

Moulding the Right to Health in the Time of the Pandemic

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Abstract:

The coronavirus pandemic has overturned the traditional terms of ‘normality’ in the daily lives of citizens around the world. After an inexplicable period of provocative inaction against repeated calls by the World Health Organisation (WHO), States were called to take drastic and unprecedented measures that resulted in suspending the most important fundamental rights, especially of individual and social nature. Cyprus could not, of course, be an exception to the imposition of protective and precautionary measures, having transformed from a purely social State into a social State of prevention. In the overall response to the pandemic, the report is positive. In the emerging legal environment, the anxious effort of the State mechanism to protect human life at all costs makes the principle of practical harmonisation of conflicting fundamental rights virtually inapplicable. In this environment, the citizen seems powerless and possibly vulnerable to the will of the executive power. The advent of the pandemic and the constant endangerment of human existence urge the national legislator to abandon the logic of harmonisation of fundamental rights and focus on their prioritisation.

Keywords: pandemic, public health, fundamental rights, proportionality, State intervention, restriction of rights, State of prevention, state of emergency

Introduction

The advent of the COVID-19 virus and the pandemic² declared by the WHO quite naturally disrupted the traditional conditions of ‘normality’³ in almost all State,

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² John M. Last (ed.), *A Dictionary of Epidemiology* (4th edn, New York: Oxford University Press, 2001), p. 325: ‘An epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people’.

³ The handshake greeting is now carefully avoided. The handshake is intertwined with the Western understanding of citizenship. On that matter, see Pamphilos Alavanos, ‘The Handshake Lost in the Pandemic: A Journey from History to Law’ (‘Η Χειραψία Χαμένη στην Πανδημία: Μια Διαδρομή από την Ιστορία ως το Δίκαιο’) (2020) 1, *Administrative Law Journal* (Athens-Thessaloniki, Sakkoulas) 94-99 (in Greek); Jan N. Bremmer, Herman Roodenberg, *A Cultural History of Gesture* (University of Groningen, 1991), available at <https://www.rug.nl/research/portal/files/3346048/BremmerH7.pdf> (last

individual and social activity (e.g. movement restriction, labour relations, social distancing, educational activities, etc.). Such a huge and dramatic event as the 2020 pandemic, which caused a global emergency, can only leave a strong mark on the domestic legal system and particularly on the law and theory of fundamental rights.⁴ Before the advent of the pandemic, one might not have thought of imposing very strict restrictions on the enjoyment of fundamental rights, which are (hopefully) gradually de-escalated, depending, of course, on the course of the spread of the virus. There has already been an international scientific debate on the limits and extent of the restrictions imposed in relation to the guaranteed constitutional freedoms, and this is because, according to another view, the consequences of the pandemic go beyond such disproportionate measures and restrictions, whose legitimacy is questioned.⁵

However, some changes in the general perception of fundamental rights may persevere after the pandemic.⁶

accessed 20 June 2021) 177; Emmanuel Putman, 'The refusal to shake the hand of a prefectural agent and an elected official for religious reasons constitutes a lack of assimilation into the French community' ('Le refus de serrer la main d'un agent préfectoral et d'un élu pour motif religieux constitue un défaut d'assimilation à la communauté française'), *Revue juridique Personnes et famille* (2018) 6, 625-647. Laurie Marguet, 'Poignée de main avec une personne de sexe opposé, une nouvelle valeur républicaine? À propos de l'arrêt du Conseil d'Etat du 11 avril 2018 (n° 412462)', *La Revue des Droits de l'Homme* n° 17/2020, available at <https://journals.openedition.org/revdh/8225?lang=fr#tocfrom1n1> (last accessed 20 June 2021) (in French).

⁴ Charalambos Anthopoulos, 'The Pandemic and the Right to Health' (Πανδημία και Δικαίωμα στην Υγεία) (*Proto Thema*, 3 May 2020), available at <https://www.protothema.gr/blogs/haralabos-anthopoulos/article/1002154/pandimia-kai-dikaioma-stin-ugeia/#Comments> (last accessed 20 June 2021) (in Greek).

⁵ Georgios Nikolopoulos, 'COVID 19 - Restricting fundamental rights through unconstitutional measures' (*COVID 19 – Περιορισμός θεμελιωδών δικαιωμάτων μέσω αντισυνταγματικών μέτρων*), available at <https://www.constitutionalism.gr/2020-04-16-nikolopoulos-pnn-arthro48s/> (last accessed 20 June 2021) (in Greek). See also David B. Rivkin Jr., Charles Stimson, 'A Constitutional Guide to Emergency Powers' (*The Wall Street Journal*, 19 March 2020), available at www.wsj.com/articles/a-constitutional-guide-to-emergency-powers-11584659429 (last accessed 20 June 2021); Akin Gump Strauss Hauer & Feld LLP, 'COVID-19: Emergency Powers And Constitutional Limits' (23 March 2020), available at <https://www.akingump.com/en/news-insights/covid-19-emergency-powers-and-constitutional-limits.html> (last accessed 20 June 2021).

⁶ For example, the protection of personal data; as COVID-19 continues to take human lives and jolt global economy, governments are urgently seeking innovative new tools to inform policy and tackle the crisis. Digital solutions based on geolocation data are emerging to help authorities monitor and contain the spread of the virus. Some are fed by mobile call data records (CDRs), i.e. data produced by telecommunication service providers on telephone calls or other telecommunications transactions, which provide valuable insights into population movements. See, Marta Kolodziejczyk, 'Technology in the Service

This is especially true of the right to health, whose protection as a fundamental principle has rightly emerged as an absolute political and social priority with the advent of the pandemic. The binding guarantee of the protection of the right to health with rules of supranational and national nature essentially determines the mutability of this right amidst the new conditions which gradually push political leaderships to adopt measures that create a ‘precautionary legal shield’ against potential health threats.

A Conceptual Approach to the Right to Health

Health comprises many different aspects (physical, mental, psychological, and cognitive). The immense progress in medical science, the constant emergence of new types of diseases, as well as the fact that it is practically impossible to characterise a natural person as ‘absolutely healthy’, are factors that cast perennial doubt on the concept of health; in short, such factors attribute the element of relevance to health. Therefore, it is possible that someone, though not absolutely healthy, lives a normal life by receiving appropriate treatment. By contrast, it is also possible that someone, seemingly healthy and active, suddenly becomes incapable of providing even the basic necessities of life to themselves. The complexity and relevance of the issue can only create a definition focused on what is certainly not covered by the concept of health.

Conceptually, then, health is defined as the situation the individual is in and where no condition characterised by medical science as a disease exists.⁷ The WHO articulated the first, specific international health-and-human-rights provisions in the Preamble to its Constitution (drawn up in 1946). It declares that:

Health is a state of complete physical, mental and social well-being⁸ and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human

of Coronavirus Containment: Potential Threats to Human Rights Protection’ (2020) 18(2) *Journal of International Relations* 156-181.

⁷ Kostas Ch. Chrysogonos, Spyros Vlachopoulos, *Individual and Social Rights (Ατομικά και Κοινωνικά Δικαιώματα)* (Nomiki Bibliothiki, 2017) 268 *et seq*, 575 *et seq* (in Greek).

⁸ It is argued that social well-being should be excluded from the conceptual framework of health because the main purpose of health is not associated with the removal of social and economic inequalities, despite the fact that they have a significant impact on human health. See Patrina Paparrigopoulou, ‘Interpretation of Article 5 of the Constitution’ in Filippou Spyropoulos et al. (eds), *Article by Article Interpretation of the Greek Constitution (Το Σύνταγμα: Κατ’ Άρθρο Ερμηνεία)* Athens-Thessaloniki: Sakkoulas, 2017) (in Greek) 127-128.

being without distinction of race, religion, political belief, economic, or social condition⁹.

Since then, the right to health has been enshrined in core international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR); key regional human rights treaties; and domestic constitutions, over two-thirds of which include provisions on health or health care.¹⁰ Certain other provisions contained in international statements of human rights may be seen as relevant in claims for rights to particular medical treatments, particularly at the beginning and end of life, even though they may not make a direct reference to health.¹¹

The value of health is inextricably linked to the right to life, a pillar, and a necessary condition for the exercise of all fundamental rights¹² (individual, political and

⁹ Grad, Frank P. (2002). *The preamble of the Constitution of the World Health Organization: public health classics*, Bulletin of the World Health Organization: the International Journal of Public Health 2002 ; 80(12): 981-984

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA res. 2200A (XXI) (ICESC) art 12. See also, for example, Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA res. 34/180 (CEDAW); Convention on the Rights of the Child (adopted 10 November 1989, entered into force 2 September 1990), UNGA res. 44/25 (CRC); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) UNGA Res. 61/106; Eleanor D. Kinney, Brian A. Clark, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World' (2004) 37(2) *Cornell International Law Journal* 285–355; Judith Bueno De Mesquita, 'The Universal Periodic Review: A Valuable New Procedure for the Right to Health?' (December 2019) D 21(2) *Health and Human Rights Journal* 263-277.

