, instead of pursuing the effectiveness of the right for everyone, restrict this right to specific groups of people. The Committee on Economic, Social and Cultural Rights has affirmed that the Covenant imposes "an obligation to move as expeditiously and effectively as possible towards that goal", also indicating that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".¹³ There is also a minimum, non-progressive obligation to ensure the satisfaction of at least an essential level of the rights, so "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant".¹⁴ From which it is understood that the denial of essential primary health care to migrants would not be in accordance with the International Covenant.

More specifically about the right contained in art. 12 of the Covenant, General Comment 14¹⁵ includes economic accessibility or affordability among the essential elements of this right, so everyone must be able to afford health services,¹⁶ although the precise application of these elements "will depend on the conditions prevailing in a particular State party".¹⁷ Therefore, although free health care for everyone is not mandatory, according to the Covenant and its interpretation, health care does have to be affordable enough so that everyone can access it, from which it can be understood that it should be free for people without means. The Comment emphasizes equal access and that "States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities".¹⁸ Regarding discrimination, the Committee indicated at the time, in relation to Spain, that it should take "the necessary steps to ensure that irregular migrants have access to all necessary health-care services, without discrimination, in accordance with articles 2 and 12 of the Covenant".¹⁹

Therefore, as Sobrino Guijarro states, "the Committee establishes a comprehensive content of the right to health that, in addition to explicitly including the group of illegal immigrants, incorporates in

¹³ Committee on Economic, Social and Cultural Rights, *General comment No. 3: The nature of States parties' obligations* (art. 2, para. 1, of the Covenant), 1990, 9.

¹⁴ *Ibid.*, 10.

¹⁵ *General Comment No. 14: The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000.

¹⁶ *General Comment No. 14: The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, 12.b.iii.

¹⁷ *Ibid.*, 12.

¹⁸ *Ibid.*, 19.

¹⁹ Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Spain*, 2018, 42.

its minimum content a duty of health care manifestly more complete than mere emergency assistance”.²⁰

Although the fulfillment of this duty is progressive, within the scope of this right there are two immediate obligations: to guarantee that the right is exercised without discrimination and to take deliberate and concrete steps towards the full realization of the right.²¹

In summary, the obligations of the International Covenant for the States that have ratified it, including Spain, regarding the right to health, imply that there must be a tendency, albeit progressive, towards health care for everyone, regardless of nationality, in a way that is affordable enough so that everyone can access it, and there is also the obligation to guarantee an essential minimum.

On the other hand, Spain has also signed the revised European Social Charter, and has recently ratified it, as well as the Additional Protocol to the European Social Charter, which contains the system of collective complaints.²² Part II of the revised Charter contains the right to the protection of health in Article 11, establishing only that the Parties must adopt appropriate measures to eliminate, as far as possible, the causes of ill-health, to provide advisory facilities in order to promote health and to prevent as far as possible epidemic and endemic diseases and accidents. Part I of the revised Charter establishes in point 11 that “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”. Furthermore, Article 13 of Part II²³ contains the right to social and medical assistance, and it establishes that the Parties must ensure that “any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition”.

Regarding whether the Charter applies equally to everyone, the appendix to the Charter indicates that “without prejudice to [...] Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19”. Therefore, the protection of the Charter regarding the protection of health, article 11, and the right to medical care, article 13, would only extend in principle to some migrants, specifically, those who have legal residence or work within the State Party and who are nationals of another State Party, there being also specific provisions for refugees and stateless persons.²⁴ Article 13 of the revised Charter (the right to social and medical

²⁰ I. SOBRINO GUIJARRO, *Inmigrantes irregulares y el derecho a la protección de la salud: análisis de la reforma sanitaria en España*, in *Revista jurídica de los Derechos Sociales*, 2013, 139. Own translation.

²¹ *General Comment No. 14: The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, 30.

²² *European Social Charter*, ratifications: <https://www.coe.int/en/web/european-social-charter/signatures-ratifications>.

²³ Also in Part I, art. 13: Anyone without adequate resources has the right to social and medical assistance.

²⁴ *European Social Charter* (revised). Appendix. Scope of the Revised European Social Charter in terms of persons protected: [...] 2. Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.

assistance) establishes that the Parties must apply the provisions contained in this article “on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953”.