¹¹ See Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA res. 2200A (XXI) (ICCPR) art 6. See *Pretty v the United Kingdom* Appl. no 2346/02 European Court of Human Rights (ECtHR, 29 April 2002); Linda Clarke, 'Abortion: A Rights Issue?' in Robert Lee, Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (London: Routledge, 1989); John Harris, *The Value of Life: An Introduction to Medical Ethics* (Routledge, 1985); Penney Lewis, *Assisted Dying and Legal Change* (Oxford University Press, 2007); Richard Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge, 2007); John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press, 2002); Graeme Laurie, Shawn Harmon, and Edward Dove, *Mason & McCall Smith's Law and Medical Ethics* (11th edn, Oxford University Press, 2019).

¹² Regarding Human Rights legal framework, see Raymond J. Vincent, *Human Rights and International Relations* (Cambridge University Press, 1986); Jack Donnelly, *International Human Rights* Boulder, CO: Westview Press, 1993) Christian Tomuschat, *Human Rights: Between Idealism and Realism*, (Oxford University Press, 2003) David P. Forsythe, *Human Rights in International Relations* (Cambridge University Press, 2006).

social). The interpretive approach of the right to health is of a dynamic nature in the sense that health or, more precisely, the possibility of fighting diseases or not and eliminating all kinds of risks depends on the progress of medical science¹³ and the means available. The pandemic has endangered personal life, biological existence, survival, living and, of course, social coexistence (self-evident until recently). However, the coronavirus disease has caused panic all over the world, as it is likely to result in death. Numerous studies —using a range of methods— estimate that in many countries some 5 to 10 people will die for every 1,000 people infected with COVID-19¹⁴. The root of global turmoil is located in the fear of death and not just the fear of contracting the coronavirus disease,¹⁵ which, according to experts, is a variant of the common flu, and it is only a matter of time¹⁶ before the appropriate vaccine is developed, a vaccine that will allow us to return to ‘normality’ which we all took for granted until recently.

The right to life, which is inextricably linked to the very continuation of human existence, is, undoubtedly, the cornerstone of all fundamental rights.

Health as a Fundamental Right

In times past, the AIDS epidemic, as well as reproductive and sexual health issues, played an important role in acknowledging the relation between health and human rights, as those include legal and strategic parameters. Conversely, the health/individual rights relation can be interpreted as follows: acknowledgement of the importance of human rights is a catalyst for tackling the current pandemic because, as it has been argued, the combination of disease with the abandonment of rights

¹³ The rapid advancement of science has expanded the scope of medicine and biology. Biomedicine no longer includes only the health of the individual and society but extends to the understanding and creation of life itself by raising enormous ethical and social issues (such as the cloning of humans or certain species of animals that have become extinct due to human activity).

¹⁴ Smriti Mallapaty, ‘How Deadly is the Coronavirus? Scientists Are Close to an Answer’ (*Nature*, 16 June 2020), available at <https://www.nature.com/articles/d41586-020-01738-2> (last accessed 20 June 2021). See also WHO, ‘International Guidelines for Certification and Classification (Coding) of COVID-19 as a Cause of Death’, available at: https://www.who.int/classifications/icd/Guidelines_Cause_of_Death_COVID-19.pdf?ua=1 (last accessed 20 June 2021).

¹⁵ Antonis Manitakis ‘The Pandemic Between Law and Morality With Life as a Constitutional Value’ (‘Η Πανδημία Ανάμεσα στο Δίκαιο και στην Ηθική, με την Ζωή ως Συνταγματική Αξία’) (May 2020) available at <https://www.constitutionalism.gr/2020-05-manitakis-pandimia-zoi-syntagmatiki-axia/> (last accessed 20 June 2021) (in Greek).

¹⁶ Sarah Boseley (ed.), ‘First Human Trial Results Raise Hopes for Coronavirus Vaccine’, (*The Guardian*, 19 May 2020), available at <https://www.theguardian.com/society/2020/may/18/first-human-trial-results-raise-hopes-for-coronavirus-vaccine> (last accessed 20 June 2021).

of both the ill and those generally affected by the pandemic is a human tragedy.¹⁷ In the face of the pandemic, the balance between security and freedom has perhaps been put to the biggest test since the period of change brought about by the terrorist attacks of 11 September 2001.¹⁸

Health rights are often seen as human rights in international law, in (European) regional human rights law, and in national constitutions, including those of the EU Member States. Rights are a potent theme in health law and biomedical ethics.¹⁹ The right to health, as a complement or continuation of the protection of personal freedom *stricto sensu*, that is, of natural bodily freedom and human value, is one of the fundamental rights. In terms of human value, its main manifestations in the field of health, biomedicine and the protection of the genetic identity focus²⁰ on: a) the prohibition of genetic discrimination, b) the right of citizens to be informed by competent professionals about their state of health, c) the right to physical and mental integrity, d) the establishment of medical confidentiality, and e) the protection of human dignity at the end of life.

Of course, it should be emphasised that health is approached from a different perspective in relation to legal and medical science. The science of law seeks, through the delegation of powers and the effective control of State institutions, the establishment of social peace by consolidating a sense of legal certainty and administering justice to citizens. In other words, it aims to create a State that will function properly by harmonising opposing rights and obligations. The medical science is called upon to tackle any health issues of citizens based on the existing

¹⁷ Mary Crewe, 'The HIV/AIDS Epidemic and Human Rights Responses' in Andrew Clapham et al. (eds), *Realizing the Right to Health* (Rüffer & Rub, 2009).; Michael Kirby, 'The Right to Health Fifty Years on: Still Skeptical?', (1999) 4(1) *Health and Human Rights* 5-25.

¹⁸ Xenophon Contiades, Alkmini Fotiadou, 'Pandemic, state of prevention and resilience of the Constitution. State and Constitution in the face of the health crisis' (Πανδημία, κράτος πρόληψης και ανθεκτικότητα του Συντάγματος. Κράτος και Σύνταγμα μπροστά στην υγειονομική κρίση) (2020) 1 *Administrative Law Journal* (Athens-Thessaloniki: Sakkoulas, 2020) 17-27 (in Greek).

¹⁹ See, for example: George J. Annas et al. (eds), *Health and Human Rights: A Reader* (New York: Routledge, 1999); Jonathan M. Mann et al., 'Health and Human Rights' (1994) 1(1) *Health and Human Rights* 6; Elizabeth Wicks, *Human Rights and Health Care* (Hart Publishing, 2007); Aart Hendriks, 'The Right to Health' (1998) 5 *European Journal of Health Law* 389; Jean McHale, 'Enforcing Health Care Rights in the English Courts' in Richard Burchill, David Harris, Annet Owers (eds), *Economic, Social and Cultural Rights: Their Implementation in UK Law* (University of Nottingham Human Rights Centre, 1999); Brigit Toebes, 'Right to Health and Health Care' (2009) 1 *Encyclopedia for Human Rights* 365; Id., *The Right to Health as a Human Right in International Law* (Intersentia, 1999).

²⁰ Paparrigopoulou (no 8) 130.

health structures and, of course, on the very progress of both research and technology. Between the two sciences, a distinction similar to the one explored by great tragedians, Sophocles and Euripides, is crystallised. According to Aristotle, —like in the science of law— by placing man at the center of his tragic world Sophocles presents his heroes as they should be (οἷους δεῖ εἶναι) that is, idealised according to moral and aesthetic ethics, so that the viewers can recognize their own virtues and passions in them. Euripides, however, presents his heroes as more human, with their passions and weaknesses, that is, exactly as they are and not idealised or supernatural other tragedians would present them.²¹ Euripides' logic embodies the agony of the modern doctor, who, despite all adversity, is called upon to do the best for the patient. As Mann et al. noted in the first issue of the *Health and Human Rights Journal* in 1994, the fields of health and human rights have 'differing philosophical perspectives, vocabularies, professional recruitment and training, societal roles, and methods of work'.²² By contrast, the law seeks to create the 'appropriate State' which, by protecting the rights and the proper functioning of institutions, can effectively defend human dignity and, consequently, the (possibly self-evident) right of every natural person to access to appropriate medical care.

According to the prevailing view, this right is part of the second-generation rights,²³ that is, the rights that have been developed and guaranteed in a regulatory way since the mid-19th century, even though they are closely connected with both first-generation rights (life protection) and third-generation rights (biomedical protection, cloning, DNA lesions, etc.). The Office of the High Commissioner for Human Rights (OHCHR) is the division of the UN responsible for mainstreaming human rights across the UN system, including the right to health, , while it also takes a lead role in advising governments on implementing the right to health in national contexts.²⁴

The right to health is of a dual nature (status mixtus). As far as the individual right is concerned, it is, as already mentioned, a complement to personal freedom and consists in every citizen claiming not to endanger their health by any activity

²¹ Dimitris K. Krevattas, *The Three Great Tragedians: Euripides, Sophocles, Aeschylus (Οι Τρεις Μεγάλοι Τραγικοί: Ευριπίδης, Σοφοκλής, Αισχύλος)* (Kastaniotis, 1999)58-64.

²² Mann (no 18) 7.

²³ See Emmanouil Roukounas, *International Protection of Human Rights (Διεθνής Προστασία Ανθρωπίνων Δικαιωμάτων)* (Athens: Estia, 1995) 15 *et seq* (in Greek).

²⁴ More about the role of the OHCHR concerning the right to health see Gillian MacNaughton, Mariah McGill, 'The Challenge of Interdisciplinarity in Operationalizing the Right to Health' (December 2019) 21(2) *Health and Human Rights Journal* 251-262.

that is subject to the direct or indirect control of State institutions. It contains negative content (*status negativus*) if it requires the State to refrain from any action that could endanger the state of health. Therefore, *status negativus* is linked to the idea of civil liberalism by constitutionally guaranteeing the rule of law.²⁵ On the other hand, as a social principle,²⁶ the right to health consists in the implementation of specific positive actions by the State (recruitment of doctors, establishment of hospitals in urban centers, medical centres in remote areas, control of medical equipment, pharmacy licensing, prescription of drugs) so that a level of health care can be guaranteed. Public health, according to Winslow's temporal-scope definition, is the science and art of preventing disease, prolonging life, and promoting physical health and human efficiency mainly by means of an organised effort of society and by developing a social machine that ensures that everybody has a standard of living, which is sufficient for maintaining their health.²⁷

It goes without saying that the quality of care provided by State structures, as the 10-year economic crisis has taught us, depends on the economic and financial capacity of the State.²⁸ However, the social manifestation of the right to health re-

²⁵ Dimitris Th. Tsatsos, *Constitutional Law III: Fundamental Rights (Συνταγματικό Δίκαιο Γ', Θεμελιώδη Δικαιώματα)* (Athens-Thessaloniki: Sakkoulas, 1987) 195-196 (in Greek).

²⁶ For a more detailed presentation of the social nature of the right see Konstantinos Kremalis, *To Δίκαιο της Υγείας (The Law of Health)* (Athens: Nomiki Bibliothiki, 2011)92 (in Greek), where the characterisation as 'mixed social right' is mentioned by Eirini Anaplioti-Vazaïou, 115; Epaminondas Spiliotopoulou, 'Guarantees for the Right to Choose Doctors and Patients Freely' ('Εγγυήσεις για την ελεύθερη επιλογή ιατρού κι ασθενούς') (1995) *Applications of Public Law* 130 *et seq.*

²⁷ Charles-Edward A. Winslow, *The evolution and Significance of the Modern Public Health Campaign* (New York: Yale University Press, 1923). The key feature of public health, which gives it a different ethical content than that which governs the doctor-patient relationship in clinical practice, is that it is characterised by collectivity. The prestigious US Institute of Medicine, endorsing this collective character, had since 1988 defined as its public health mission to ensure, through collective action, the conditions under which people can be healthy.

²⁸ A typical example is the amount of pensions provided and the legality of the corresponding reductions due to the economic crisis. The pension, provided that the conditions for receiving it are met, is a fundamental individual right. The amount of the monthly payment, however, is inextricably linked to the existing possibilities. See 'The 2012 Law on the Reduction of Remuneration and Pensions of Officials, Employees and Pensioners of the State Service and the Wider Public Sector, Law 168(I)/2012' 'Ο περί της Μείωσης των Απολαβών και των Συντάξεων των Αξιωματούχων, Εργοδοτούμενων και Συνταξιούχων της Κρατικής Υπηρεσίας και του Ευρύτερου Δημόσιου Τομέα Νόμος του 2012, Ν. 168(I)/2012' (in Greek) [] and then the recent decision *The Republic & Ors v Avgousti*, 'Appeals against an Administrative Court Decision' Appl. nos 177/18, 75/19, 76/19, 77/19, 79/19, 80/19, 84/19 and 85/19 (Supreme Court of Cyprus, 10 April 2020) (*Κυπριακή Δημοκρατία v Αυγουστή κ.α.*, 'Εφέσεις κατά Απόφασης Διοικητικού Δικαστηρίου Αρ. 177/18, 75/19, 76/19, 77/19, 79/19, 80/19, 84/19 και 85/19' (Ανώτατο Δικαστήριο Κύπρου, 10 Απριλίου 2020) (in Greek).

quires that the State take concrete positive actions. For example, in Cyprus and in many other countries governments eventually provided financial aid through job retention schemes (furlough), aid to the self-employed, and temporary boosts to unemployment benefits to ensure a minimum, decent standard of living. The scope and effectiveness of the actions, combined with the social nature of the right, should not be construed as every citizen's right to be healthy (both physically and mentally).²⁹ After all, it is impossible for any organised State to eradicate every form of disease or heal every form of bodily harm resulting from an accident. The duration of human life and the quality of health of every living being is a combination of factors that go beyond predictability in strictly technocratic and scientific terms. The social nature of the right implies the obligation of the State mechanism to establish the appropriate organisational and technocratic structures to ensure the best protection of the right to health care.³⁰ These two aspects of law are marked by a relationship of interaction and complementarity.³¹ As a matter of fact, despite its enforcement power in the hierarchy of legal rules, the legal rule is incapable of ensuring a perfectly healthy life. Good or bad, health depends primarily on the choic-

²⁹ Judith Asher, *The Right to Health: A Resource Manual for NGOs* (Leiden: Brill/Nijhoff, 2010) 27-28.

³⁰ 'As a 'welfare State' Manesis characterises the State which ensures the provision of social services through the legislative and administrative way and which has as its main goal the provision of social security, i.e. ensuring a minimum standard of living conditions for the citizens. As a 'social State' ('Sozialstaat' in German) he describes a State where social rights do not merely express a legislative or administrative provision but are guaranteed at a constitutional level, so that the social policy is constitutionally established and social security has constitutional foundations', in a preamble by Aristonoulos Manesis in Giorgos Katrougalos, *Θεσμοί κοινωνικής Πολιτικής και Προστασία των Κοινωνικών Δικαιωμάτων σε Διεθνές και Εθνικό Επίπεδο (Social Policy Institutions and Protection of Social Rights at an International and National Level)*, Athens: Nomiki Bibliothiki, 2009), 30; Ibid., 'The Problem of the Protection of Social Rights in the European Area' ('Η Προβληματική της Προστασίας των Κοινωνικών Δικαιωμάτων στον Ευρωπαϊκό χώρο') in Aristonoulos Manesis, *Constitutional Theory and Practice 1980-2000*, Athens-Thessaloniki: Sakoulas, 2007, p. 572 *et seq* (in Greek). Cf. Giorgos Katrougalos, *The Welfare State of the Post-Industrial Era (Το κοινωνικό Κράτος της Μεταβιομηχανικής Εποχής)* (Athens-Komotini, Sakkoulas, 1998) 504 *et seq.*, 537 *et seq* (in Greek). For the need to distance oneself from the one-dimensional 'welfare' version of social rights, see the preface of Giorgos Sotirelis, Christos Tsaitouridis in: Giorgos Sotirelis, Christos Tsaitouridis (eds), *Social Rights and Welfare State Crisis (Κοινωνικά Δικαιώματα και Κρίση του Κράτους Πρόνοιας)* (Athens: Savvalas 2007) 16 (in Greek); Anastasia Poulou, 'The Contested Social Rights and the Modern Concept of Social Democracy According to Aristonoulos Manesis' (*Τα Βαλλόμενα Κοινωνικά Δικαιώματα και η Σύγχρονη Έννοια της Κοινωνικής Δημοκρατίας Κατά τον Αριστόβουλο Μάνεση*) [(29 June 2019), available at <https://www.constitutionalism.gr/ta-vallomena-koινωνika-dikaiomata/> (last accessed 20 June 2021) (in Greek).

³¹ Prodromos D. Dagtoglou, *Constitutional Law: Individual and Social Rights (Συνταγματικό Δίκαιο: Ατομικά και Κοινωνικά Δικαιώματα)* (4th edn, Athens Thessaloniki: Sakkoulas, 2012) 58 (in Greek).

es/free will of the individual (diet, exercise, unhealthy habits, etc.) and secondarily on the influence of the external environment (pollution, climatic conditions, accidental events, etc.). After all, a person's state of health can be better determined over time rather than permanently.