Despite this, in interpreting the appendix, the Committee has generally concluded on this restriction that it “should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity”.²⁵ However, the Committee also states that the application of the Charter to unlawfully present migrants is exceptional and would be justified “solely in the event that excluding unlawfully present foreigners from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights (such as the right to life, to the preservation of human dignity, to psychological and physical integrity and to health) and would consequently place the foreigners in question in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners”.²⁶ On the other hand, the Committee has also indicated that the States Parties “have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention on Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-national persons. In doing so, the Parties have undertaken these obligations”. Although the Committee has stated that “these obligations do not in principle fall within the ambit of its supervisory functions”.²⁷

This interpretation, in relation to the States Party to the Charter having ratified human rights treaties, has been used in a specific case to apply article 11 to foreign minors unlawfully present or resident in a country.²⁸ It depends, however, on the interpretation made, since the Committee only notes that this applies in “certain cases and under certain circumstances”.

3. Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons.

²⁵European Committee of Social Rights, *Defence for Children International (DCI) v. Belgium*, Decision on the merits of the Complaint 69/2011, Assessment of the Committee, 28.

²⁶ *Ibid.*, 35: “However, although the restriction of personal scope contained in the Appendix does not prevent the application of the Charter’s provisions to unlawfully present foreign migrants (including accompanied or unaccompanied minors) in certain cases and under certain circumstances, the Committee wishes to underline that an application of this kind is entirely exceptional. It would in particular be justified solely in the event that excluding unlawfully present foreigners from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights (such as the right to life, to the preservation of human dignity, to psychological and physical integrity and to health) and would consequently place the foreigners in question in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners”.

²⁷ European Committee of Social Rights, *Conclusions 2004, General introduction*, 5 and 6.

²⁸ European Committee of Social Rights, *Defence for Children International (DCI) v. Belgium*, Decision on the merits of the Complaint 69/2011, Assessment of the Committee, 101: “For this reason, the Committee has

However, the European Committee of Social Rights considered, with respect to article 11 and the exclusion in Spain of foreigners in an irregular situation from access to health care in general that “this denial of access to health care for adult foreigners (aged over 18 years) present in the country irregularly is contrary to Article 11 of the Charter”.²⁹

Regarding the general obligations contained in Article 11, it has stated that it requires States “to take appropriate measures to remove the causes of ill-health and that, as interpreted by the Committee, this means, inter alia, that States must ensure that all individuals have the right of access to health care and that the health system must be accessible to the entire population”.³⁰

It is concluded that the interpretation that has been made of this article may depend on the ratification that the States have made of other Treaties that contain rights identical or inseparable from those of the Charter and that, although it depends on each specific case, it has been appreciated in some cases that foreigners should not be denied health care regardless of their situation. In terms of content, the right to health in the Charter has been interpreted by the Committee as a right to have access to accessible health care.

Regarding the right contained in article 13, the right to social and medical assistance, this is a different right from that contained in article 11, and it has been interpreted that medical assistance is guaranteed by article 13 in the case of an exceptional situation that endangers the life of any person at risk of social exclusion.³¹ In this sense, it must be taken into account that article 13 includes the right to social and medical assistance for people who do not have sufficient resources.³²

Likewise, the Committee holds “that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter”.³³ The application of article 13 of the Charter beyond the restrictions set out in

already applied its teleological interpretation of the personal scope of the Charter in respect of Article 11§ 1, noting that the States Parties ‘have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.’ (Conclusions 2004, Statement of interpretation on Article 11”.

²⁹ European Committee of Social Rights, *Conclusions XX-2, Spain, Articles 3, 11, 12, 13 and 14 of the 1961 Charter*, November 2014, 13. Available in: https://www.idhc.org/arxiu/noticies/1418903800-SpainXX2_en.pdf.

³⁰ *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, decision on the merits, 2012, 100: “With specific regard to Article 11, the Committee points out that paragraph 1 requires States Parties to take appropriate measures to remove the causes of ill-health and that, as interpreted by the Committee, this means, inter alia, that States must ensure that all individuals have the right of access to health care and that the health system must be accessible to the entire population”.

³¹ M. S. ANDRZEJ, M. WUJCZYK, *The European Social Charter as a basis for defining social rights for EU citizens*, in F. PENNING, M. SEELEIB-KAISER (Ed.), *EU Citizenship and Social Rights: Entitlement and Impediments to Accessing Welfare*, Cheltenham and Northampton, 2018, 13.

³² Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: 1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.

³³ European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Decision on the merits of the Complaint 14/2003, 32.

the Appendix can take place “only insofar as any shortcomings in the implementation of the obligations set out in the article are likely to impair the most fundamental rights of the persons in question such as the rights to life, psychological and physical integrity and preservation of human dignity”.³⁴ It has been interpreted as a right that cannot be made dependant, by States, on periods of residence or legal status.³⁵

In accordance with the protection of article 13, the right that foreigners in an irregular situation have is a right to emergency medical assistance.³⁶ Therefore, migrants have the right to medical assistance in case of emergency in any case.

Finally, according to Part III of the Charter, States only have to consider themselves bound by a certain number of articles in Part II, among which Article 13 can be found. However, Spain has accepted all the articles of the Charter, therefore, the obligations of articles 11 and 13 apply in it.

3. Protection of health in the European Union

As indicated above, the European Union can only coordinate, support, or complement the action of the Member States, so it cannot decide on the scope of the health protection of migrants, although competences are shared in “common safety concerns in public health matters, for the aspects defined” in the TFEU.³⁷ In the area of public health the Union “shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health”.³⁸ In any case, the right established in the CFREU is a right of “everyone”.

On the other hand, there are obligations in relation to migrants with European citizenship. In this sense, people with European citizenship have a right to health care in any country of the Union in which they reside, under the same conditions as nationals of that country, although this does not imply that the assistance is free since the expenses will be in charge of the health insurance that they have contracted.³⁹ Therefore, in the European Union it is necessary to differentiate the rights of European migrants from those who come from non-EU countries.

In relation to the protection of health, some policies at the level of the Union can be highlighted. The influence that lack of health has on all areas of life has been noticed, as well as how it can influence

³⁴ *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, decision on the merits, 23rd October 2012, 121: “The Committee would also point out that, in the case of exceptional application of the provisions of the Charter, extending beyond the restriction set out in paragraph 1 of the Appendix, Article 13 can apply to the persons concerned by this application (foreign minors present unlawfully) only insofar as any shortcomings in the implementation of the obligations set out in the article are likely to impair the most fundamental rights of the persons in question such as the rights to life, psychological and physical integrity and preservation of human dignity”.

³⁵ M. S. ANDRZEJ, M. WUJCZYK, *op. cit.*, p. 15.

³⁶ Secretariat of the Committee, *Digest of the case law of the European Committee of Social Rights*, citing several cases, 149.

³⁷ TFEU, art. 4. 2. k.

³⁸ TFEU, art. 168.

³⁹ L. E. DELGADO DEL RINCÓN, *cit.*, *El derecho a la asistencia sanitaria de los extranjeros: limitaciones y problemas competenciales*, 42.

the integration of people from third countries. In this sense, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the Action Plan for the integration of third country nationals, highlights that “ill health and lack of access to health services can be a fundamental and ongoing obstacle to integration, with an impact on virtually all areas of life” and that “during the first reception phase, ensuring access to healthcare is essential”. It is established that the Commission “will promote the use of EU funds for [...] health and social infrastructures for third country nationals”.⁴⁰

On the other hand, Regulation 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union’s action in the field of health (‘EU4Health Programme’) for the period 2021-2027 contains relevant provisions regarding the protection of the health of migrants since one of its objectives is to achieve universal health coverage⁴¹ and it plans funding for actions that implement the objectives listed in the Regulation.⁴² One of the eligible actions that is listed is “supporting the strengthening of primary care and reinforcing the integration of care, with a view to providing universal health coverage and equal access to good quality healthcare”.⁴³

Also, the Communication from the Commission on effective, accessible and resilient health systems, from 2014, indicates that “health systems must be accessible” and must not exclude parts of the population.⁴⁴

Therefore, in conclusion, although the European Union only has support competences regarding health, some Union institutions have supported the extension of the right to health, and to health care, to everyone. Likewise, the Charter of Fundamental Rights of the European Union includes this right for everyone.