In conditions of economic freedom and free economic development, the establishment of private healthcare structures emerges as a self-evident action on the part of the private enterprise, apparently for profit. Lack of access to these structures for all citizens may be a '*natural consequence*' of the economic and social stratification of societies that faithfully follow the model of liberal economy, but it should not be forgotten that, in this case, it is the effective defence of a fundamental right that is at stake and not the abstract biotic prosperity which, up to a point, also touches on the personal capacity of the individual. With the exception of the United States (US), where access to health care is limited to such an extent that the attempt to expand the social right to health by introducing the famous 'Obamacare'³² plan faced a fierce (even inter-party) war even in the midst of the pandemic,³³ the policies followed in Europe³⁴ admittedly seek at least to guarantee a minimum standard of protection for everybody. In any case, however, it is commonplace for the private enterprise in the field of health to bring about a clear asymmetry among citizens in defending the fundamental right to life. The long-term economic recession, which,

³² Robert E. Goodin, 'Reasons for Reason-Giving: The Obamacare Debates' (December 2018) 43(6) *Journal of Health Politics, Policy and Law* 991-1012; Nicholas Bagley, 'Is Obamacare Really Unconstitutional?' *The New England Journal of Medicine (NEJM)* (Massachusetts Medical Society, 2020) 400-401.

³³ BBC, 'Obamacare: Trump Asks Supreme Court to Invalidate Affordable Care Act' (*BBC News*, 26 June 2020), available at <https://www.bbc.com/news/world-us-canada-53190429> (last accessed 20 June 2021).

³⁴ On 23 October 2007, the European Commission adopted a new Health Strategy called 'Together for Health: A Strategic Approach for the EU 2008-2013'. Building on current work, this Strategy aims to provide, for the first time, an overarching strategic framework spanning across core issues in health as well as health in all policies and global health issues. The Strategy focuses on four principles and three strategic themes for improving health in the EU. The principles include taking a value-driven approach, recognising the links between health and economic prosperity, integrating health in all policies, and strengthening the EU's voice in global health. The strategic themes include Fostering Good Health in an Ageing Europe, Protecting Citizens from Health Threats, and Dynamic Health Systems and New Technologies. See Tim Lang et al., 'Building a healthy CAP' (2001) 7 *Eurohealth* 34-40; Mike Rayner, 'European Union Policy and Health' (1995) 311 *BMJ* 1180-1; Martin McKee, Elias Mossialos, Paul Belcher, *The influence of European Law on National Health Policy* (1996) 6(4) *Journal European Social Policy* 268-269; Elias Mossialos, Martin McKee, *Is a European Healthcare Policy Emerging?* (2001) 323(248) *BMJ*; Henriette D. C. Roscam Abbing, *EU Cross-Border Healthcare and Health Law* (March 2015) 22(1) *European Journal of Health Law* 1-12.

unfortunately, is intensified with the advent of the pandemic, weakens the State health structures, thus degrading the protection of the right to health, at least for those who only have limited financial resources. It is worth noting that the lack of balanced protection and the consequent issues of equality³⁵ resulting from the access to better health care services for some but not all citizens cannot be solved by a rule of law (at the level of a formal law) because that would require the restructuring of the existing economic model (of a market economy) and, certainly, of political will. However, preservation of the asset of health could not be excluded from international regulatory texts discussed below.

Introducing Binding Rules of a Supranational Nature

The right to health is a traditional socio-economic right, and the status of an aspirational right has been accorded with the main problematic issue, which is its non-justiciable character. At the level of binding rules of international law, the European Convention on Human Rights (ECHR) does not guarantee a right to health care or a right to be healthy. Matters such as health, housing, social benefits, and other socio-economic rights are traditionally more appropriately addressed in instruments such as the European Social Charter (ESC).³⁶ The obligations assumed by the Contracting States under the Convention are of a negative as well as of a positive kind.³⁷ According to the current case law of ECHR, health-related cases brought before the Court have most frequently been argued under Articles 2³⁸, 3³⁹,

³⁵ For equality in the right to health see Norman Daniels, *Just Health: Meeting Health Needs Fairly* (Cambridge: Cambridge University Press, 2008).

³⁶ Article 11 of the European Social Charter guarantees the right to protection of health.

³⁷ Under the negative obligation, a Contracting State must not interfere with the health of an individual unless there is a Convention-compliant justification for doing so. A Contracting State may also be required to take measures to safeguard the health of an individual under the so-called positive obligations.

³⁸ Where it is shown that the authorities of a State have put an individual's life at risk through the denial of health care that they have otherwise agreed to make available to the population in general (*Cyprus v. Turkey*, Appl. no 25781/94 (ECtHR, 10 May 2001), para 219; *Nitecki v. Poland*, Appl. no 65653/01 (ECtHR 21 March 2002); *Oyal v Turkey*, Appl. no 4864/05 (ECtHR, 10 May 2001).

³⁹ State agents must refrain from treatment which damages a person's physical health. At the same time, every State should take positive measures to protect the physical and mental health of individuals who are in a disadvantaged position (e.g. prisoners).

8⁴⁰ and 14⁴¹ of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (opened for signature in Oviedo, Spain on 04 April 1997), ratified by Cyprus and entered into force on 01 July 2002.

It should be noted at the outset that health care is not part of the EU goals. However, the EU has recognized health as a human right in its policy documents, such as the European Commission's White Paper, 'Together for Health'.⁴² The Council of Europe's ESC Article 11, first recognized⁴³ by the Court of Justice of the European Union (CJEU) in the *Defrenne*⁴⁴ case, covers the 'right to the protection of health', obliging States to 'take appropriate measures' to 'remove as far as possible the causes of ill-health', 'to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health', and 'to prevent as far as possible epidemic, endemic and other diseases as well as accidents'. The CJEU mentioned human dignity⁴⁵ in its judicial review of Directive 98/44/EC on the legal protection of biotechnological inventions.

The formal place of human rights in the EU legal order changed with the incorporation of the EU Charter of Fundamental Rights and Freedoms 2000 (EU CFR) into the Treaties in December 2009.⁴⁶ Article 35 of the Charter guarantees the right to health (care).⁴⁷ In the context of health rights, and acknowledging the jurispru-

⁴⁰ The Court treats the notion of private life as a term covering the right to the protection of one's physical, moral, and psychological integrity, as well as the right to choose, or to exercise one's personal autonomy, to refuse medical treatment or to request a particular form of medical treatment. (*Glass v the United Kingdom*, Appl. no 61827/00 (ECtHR, 20 March 2007), paras 74-83; *Tysic v Poland*, Appl. no 5410/03 (ECtHR, 20 March 2007).

⁴¹ The right not to be discriminated against on account of one's physical or mental condition (*Kiyutin v Russia*, Appl. no 552/10 (ECtHR, 15 March 2011); *I.B. v Greece*, Appl. no 552/10 (ECtHR, 3 October 2013).

⁴² Commission of the European Communities, 'Together for Health: A Strategic Approach for the EU 2008-2013 (White Paper)' (Brussels, 23 October 2007) COM (2007) 630 final.

⁴³ Tamara K. Hervey, Jean V. McHale, 'Rights: Health Rights as Human Rights' in *European Union Health Law: Themes and Implications* (Cambridge University Press, 2015) 156-183.

⁴⁴ *Defrenne v. Sabena*, Case no 149/77 (Cour de Cassation, 15 June 1978) 130.

⁴⁵ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, paras 70-77.

⁴⁶ European Commission, 'Declaration Concerning the Charter of Fundamental Rights of the EU' (EU, 2010), 337. See Sionaidh Douglas-Scott, 'The European Union and Human Rights after Lisbon' (2011) 11(4) *Human Rights Law Review*, 645.

⁴⁷ Article 35 'Health care': '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

dence of the CJEU, we see an increased willingness to consider human rights implications in EU litigation. For instance, Article 35 of EU CFR was cited by the CJEU only once before 2009 (and that was only in an AG Opinion⁴⁸) but has been cited many times ever since.⁴⁹ At the level of legislative initiative, health-related issues had been identified in the Directives 98/44/EC of 6 July 1998 regarding the legal protection of biotechnological inventions and 2011/24/EU of 9 March 2011 regarding the application of patients' rights in cross-border healthcare. International human rights law allows for the limitation of certain rights, especially when addressing a major health crisis. Moreover, States can also introduce emergency laws when exceptional circumstances arise. These laws can derogate from some human rights, but they need to be in force for a limited time and in a supervised manner.⁵⁰

Health takes on special significance as a protected legal benefit. Modern States must ensure this right in relation to human value. The level of protection of the right to health in the Cypriot legal order determines, apart from its protective scope, the content of the claims that citizens have against the State.