4. The right to healthcare in the Spanish Constitution

As it has been indicated, the right to health is found in article 43 of the Spanish Constitution, among the guiding principles of economic and social policy, and it is not considered a fundamental right. Although the formulation of the right to health in the Spanish Constitution does not refer to who the holders of this right are, it has sometimes been limited for some migrants.

Article 13 of the Constitution contains the general provision on the rights of foreign people, indicating that they will be holders of the rights in the terms established by the treaties and the law. However, the Constitutional Court has considered that there are rights that belong to the person as such and not as a citizen and that therefore do not depend on their legal regulation, so that everyone is entitled to

⁴⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan for the integration of third country nationals, 2016, 4.1.4.*

⁴¹ *Regulation 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union’s action in the field of health (‘EU4Health Programme’) for the period 2021-2027, art. 4. G: “enhancing access to quality, patient-centred, outcome-based healthcare and related care services, with the aim of achieving universal health coverage”.*

⁴² *Ibid.*, art. 12.

⁴³ *Ibid.*, Annex I, 7.b.

⁴⁴ *Communication from the Commission on effective, accessible and resilient health systems, 2014, 3.*

them. These are the rights essential to guarantee human dignity, which will depend on the interpretation made in each case. In the case of other rights that are not considered as essential to guarantee human dignity, it will depend on what the treaties and laws establish, while in the case of others the Constitution clearly establishes that only Spanish people are holders of them.⁴⁵

Therefore, those rights essential to guarantee human dignity are rights of everyone, of which the Court mentions the right to life and physical and moral integrity, among others.⁴⁶ It depends on interpretation whether a right is protected for everyone or only for nationals.

There is no single notion of human dignity, defined by the Constitutional Court as “a spiritual and moral value inherent to the person, which is singularly manifested in conscious and responsible self-determination of one’s own life and which is accompanied by a claim for the respect of others”⁴⁷. Vidal Fueyo highlights that it is risky to classify rights according to their connection with the dignity of the person as it is a fragile concept “that can rest on very respectable arguments from an ethical perspective, but not very consistent ones from a strictly legal perspective, and of course, it is not the subjective perceptions of what the ‘dignity of the person’ is that can guarantee an area of legal certainty and exclude the arbitrariness of the interpreter”.⁴⁸ It is a concept with a large degree of imprecision. The definition made by the Constitutional Court depends on what is understood by “conscious and responsible self-determination of one’s own life” and what is more difficult to specify is what rights are essential for that self-determination.

The Constitutional Court, in judgment 236/2007 of November 7, summarizes its jurisprudence on those rights that belong to the person as such, inherent to the dignity of the human person: the right to life, to physical and moral integrity, to privacy, to freedom of ideology, to effective judicial protection, to liberty and security and to not to be discriminated against, indicating that it is not a closed list and that “the degree of association with human dignity of a specific right will be a decisive factor”.⁴⁹ In this sense, the Court has stated that “application of the criterion established by this Court for determining whether or not a specific right belongs to this group presents problems in that all fundamental rights, by their very nature, are associated with human dignity”, reiterating that the dignity of the person means the obligation to recognize everyone the rights that are essential to guarantee it, which is why linking a right with dignity is insufficient. On the contrary, “the degree of connection of a specific right with dignity should be determined on the basis of its content and nature, which will in turn permit specification of the extent to which it is essential for the dignity of a person perceived as a subject of law”.⁵⁰ The Court has established that in order to identify these rights, essential to ensure human dignity, and their content, attention must be paid to the essential content of the rights:

⁴⁵ Judgment of the Constitutional Court 107/1984, of November 23, Conclusions of law, 3 and 4.

⁴⁶ *Ibid.*, Conclusions of law, 3.

⁴⁷ Judgment of the Constitutional Court 53/1985, of April 11, Conclusions of law, 8. Unofficial translation, available in: <https://www.tribunalconstitucional.es/ResolucionesTraducidas/53-1985,%20of%20April%2011.pdf>.

⁴⁸ M. C. VIDAL FUEYO, *La jurisprudencia del tribunal constitucional en materia de derechos fundamentales de los extranjeros a la luz de la STC 236/2007*, in *Revista Española de Derecho Constitucional*, 85, January-April, 2009, 353-379, 359.

⁴⁹ Judgment of the Constitutional Court 236/2007, of November 7, Conclusions of Law, 3. Unofficial translation, available in: <https://www.tribunalconstitucional.es/ResolucionesTraducidas/236-2007,%20of%20November%207.pdf>.

⁵⁰ *Ibid.*, Conclusions of law, 3. Unofficial translation.

“we should proceed in each case on the basis of the abstract type of right and the interests which it basically protects, (that is, its essential content as we defined in SJCC 11/1981, of 8 April, 101/1991, of 13 May and ATC 334/1991, of 29 de October) in order to decide if and to what extent they are inherent in the dignity of the human person perceived as a subject of law, namely as a free and responsible member of a legal community meriting that title and not as a mere object of the exercise of public powers”.⁵¹

It is about considering the interests that the right protects to determine the connection that it has with dignity.

Finally, the Court has also understood that, to determine what these rights are, “the Universal Declaration of Human Rights and the other international treaties and agreements on the same matters ratified by Spain” are of special relevance.⁵²

On the other hand, the Constitutional Court has considered that it may be constitutional to make a differentiation in the law between foreign people according to their residence status, as long as this differentiation does not violate constitutional precepts or principles.⁵³

Therefore, it is concluded, with respect to the rights of foreign persons, that they are holders in any case of the rights that are considered essential to guarantee human dignity, while other rights may be limited to a greater extent to foreigners, although the content defined for the right by the Constitution or the International Treaties signed by Spain cannot be affected.⁵⁴ Differences may also be established between foreign people according to their administrative situation, in the event that this situation is a requirement that prevents them from “exercising specific rights or contents thereof which, by their very nature, are incompatible with an irregular situation”. Furthermore, “the conditions for exercising these rights and freedoms of foreigners in Spain” that the legislator establishes “shall only be constitutionally valid if, respecting their essential content (art. 53.1 SC), they are designed to preserve other rights, property or interests which are constitutionally protected and which are suitably proportionate to the intended purpose”.⁵⁵ When a right is directly recognized for foreigners in the Constitution, the legislator cannot freely configure its content and, although it is possible to establish conditions for the exercise of the right by foreigners, they must respect constitutional provisions.⁵⁶

The possibility of establishing differences between foreign people according to their administrative situation would be impossible regarding those rights that belong to the person as such and this has been affirmed by the Court by indicating that one cannot deny its exercise to foreigners, irrespective of their situation.⁵⁷ It is therefore possible to establish distinctions between foreign people regarding those rights that are considered of legal configuration. The Court has specified that the legislator may “require foreigners to obtain authorisation for their stay or residence as a requisite for the exercise of

⁵¹ *Ibid.*, quoting judgment of the Constitutional Court 91/2000, of March 30. Unofficial translation.

⁵² Judgment of the Constitutional Court 91/2000, of March 30, Conclusions of law, 7. Own translation.

⁵³ Judgment of the Constitutional Court 236/2007, of November 7, Conclusions of laws, 2: “Although the Constitution does not distinguish between foreigners based on the regularity of their situation or residence in Spain, it may however be constitutional for the law to address this difference in order to configure the legal status of foreigners, provided that in doing so no constitutional precepts or rights are violated”. Unofficial translation.

⁵⁴ *Ibid.*, Conclusions of law, 4, Judgment of the Constitutional Court 242/1994, of July 20, Conclusions of law, 4.

⁵⁵ *Ibid.* Unofficial translation.

⁵⁶ Judgment of the Constitutional Court 115/1987, of July 7, Conclusions of law, 3.