The Protection of the Right Within the Constitution

In the Constitution of Cyprus (unlike the Greek one⁵¹), there is no explicit guarantee of the right to health, which, according to the prevailing grammatical, systematic, and teleological interpretive approach is nevertheless preserved by the provision of

level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'.

⁴⁸ Opinion in *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)* Case no 444/05 (Second Chamber, 19 April 2007) 24.

⁴⁹ *Hervey, McHale* (no 42) 165. See *Deutsches Weintor eG v Land Rheinland-Pfalz*, Case no 544/10 (Third Chamber), 6 September 2012) 526; *Susilo*, Case no 84/11 (Third Chamber) 21 June 2012) 374; *Perez and Gomez*, Case nos 570/07, 571/07 (Grand Chamber, 1 June 2010) 300; Opinion in *Marc Michel Josemans v Burgemeester van Maastricht*, Case no 137/09 (Second Chamber, 16 December 2010) 433. Order in *André Rossius and Marc Collard v Belgian State*, Case nos 267/10, 268/10 (Fifth Chamber, 23 May 2011) 332 was found inadmissible for lack of jurisdiction.

⁵⁰ European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU – Fundamental Rights Implications*, Bulletins 1 & 2 (European Union Agency for Fundamental Rights, 2020), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf (last accessed 20 June 2021).

⁵¹ In the Greek Constitution, the right to health is guaranteed by the provision of Article 7 par. 2 which stipulates that 'torture, any bodily injury, damage to health, or the exercise of psychological violence, as well as any other violation of human dignity, is prohibited and punishable, as provided by law'. Article 5 par. 5 states that 'everyone has the right to protection of their health and genetic identity', and also Article 21 par. 3 stipulates that 'the State takes care of the health of the citizens and takes special measures for the protection of youth, old age, disability and for the care of the poor'. It is worth noting that the

Article 7 par 1 which stipulates that ‘everyone has the right to life and physical integrity’. Also, Article 9 of the Constitution stipulates that every person has the right to sufficient living conditions and social security. The Constitution does not attempt to define the notion of ‘sufficient living conditions’. However, it is submitted that the State has an obligation to create and maintain such conditions of life, of work and of health that allow every person to enjoy a standard of living adequate for the health and well-being of themselves and their family.⁵² There is no doubt that such provision establishes a social right and, as such, should be regarded as not giving its bearer the power to satisfy it with no further formalities.⁵³ Besides, its exercise presupposes organised State intervention⁵⁴ that depends on both the capacity of the State mechanism and the will of the respective executive power. It is, of course, worth mentioning the —extremely relevant under the current circumstances— provision of Article 11 par. 2 per. e’, which imposes measures that are restrictive of the freedom of movement to prevent the spread of communicable diseases.

Lack of an explicit guarantee of the right in the Constitution in no way distorts the importance and scope of its protection. Besides, it is self-evident that health protection is included in the right to life protection which is also a *sine qua non* condition for the specific benefit of health. Moreover, the indisputable supremacy of the Union law,⁵⁵ and especially of the ECHR law,⁵⁶ makes the addition of a more

right to health is not constitutionally guaranteed in the United Kingdom (UK), where it is guaranteed through the Human Rights Act 1998 and the ECHR.

⁵² Achilles C. Emilianides, *Constitutional Law in Cyprus*, (Wolters Kluwer Law & Business, 2019), 195-196. See also Criton Tornaritis, ‘The Social and Economic Rights under the Law of the Republic of Cyprus’ in *Mellanges Bridel* (Lausanne, 1968) 533-556.

⁵³ Filippou K. Spyropoulos, *Introduction to Constitutional Law II, Fundamental Rights, General Part (Εισαγωγή στο Συνταγματικό Δίκαιο II, Θεμελιώδη Δικαιώματα, Γενικό μέρος)* (Themis-Sakkoulas, 2012) 14 (in Greek).

⁵⁴ Kostas Paraskevas, *Cypriot Constitutional Law, Fundamental Rights and Freedoms (Κυπριακό Συνταγματικό Δίκαιο, Θεμελιώδη Δικαιώματα και Ελευθερίες)*, (Nomiki Bibliothiki, 2015) 114 *et seq.* (in Greek).

⁵⁵ Provision 1A of the Constitution: No provision of the Constitution shall be deemed to invalidate any laws adopted, acts carried out or measures taken by the Republic which are necessitated by its obligations as a Member State of the European Union, nor shall it prevent Regulations, Directives or other binding acts or legislative measures adopted by the European Union or by the European Communities or by their institutions or by their competent bodies on the basis of the Treaties establishing the European Communities or the European Union, since they have legal force in the Republic.

⁵⁶ For a detailed presentation of the case law of the ECtHR thematic report see ECtHR, ‘Health-related issues in the case-law of the European Court of Human Rights’ (June 2015), available at https://www.echr.coe.int/Documents/Research_report_health.pdf (last accessed 20 June 2021).

specific provision to guarantee the right to health unnecessary. Consequently, the provision of Article 9 on ensuring quality living conditions for physical and mental health complements the social aspect of the right.

The incorporation of a second or third-generation fundamental right into a broader first- generation right through interpretation, is, if not the most usual, an acceptable legal practice of legislation and jurisprudence at the very least which aims at maintaining the normative force of the Constitution, which, in its turn, should guarantee the rights considered necessary means for the maintenance and defense of the democratic rule of law. Thus, just as the right to health is interpretively incorporated into the right to life protection, so is the right to the protection of personal data incorporated into the broader right to the protection of privacy. A typical example is France, which, even though it has been a pioneer in the protection of personal data by adopting a relevant law in 1978⁵⁷ has not, however, considered the introduction of a more specific provision at a constitutional level necessary so far (as was the case in Cyprus). According to the established interpretation of the case law, the protection of personal data is a fundamental right that is constitutionally protected through the protection of privacy.⁵⁸ The framework for the protection of the right to health in the fields of State action and economic activity is regulated on the initiative of the national legislator.

The Creation of a Protective Environment to Ensure Public Health

The wider health of the population, the context in which health care is provided and the grim reality of inequalities in care and of resource allocation, as well as social justice dilemmas are issues that, at the crossroads of public health, must be part of the expanded field of modern Bioethics,⁵⁹ considering their moral dimension and the human rights involved. The concept of public-health legal preparedness refers to the specific legal reference points vital to intervention in a public health emer-

⁵⁷ 'Law n° 78-17 (January 6, 1978) relating to data processing, files and freedoms' ('Loi n° 78-17 (6 Janvier 1978) relative à l'informatique, aux fichiers et aux libertés').

⁵⁸ See 'Constitutional Council decisions' ('Decisions du Conseil Constitutionnel'), déc. n° 91-294 DC, 25 juillet. 1991, Cons. const, déc. n° 99-416 DC, 23 juill. 1999, Cons. const., déc. n° 2016-591 QPC, 21 oct. 2016, Cons. const., déc. n° 2017-752 DC, 8 sept. 2017, Cons. const, déc. n° 2015-478 QPC, 24 juill. 2015. Cf. Vasilis A Sotiropoulos, *The Constitutional Protection of Personal Data (Η Συνταγματική Προστασία των Προσωπικών Δεδομένων)* (Athina-Thessaloniki: Sakkoulas, 2006) (in Greek).

⁵⁹ Norman Daniels, 'Equity and Population Health: Toward a Broader Bioethics Agenda' (2006) (36)4 *Hastings Center Report* 22-35.

gency.⁶⁰ Moreover, the public-health justification may be invoked as a ground for limiting certain individual interests to deal with a serious threat to individuals or the health of the population and does not require complete disregard for a person's basic fundamental rights.⁶¹ Constitutional guarantees of life, liberty, and property, of which a person cannot be deprived without due process of law, do not limit the exercise of the police power of the State to preserve public health, as long as that power is reasonably and fairly exercised and not abused.⁶² In Cyprus, the protection of the right to health is indirectly guaranteed by the Safeguarding and Protecting Patients' Rights Act which incorporated patients' rights into the domestic legal system at a European level (see the Preamble⁶³). The Law essentially forms a sphere of protection which includes the basic rights of patients (including the right to decent treatment and health care, equal access to State health facilities,⁶⁴ the right to inform the patient and to complain of any violation, etc.). The Law on Infectious Diseases essentially establishes a defense map of the State from particularly dangerous and infectious diseases. In fact, with the advent of the pandemic, the legislator has already made two amendments⁶⁵ to the Law in order to protect citizens' health more effectively. The regulatory framework for the protection of the right to

⁶⁰ Anthony D. Moulton et al., 'What Is Public Health Legal Preparedness?' (2003) 31(4) *The Journal of Law, Medicine & Ethics (JLME)* 672.

⁶¹ Octávio Luiz Motta Ferraz, 'The Politics of the Right to Health' in *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge University Press, 2020) 23-100.