⁵⁷ Judgment of the Constitutional Court 236/2007, of November 7, Conclusions of law, 3.

constitutional rights which, by their very nature, make it impossible to fulfil the requirements that the same law has established for entering and remaining in Spanish territory”,⁵⁸ which cannot be specifically deduced from the right to health care as there is no need, in itself, of authorization of residence in order to be able to access health care.⁵⁹

Fundamental rights, those contained in Section 1 of Chapter II of Title I of the Constitution, except for explicit exceptions, are rights of everyone.⁶⁰ There is less clarity regarding other rights not considered fundamental rights, such as the right to health. These rights, however, are closely related to fundamental rights. Specifically, the right to health, as it has already been highlighted, cannot be completely separated from the right to life and physical integrity, and, indirectly, it is also closely related to other rights, since health is a basic need for the lives of people, without which it is difficult to live and exercise other rights. As Solozábal Echavarría has affirmed, social rights are “true fundamental rights, which derives from the indispensability of the faculties in which such rights consist, at least in the case of large sectors of the population, in order to lead a dignified life or be able to fully develop as individuals”.⁶¹

Specifically, the Constitutional Court ruled on the right to health in judgment 95/2000, in which it does not understand the right to health as one of the rights that belong to the person as such, essential for the guarantee of human dignity, but it considers it inserted in the group of rights that people may be entitled to in accordance with what is established in Treaties and laws.⁶² Therefore, with this interpretation, although it may be debatable, it is only possible to connect the right to health, and consequently to health care benefits, with human dignity, in that which is related to the right to physical integrity and to life. Therefore, this distinction between rights essential for human dignity and others is complex, since if health is essential for the exercise of other rights, its connection with human dignity is as close as theirs.

⁵⁸ *Ibid.*, Conclusions of law, 4.

⁵⁹ From 2009 registration of residency was necessary, which, although it meant its own problems for migrants in an irregular situation, did not require that there was authorization of residence: “art. 12.1 of LO 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter LOEX), in the wording modified by LO 2/2009, of December 11, attributed the right to health care, under the same conditions as Spanish people, to foreigners who were in Spain (regardless of their legal or administrative situation) as long as they were registered in the register of inhabitants of the municipality in which they had their habitual residence. The criterion used to attribute the right to health protection to foreigners was effective residence in a municipality [...] Unregistered foreigners, those who did not have an effective residence, could access health care through the emergency service in cases of serious illness or accident, just like temporary residents.

The requirement of municipal registration to exercise the right to health care (and other social rights) solved some problems (2), but also caused certain difficulties for irregular immigrants, such as having to comply with and overcome numerous bureaucratic procedures, with the addition of not knowing the language”. L.E. DELGADO RINCÓN, *El derecho a la asistencia sanitaria de los inmigrantes irregulares: reflexiones sobre la reforma introducida por el real decreto-ley 16/2012, de 20 de abril*, in *Revista de Estudios Políticos (nueva época)*, 163, 2014, 189-231, 191. Own translation.

⁶⁰ J. M. PORRAS RAMÍREZ, *Eficacia jurídica del principio constitucional de la dignidad de la persona*, in *Anuario de Derecho Eclesiástico del Estado*, XXXIV, 2018, 212.

⁶¹ J. J. SOLOZÁBAL ECHEVARRÍA, *Una revisión de la teoría de los derechos fundamentales*, in *Revista Jurídica Universidad Autónoma de Madrid*, 2016, 112.

⁶² Judgment of the Constitutional Court 95/2000, of April 10, Conclusions of law, 3.

The absence of treatment for illness represents damage to physical integrity and possibly to life. However, regarding the right to physical integrity, the Constitutional Court has limited the connection between this right and the right to health, so that the right to physical integrity is only infringed in cases in which there is a serious and immediate danger to health.⁶³ In this regard, it is difficult to agree with this interpretation by which only an immediate health danger means damage to physical integrity or life, since clearly the absence of medical treatments will affect the physical integrity of a person, even if it is in the long term.⁶⁴ Lack of healthcare can seriously endanger health, which necessarily affects life and physical integrity.⁶⁵

Aside from this connection and interrelation of rights, it has also been stated that the appeal to the principle of the dignity of the person contributes to the definition and recognition of rights and it is aimed at completing “the characterization and guarantee of the so-called prestational rights”.⁶⁶

The Constitutional Court has considered that “the claim of universality accepted by art. 43 SC has been articulated in accordance with the legal provisions existing at a given time, without up to now having meant the unconditional right of any resident or transient person who is in Spain to obtain all kinds of health benefits free of charge”⁶⁷ and that “it is possible, in constitutional terms, a lack of identity between the right to universal access to the public health system by that ‘everyone’ of art. 43 SC, with that access to public health care including benefiting from a specific regime of free healthcare benefits or subsidized healthcare benefits charged to public funds”.⁶⁸ In this regard, without free health services, universal access to the public health system is not possible since there will always be people without resources who will not be able to access it.