⁶² Erin M. Page, 'Balancing Individual Rights and Public Health Safety during Quarantine: The U.S. and Canada' (2006-2007) 38(3) *Case Western Reserve Journal of International Law*, available at <https://scholarlycommons.law.case.edu/jil/vol38/iss3/4/> (last accessed 20 June 2021).

⁶³ 'Safeguarding and Protecting Patients' Rights Act' ('Ο περί της Κατοχύρωσης και της Προστασίας των Δικαιωμάτων των Ασθενών Νόμος του 2004 (Ν. 1(Ι)/2005').

⁶⁴ It is noted that equal access to health services and the quality of these services is ensured by the Law on Physicians, whose provision of Article 5 stipulates that 'the doctor must show all patients equal care, diligence and devotion, regardless of the financial situation and social position of each one and regardless of their personal feelings'.

⁶⁵ With the most important one being that of Law 72(Ι)/2020 which introduces the concept of 'beneficial customer service space' and which is enriched in Article 7 regarding the process of operation suspension of a business or economic activity, ban notification on using the property, and the powers of police authorities.

health is complemented⁶⁶ by the General Health System Law of 2001⁶⁷ which also strengthens the right to equal treatment and aims —as reflected by the legislator’s ambition in the Preamble— at ensuring high level health care services through the creation of the General Health System (GHS). Regarding medical liability, it is possible to bring action if the treating physician does not provide the care that is reasonably expected of the average prudent person.⁶⁸

The case-law attitude could not deviate from the attitude of the average/prudent citizen who wants to ensure appropriate conditions of health care protection. In particular, it has been judged that:

[...] legislation related to the protection of public health must be respected zealously. The Courts will not fail to perform their duty to strictly implement the Law and protect the general public, by imposing, depending on the facts of the case, imprisonment sentences.⁶⁹

Of course, any measures adopted by the State authorities should be harmonised with citizens’ rights, which may be violated by actions that go beyond the purpose of ensuring public health by violating the core of individual rights. As is characteristically stated in a decision on an appeal seeking the annulment of the decision not to grant asylum to an HIV-positive applicant ‘[...] on the basis of what the applicant relied on, I would tend towards her approach that the possibility of expulsion in relation to HIV/ AIDS only, in the context of Article 6(1)(c) of Chapter 105, violates the principle of equality’.⁷⁰ It is worth noting that with regard to the protection of the environment —which is obviously inextricably linked to the protection of public health— the current case law restricts, possibly excessively, the concept of legitimate interest to individuals, associations, and organisations, acknowledging, as a

⁶⁶ It is self-evident that the legislative arsenal also incorporates the specific legislation that has been enacted for the protection of public health within the entire scope of economic and social activity (including the Food (Control and Sale) Law of 1996 (‘Ο περί Τροφίμων (Έλεγχος και Πώληση) Νόμος του 1996 (N. 54(I)/1996’), the Care and Treatment of Drug Addicts Law of 1992 (‘Ο περί Περίθαλψης και Μεταχείρισης Τοξικομανών Νόμος του 1992 (57(I)/1992’), etc.

⁶⁷ The General Health System Law of 2001 (‘Ο Περί Γενικού Συστήματος Υγείας Νόμος του 2001 (N. 89(I)/2001’)

⁶⁸ *Aggeli Christos v. Andrea Vorka*, Appl. no 12133 (26 June 2007) 1 ΑΑΔ 761 (in Greek).

⁶⁹ *Goris Trading Ltd & Ors v Health Services*, (1996) 2 ΑΑΔ 88 (in Greek). See also *Milk industry Zita LTD v. Health ministry*, etc. 1274/2011 and 45/2012, 27/3/2019 (in Greek).

⁷⁰ *Leonie Marlyse Yombia Ngassam v. Cyprus Republic*, Case. no 493/2010 (Supreme Court of Cyprus, 20 August 2010) (in Greek).

general rule, the possibility of appealing to the local authorities on the grounds that the action brought is an inherent element of the nature of their mission.⁷¹

We therefore observe that, in the domestic legal order, the right to health is seen by the legislator not so much as an independent individual right but rather as a positive obligation of the State. The protection of health as an individual right is based on the provision of Article 7 par. 1 of the Constitution but also on the interpretative approaches of the ECtHR. With regard to the protection of public health, i.e. the creation of a safe subsistence environment (e.g. appropriate living conditions, maintenance of physical and mental health, etc.), the grid of established rules of law is judged, to a large extent analogous to other EU Member States, at least until the advent of the pandemic which, as an unprecedented event, pushes the national legislator to react immediately and effectively.

The Legal Approach to the Health Crisis

Within a few days, the legislator was called upon to review and restructure traditional public health policies; the social right to health has now turned into a pressing objective. This development is primarily due to the easy transmission of the virus as well as the complications it causes (COVID-19 has increased mortality compared to the common flu). The epidemiological data suggests a dramatic increase in the number of people in need of health care. No State has enough hospital beds and medical staff to cope with the number of patients, which was the unfortunate case especially in Italy, Spain, France, and the UK. The interruption of the transmission link of the virus requires the adoption of measures of social distancing or simply of social isolation which, however, make it impossible to exercise certain 'self-evident' individual and social rights to date. Of course, many democratic constitutions provide for the implementation of the state of emergency, locally or nationwide, suspending the application of the constitutional provisions and restricting freedoms for a limited period.⁷² In a brief throwback to the ancient times, these exceptional

⁷¹ See *Koinotita Pirgon v. Republic*, (1991) 4 A.A.Δ. 3498 (in Greek); *Republic v. Council of Geriou*, (1998) 3 A.A.Δ. , 210, 219 (in Greek); *Friends of Akamas & Ors v. Republic*, (1998) 4 A.A.Δ. 767 (in Greek).

⁷² E.g. French Constitution (Art. 16), Portuguese Constitution (Art. 138), Spanish Constitution (Art. 55 & 116), Greek Constitution (Art. 48), and Cypriot Constitution (Art. 183). Regarding the specificity of the Constitution of Cyprus, see also Achilles C Emilianides, Christos Papastylianos, Costas Stratilatis, *The Republic of Cyprus and the Law of Necessity (Η Κυπριακή Δημοκρατία και το Δίκαιο της Ανάγκης)* (Athina-Thessaloniki: Sakkoulas, 2016) 124-177 (in Greek).

situations originate in Rome, in the implementation of the legal regulation *salus populi suprema lex esto*.

The advent of the pandemic brought about situations of an asymmetric threat, ora peculiar state of siege, without, however, any internal or external (material) danger.⁷³ It brought back terms which were forgotten in textbooks of medieval history (quarantine, mass deaths) to everyday vocabulary and cast doubt over the unimpeded exercise of many fundamental rights. It should be noted, of course, that, apart from the obvious importance for legal science, the importance of respecting or proportionally restricting human rights as an added value to public health interventions is also reflected in the official positions of WHO, according to which health is not only a foundation but also a basic prerequisite for any form of economic and social development.⁷⁴ Consequently, the implemented public health policies need to be based on good practice, which not only consists in the need for evidence-based public health data, but also in the formulation of specific regulatory principles and values on which full justification of any discrimination and the sustainability of actions in the real world is achieved by taking into account cultural, social, political and material conditions and constraints.⁷⁵

In the context of protective measures and the delegated decrees adopted, extensive restrictions on fundamental rights aimed at the effective protection of public health have taken place. For illustrative purposes only, financial and professional freedom was restricted by a temporary ban on the operation of most shops and service companies,⁷⁶ the freedom of assembly was restricted by a temporary ban on public outdoor gatherings,⁷⁷ free movement was restricted by both a temporary

⁷³ For the state of siege according to Article 48 of the Greek Constitution see Stylianos I. Koutnatzis, in Filippou K. Spyropoulos, Xenofon Contiades, Charalambos Anthopoulos (eds), *Constitution Interpretation by Article (Σύνταγμα: Κατ'άρθρο Ερμηνεία)* (Athens-Thessaloniki: Sakkoulas, 2017) 947-959 (in Greek).

⁷⁴ WHO Regional Office for Europe 1998, *The Solid Facts* (WHO, Copenhagen, 2003).

⁷⁵ Tina Garani-Papadatou, Venetia Velonaki, 'Human Rights and Infectious Diseases' (Ανθρώπινα Δικαιώματα και Λοιμώδη Νοσήματα) (2015) 66 ΔτΑ 791-819.

⁷⁶ 'Special Plan for the Complete Suspension of the Company's Operations as Well as for the Terms, Conditions and the Method of Calculation for the Provision of Special Unemployment Benefit' Decision no 4 of 2020 (KPD 130/2020) ('Ειδικό Σχέδιο Πλήρους Αναστολής των Εργασιών της Επιχείρησης καθώς και για τους όρους, προϋποθέσεις και τον τρόπο υπολογισμού για την παροχή Ειδικού Ανεργιακού Επιδόματος'), available at <https://www.coronavirus.mlsi.gov.cy/pliris> (last accessed 21 June 2021) (in Greek).