In any case, the right to health care (as part of the right to health in article 43), in relation to foreigners, depends, therefore, on what is established in the law.

Currently, this recognizes the right to health care for everyone, nationals and foreigners, regardless of the administrative situation of migrants. This is a relatively recent regulation after health care from public funds was limited in 2012 to part of migrants, specifically, those who had authorization to reside in the territory, while for the rest of migrants there would only be emergency health care and pregnancy, childbirth and postpartum care for adults, while assistance was not limited for minors.⁶⁹ This regulation left numerous people out of the free health care system, many of whom, it is understood, had to interrupt treatments already in progress,⁷⁰ a situation of exclusion that continued for six years.

⁶³Judgment of the Constitutional Court 119/2001, of May 24, Conclusions of law, 6.

Also: Judgment of the Constitutional Court 139/2016, of July 21, Conclusions of law, 10.

⁶⁴This is expressed in the dissenting opinion in by Magistrate Fernando Valdés Dal-Ré and Magistrate Adela Asua Batarrita in Judgment 139/2016 of July 21.

⁶⁵L.E. DELGADO RINCÓN, cit., *El derecho a la asistencia sanitaria de los inmigrantes irregulares: reflexiones sobre la reforma introducida por el real decreto-ley 16/2012, de 20 de abril*, 207.

⁶⁶J.M. PORRAS RAMÍREZ, cit., *Eficacia jurídica del principio constitucional de la dignidad de la persona*, in *Anuario de Derecho Eclesiástico del Estado*, 214.

⁶⁷Judgment of the Constitutional Court 139/2016, of July 21, Conclusions of law, 8.

⁶⁸*Ibid.* Own translation.

⁶⁹*Royal Decree Law 16/2012*, of 20 April, on urgent measures to ensure the sustainability of the National Health System and improve the quality and safety of its services, art. 1.

⁷⁰“There is no agreement about the exact number of people that lost their right to health services, as some communities did not follow this restrictive policy”. European Commission. *OECD and WHO. State of Health in the*

In this sense, the Ombudsman reported that in the case of chronic diseases, continuity of care outside emergency services was not taking place.⁷¹

The Constitutional Court considered this measure constitutional in judgment 139/2016, arguing that “the fact that public authorities must organise the benefits and services necessary to guarantee health protection does not mean that these benefits must necessarily be free for all their potential recipients”,⁷² an argument that is debatable because, as it has already been indicated, health protection cannot be guaranteed if there are people who cannot access these benefits on their own.

Royal Decree-Law 7/2018, of July 27, on universal access to the National Health System modified the law and included migrants, regardless of the regularity of their residence, in its protection. In this sense, for the right to be effective with charge to public funds, the requirements are to have Spanish nationality and habitual residence in the Spanish territory or “to have their right to healthcare in Spain recognized by any other legal title, even without having their habitual residence in Spanish territory, provided that there is no third party obliged to pay said assistance” or to be “a foreign person with legal and habitual residence in the Spanish territory” who does not have “the obligation to prove the mandatory coverage of the health benefit through another means”⁷³ or, in the case of “foreign people not registered or authorized as residents in Spain”, they have the right to healthcare under the same conditions as Spanish nationals, and the requirements for the assistance to be charged to public funds are “not to have the obligation to prove the mandatory coverage of the health care benefit through another means, by virtue of the provisions of European Union law, bilateral agreements and other applicable regulations”, “not to be able to export the right to health coverage from their country” and that “there is no third party obligated to pay”.⁷⁴ Another requirement is that they are not on a temporary stay,⁷⁵ as, in this case, a prior favorable report from the social services would also be required.