⁷⁷ Under ECHR jurisprudence, the right to assembly may be restricted for reasons related to the protection of public health. On that matter see *Cisse v. France*, Appl. no 51346/99 (ECtHR, 9 April 2002)

imposition of the traffic-restriction measure nationwide⁷⁸ and a ban on entry into the Republic,⁷⁹ while religious freedom was also restricted by a temporary ban on performing all kinds of services and rituals in all places of religious worship.⁸⁰ The administration of justice did not remain unaffected either.⁸¹ So far, vaccination of the population remains optional, although the political leadership, according to its statement,⁸² would like to make it mandatory. On this issue, the ECtHR in a recent decision⁸³ gives a clear –though not unconditional– message in favour of the possibility of imposing appropriate public-health protection measures to tackle the COVID-19 pandemic, if deemed necessary. The Court held that, in so far as vaccination aims to protect individual and public health and the rights of third parties,

paras 51-52: ‘However, the Court notes that even though it was peaceful and did not in itself entail any disturbance of public order or prevent churchgoers from attending services, after two months the continued occupation of the church by illegal immigrants, including the applicant, had developed into a situation – described in a report drawn up by a bailiff on the instructions of the Commissioner of Police – in which the hunger-strikers’ health had deteriorated and sanitary conditions become wholly inadequate. In these circumstances, the Court accepts that restrictions on the exercise of the applicant’s right to assembly may have become necessary’.

⁷⁸ Setting out measures to prevent the spread of coronavirus COVID 19 Decree (No. 9) of 2020 (‘ΚΔΠ 117/2020, Το περί Λοιμοκαθάρσεως (Καθορισμός Μέτρων για Παρεμπόδιση της Εξάπλωσης του Κορωνοϊού COVID-19 Διάταγμα (Αρ. 9) του 2020, Ε.Ε. Παρ.ΙΙΙ(1), Αρ. 5225, Σελ. 419, 23/3/2020’), available at http://www.cylaw.org/KDP/data/2020_1_117.pdf (last accessed 21 June 2021) (in Greek).

⁷⁹ *Patsalidi v. Republic via the Minister of Health*, Case no. 301/2020 (16 April 2020) (in Greek).

⁸⁰ The first measures to be announced allowed the presence of a number of believers, who, according to a circular issued by the Archbishop, amounted to 10. However, in view of the mass attendance of believers for the celebration of Easter, the government closed the Churches as a measure against the spread of the coronavirus. See Spyridon Vlahopoulos, ‘Religious Freedom and the Protection of Health’ (‘Θρησκευτική Ελευθερία και Προστασία της Υγείας’ (*I Kathimerini*, 21 March 2020), available at <https://www.kathimerini.gr/politics/1070269/thriskeytiki-eleytheria-kai-prostasia-tis-ygeias/> (last accessed 21 June 2021) (in Greek).

⁸¹ In accordance with the Supreme Court (Judiciary’s Issuance of Privileged Order) (Amending) (No. 1) Procedural Regulation of 2020, the time limits for the registration of any document or other document or application, or the application for a procedural step in general, are suspended due to the coronavirus pandemic, with effect from 16 March 2020; *Chrysanthou v. Chrysanthou*, Appl. D.O.D. 2/2019 (Appellate Family Court, 7 April 2020) (in Greek); *Mavronikola v. Xanthis*, Appeal no 8/2018 (Appellate Family Court, 14 April 2020) (in Greek).

⁸² Statement of the Minister of Health, Constantinos Ioannou, on 26 June 2020, interview on Ant1 TV, available at <https://www.youtube.com/watch?v=wyr2pGhxFY> (last accessed 21 June 2021) (in Greek).

⁸³ *Vavrička and Others v. the Czech Republic* Appl. nos 47621/13 and 5 others (ECtHR, 8 April 2021); *Solomakhin v. Ukraine*, Appl. no 24429/03 (ECtHR, 15 March 2012) paras 35-36; *Jehovah’s Witnesses of Moscow & Ors v. Russia*, Appl. no 302/02 (ECtHR, 10 June 2010) para 136. See also Alberto Giubilini, Julian Savulescu, Dominic Wilkinson, ‘COVID-19 Vaccine: Vaccinate the Young to Protect the Old?’ (26 June 2020) 7(1) *Journal of Law and the Biosciences*..

such as individuals who cannot be vaccinated for medical reasons and who are in a state of constant danger, collective immunity (herd immunity) should be achieved. As for the rest of the population, as the Court points out, there is a debt of demonstration of social solidarity through compulsory vaccination. Similarly, it should not be overlooked that Articles 2 and 8 impose a positive obligation on the State to protect the life and health of its citizens. In general terms, the measures adopted in Cyprus in the struggle against the pandemic could not differ significantly from the rest of the EU Member States. The only measure for which there were strong objections⁸⁴ regarding its compatibility with Article 14 of the Constitution⁸⁵ concerned the decision to allow entry to the Republic of Cyprus only to those who present a medical certificate for coronavirus from an approved, accredited public-health organisation or laboratory. Properly interpreted, however, Article 14 of the Constitution intends to prohibit the application of either deportation/exile or entry into the Republic to make it clear that the treatment reserved for the citizens of the Republic is not permitted, for better or worse, to foreigners in accordance with the law of each State. It is not conceivable to extend Article 14 of the Constitution to issues other than those related to exile or deportation.⁸⁶ The restriction of entry to Cyprus is a purely administrative measure which can be annulled in court and not a government decision, as is incorrectly reflected in current case law.⁸⁷

The extent of State intervention that is allowed by each political and constitutional culture is reflected in the way in which different countries, such as the UK, France, the US, Spain, Sweden, Greece, and Cyprus,⁸⁸ reacted to the health crisis.

⁸⁴ Dimitris Lohias, 'Unconstitutional Measures Beyond Any Reasonable Doubt' ('Πέραν Πάσης Λογικής Αμφιβολίας Αντισυνταγματικά τα Μέτρα') (17 March 2020), available at <https://dikaiosyni.com/katigories/arhra/peran-pasis-logikis-amfivoliis-antisynatgamatika-ta-metra/> (last accessed 21 June 2021) (in Greek).

⁸⁵ Article 14 of the Cypriot Constitution: No citizen shall be banished or excluded from the Republic under any circumstances.

⁸⁶ On that matter see Achilles C. Emilianides, 'Does the Requirement to Present a Medical Certificate at the Airport Violate the Constitution?' ('Παραβιάζει το Σύνταγμα η Απαίτηση για Προσκόμιση Ιατρικού Πιστοποιητικού στο Αεροδρόμιο;') (16 March 2020), available at <https://dikaiosyni.com/katigories/arhra/paraviazei-tosyntagma-i-apaitisi-gia-proskomisi-iatrikou-pistopoiitiku-sto-aerodromio/> (last accessed 21 June 2021) (in Greek).

⁸⁷ *Patsalidi v. Republic of Cyprus* (no 76).

⁸⁸ Regarding the constitutionality of the requirement to present a medical certificate to enter the Republic see Achilles C. Emilianides, 'The Application of Article 14 of the Constitution' ('Η Εφαρμογή του Άρθρου 14 του Συντάγματος'), available at <https://dikaiosyni.com/katigories/arhra/i-efarmogi-tou-arthrou-14-tou-syntagmatos/> (last accessed 21 June 2021) (in Greek); *Ibid.* 'The Constitution is Violated by the Requirement of Submission of a Medical Certificate at the airport?' ('Παραβιάζει το

Also, the role and functions of the welfare State are inevitably redefined within the conditions of a pandemic, as is the concept of borders. A return to ‘normality’ requires careful weighing of health data on the one hand and, on the other, the acknowledgment that it is not essentially determined by the special characteristics and capacity of the State mechanism.⁸⁹ Moreover, the constitutionality of restrictive measures is determined by their effectiveness. The restriction is required to bear fruit, namely, to be socially beneficial to be considered constitutionally and socially tolerable. During the first lockdown, there was a general international ignorance and fear about the virus, so the lockdown itself was rightly considered the most appropriate and proportional precaution. Over time, however, the predictability of the State mechanism should increase to become more effective, precisely with the aim to prevent the extension of restrictions on individual freedoms. In this light, the third lockdown recently implemented in Cyprus (in May 2021) was considered by both lawyers and the Bar Association itself to be ‘manifestly unconstitutional’. Despite the exaggerated objections, in some respects, to the constitutionality of the restrictions, the lack of a clear and substantiated reasoning for the impossibility of finding another milder measure raises serious questions of violation of the principle of proportionality.⁹⁰ One of the ways in which the courts could ensure the due process rights of those affected by quarantine laws is to make risk assessments on a case-by-case basis. Individualised risk assessments avoid decisions made under a blanket rule or generalisation about a class of people.