However, it will be the Autonomous Communities that establish the procedure for the application and for the certification that the requirements are met,⁷⁶ which could imply differences in the regulation in each Community, since, as Delgado Del Rincón states “by transferring to the Autonomous Communities the competence to regulate the request and issuance of a certifying document that identifies non-legally resident foreigners, there is a risk that the exercise of the right be conditioned to a restrictive interpretation of the established requirements”.⁷⁷

In short, although all migrants currently have the right to access health care charged to public funds, it is a right that was limited for six years, and which, therefore, could be limited again in the future. In fact, this right to free health care could be limited for everyone since the Constitutional Court has considered that “the fact that public authorities must organise the benefits and services necessary to

EU. España. *Perfil Sanitario del país 2017*. Own translation. Available in: https://health.ec.europa.eu/system/files/2017-12/chp_es_spanish_0.pdf.

⁷¹ OMBUDSMAN, *Recommendation 167/2013*, of October 11, 453.

⁷² Judgment of the Constitutional Court 139/2016, of July 21, Conclusions of law, 8. Own translation.

⁷³ Law 16/2003, of May 28, of cohesion and quality of the National Health System, art. 3.2. Own translation.

⁷⁴ Law 16/2003, of May 28, of cohesion and quality of the National Health System, art. 3. ter. Own translation.

⁷⁵ 90 days according to Organic Law 4/2000, of January 11, on rights and liberties of foreigners in Spain and their social integration.

⁷⁶ *Ibid.* Art. 3. Ter. 3

⁷⁷ L.E. DELGADO DEL RINCÓN, *El derecho a la asistencia sanitaria de los extranjeros: limitaciones y problemas competenciales*, Valencia, 2019, 237.

guarantee health protection does not mean that these benefits must necessarily be free for all potential recipients. It will be the legislation that at all times determines the scope and graduation of this gratuity".⁷⁸

5. Conclusions

Although currently the right to free health care is protected for everyone in Spain, it is a right, part of the right to health, which is in a weak situation for some people, as it has not been interpreted that there is a constitutional obligation to provide free health care to everyone in all cases. Indeed, for six years the right to free health care was eliminated, with some exceptions, for people without authorisation to reside in Spain.

The consequences for people's health and lives of not having free health care are very grave if there are not enough resources to access non-free care. Although the right to health protection is found in the Constitution among the guiding principles of social and economic policy, its relationship with the fundamental right to life and physical integrity is unquestionable. Although this relationship has been limited by the Constitutional Court to serious and immediate dangers to health, the truth is that immediacy is not necessary for this connection to occur, since inattention to health and lack of health care can cause long-term irreparable damage to physical integrity, especially in the case of chronic illnesses. However, it has been considered constitutional to deny health care to groups of people except in some cases such as emergencies and care during pregnancy and childbirth.

At the international level, however, there is a clear obligation to include everyone in an affordable healthcare system, regardless of whether they are nationals or migrants. This obligation derives from the ICESCR, although it is a progressive obligation. Despite this progressiveness, the States parties must take measures to achieve the objectives of the Covenant, so it can be considered that the exclusion of groups of people from protection, especially if they were not previously excluded, would be a measure contrary to the obligation to progress towards the complete and effective protection of the rights that the Covenant protect. On the other hand, the protection of the European Social Charter regarding health care in general is not so clear, since it partly depends on an indirect connection with other Treaties and because it also depends on the interpretation given in each specific case. It is, therefore, a weaker protection than that of the Covenant. In any case, there is an obligation under the Charter to provide emergency medical assistance to everyone.

Although the right to health of migrants is currently protected in Spain, as it has been seen, the Constitutional Court has considered the exclusion of migrants in an irregular administrative situation from most of the assistance to be constitutional, so this right depends on the legislation that is established, it being a legal configuration right,⁷⁹ and could, therefore, be unprotected again. The only right to health care for migrants, unconditionally and that does not depend on a residence permit, is the right to emergency care and pregnancy and childbirth care, since it has been understood that there is a closer and direct connection between this assistance and the physical integrity and life of the person. Likewise, also health care in any case for minors. Therefore, progress must be made in the

⁷⁸ Conclusions of law, 8. Own translation.

⁷⁹ Judgment of the Constitutional Court 139/2016, of July 21, Conclusions of law, 8.

Focus on

understanding of the right to free health care as an essential right for the protection of the right to physical integrity and to life in all cases and not only in urgent cases.