The right to health plays a leading role in both its individual and social aspects. The unprecedented health crisis we are experiencing as a human race has reminded us that fundamental rights do not enjoy absolute protection and enforcement *per mare per terra*. In such a case, restrictive measures aiming to address the health risk may go beyond the golden rule of ‘practical harmonisation’ among the conflicting constitutional rights and occasionally give absolute or near-absolute priority to the protection of the collective right to health, when the ‘normal’ or unimpeded

Σύνταγμα η αιτίαση για προσκόμιση ιατρικού πιστοποιητικού στο αεροδρόμιο;’), available at <https://dikaioyni.com/katigories/arthra/paraviazei-tosyntagma-i-apaitisi-gia-proskomisi-iatrikou-pistopoiitikon-sto-aerodromio/> (last accessed 21 June 2021) (in Greek).

⁸⁹ For Cyprus, the main indicators that contribute to decision-making but are not binding are three: 1) the disease transmission rate, i.e. the true estimated reproductive number of SARS-CoV-2 must be below 1 $R(t) < 1$, 2) the daily number of positive diagnoses of COVID-19 should be less than 5/1000, and 3) the number of patients in ICU should not exceed 14.

⁹⁰ See also Hrefna Dögg Gunnarsdóttir et al., ‘Applying the Proportionality Principle to COVID-19 Antibody Testing’ (January-June 2020) 7(1) *Journal of Law and the Biosciences*.

exercise of certain individual rights is a risk factor. This possibility is included, after all, in the very principle of proportionality that inspires the ECHR law⁹¹, which, when weighing up the assets (proportionality in the narrow sense), sets the formal rule that the greater the legislator's intervention in a fundamental right, the more important the constitutional asset for the sake of which the restriction of the right is established.⁹² Is there anything more important than protecting human life?

In the inevitable⁹³ conflict of rights, the protection of public health serves as the legal basis for the imposition of restrictions, as individual fundamental rights recede in the name of safeguarding public health. The discussion on the mandatory nature of vaccines was a preamble of the urgent dilemmas of the pandemic. Is it legally tolerable to 'exploit' the concept of herd immunity created by others so that parents do not vaccinate their children? Can freedom be exercised by ignoring the vulnerable who cannot be vaccinated? The outcome of the pandemic may allow for a review of the weighing up process⁹⁴ and the acceptable limits set regarding the abuse of the exercise of individual rights that affect the safeguarding of public health.

Conclusion

The advent of the pandemic motivated the legislator to adopt particularly restrictive—for individual freedoms—measures, certainly hoping that those implemented would be of a temporary nature. Undoubtedly, there is a violent transition from

⁹¹ Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4(1) *Law and Ethics of Human Rights* 21-32.; Timothy Endicott, 'Proportionality and Incommensurability' (16 February 2013) 40/2012 *Oxford Legal Research Paper*; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (September 2008) *Jean Monnet Working Paper*.

⁹² Charalambos Anthopoulos, 'Pandemic, the Right to Health and the Duty of Solidarity' ('Πανδημία, Δικαίωμα στην Υγεία και Καθήκον Αλληλεγγύης') (2020) 1 *Administrative Law Journal*, (Athens-Thessaloniki: Sakkoulas) 28-34 (in Greek).

⁹³ Giannis Tasopoulos, "Athenians" and "Spartans": The Shield of Rights in the Time of the Pandemic and the Restrictions on Movement' ("Αθηναίοι" και "Σπαρτιάτες": Η Ασπίδα των Δικαιωμάτων στον Καιρό της Πανδημίας και των Περιορισμών της Κίνησης') (2020) 1 *Administrative Law Journal* (Athens-Thessaloniki: Sakkoulas) 35-45 (in Greek): 'In the face of insecurity and skepticism about what it means to have individual rights enshrined in the Constitution, some are reacting as "Spartans" of rights. They are defending the irreconcilable legal-political position for inviolable power and application of rights. For them, the shield of rights exists to offer absolute protection. As military defenders of the rights of Thermopylae, they are adamant and militant against state restrictions on freedoms and even prefer to be defeated in a conflict of rights with a much stronger adversary, who advises them rather than accepting the decline of their principles and weighting of rights'.

⁹⁴ Contiades, Fotiadou (no 18).

the welfare State to the State of prevention, which is reflected in the tendency to turn traditional legal certainty into security of legal assets (with an obvious emphasis on public health). The prevention State, like the welfare State, distorts the constitutional model of law in view of the need to regulate complex and uncertain situations with increased liquidity and variability. The legislator is called upon to respond to ever-changing circumstances which make such work substantially more difficult. For this reason, the elements that compose the concept of legal certainty (duration, clarity, publicity and formality of the law) recede, while, at the same time, the discretion of the public administration is strengthened, and the concept of public interest is expanded.⁹⁵ The functioning of the preventive State implies new or successive restrictions on the exercise of individual rights. As Gross very accurately pointed out, the executive power often confronted with the management of sudden crises does not attach much importance to the requirements of the Constitution when taking emergency measures.⁹⁶ Besides, up to a point, the strictness or mildness of the measures reflects the political/ideological philosophy of the respective government.

The greater and more extensive the risk to the health of citizens (safety), the more intense the duty of the State to minimise it through restrictions on freedoms (e.g. freedom of movement), if this is indicated by epidemiologists as absolutely necessary. In the case of Cyprus, the measures adopted during the pandemic outbreak (March/May) were strict, but as evidenced by the overall course of contagion and the limited number of deaths, they were absolutely necessary. Does health-care policy have any limits to the restriction of individual freedoms? The answer to that question is not obvious. The necessity for the restrictions is self-evident, while their intensity in combination with their duration creates skepticism and doubts, especially when it comes to the reasoning and proportionality of the measures. The corrupting cycle of the relaxation and tightening of measures raises concerns about the adequacy and effectiveness of health policies, as well as reasonable doubts as to the compatibility of the measures with the requirements of the Constitution and, particularly so, with the protected freedoms. As these public-health measures are aimed at the protection of health, a social right, but are, nevertheless, very intrusive, it seems natural to worry chiefly about their impact on civil liberties. These

⁹⁵ On this issue, see Xenophon Paparrigopoulos, 'Rule of Law: Justice or Arbitrariness?' ('Κράτος Δικαίου: Δικαιοκρατία ή Νομοκρατία;') in *Rule of Law* (Athens-Thessaloniki: Sakkoulas, 2011) 59 (in Greek).

⁹⁶ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011-1028.

are, after all, the most obviously and directly at risk even from well-meaning governments, let alone from less well-meaning ones in an age of democratic decline.⁹⁷ In fine, despite the objections expressed, it could hardly be argued that in Cyprus the absolutely-necessary measure has been abused nor, of course, is this documented in case law.

In comparison, the measures taken by the country did not differ significantly from the corresponding measures taken by other EU countries. At the level of institutional control, the intervention of the independent administrative authorities regarding the proportionality of the applied measures in cases where the protection of life is not directly affected, could certainly be more intense and substantial.⁹⁸ Their observed inaction may be due both to the sudden reversal of normality and, of course, their reluctance to oppose the competent public and private bodies.⁹⁹ This aspect is particularly important because the justification for the creation of independent administrative authorities lies in the control of the executive power. Possible inaction or lack of effectiveness leads to a degradation of the rule of law itself, which, we must not forget, is strengthened by self-control mechanisms as well.

What is certain, however, is that we are not facing the revival of a police State or a tyrant State, which, on the occasion of the advent of the health crisis, takes liberties away and imposes its will on citizens in an authoritarian way. It is the increased transmissibility of the virus which inhibits the seamless exercise of indi-

⁹⁷ Octávio Luiz Motta Ferraz, 'Covid-19 and Inequality: The Importance of Social Rights' (2021) 32(1) *King's Law Journal* 109-121.

⁹⁸ At EU level, see the Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak, by European Data Protection Board, adopted on 21 April 2020, available at https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf (last accessed 21 June 2021).

⁹⁹ For example, in the 'Announcement Installation and Operation of Thermocameras and other applications in places accessible to the public/ employers' ('Εγκατάσταση και Λειτουργία Θερμοκαμερών και άλλων εφαρμογών σε χώρους που έχει πρόσβαση το κοινό/ εργοδοτούμενοι') (24 April 2020), available at <http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/All/798C8B6809EBDC87C2258554004137CB?OpenDocument> (last accessed 21 June 2021) (in Greek) the Data Protection Commissioner avoids giving specific instructions but rather explains that 'in any case, in the following general wording: the use of applications and measures should have a legal basis. The use of applications and measures, which involve the processing of special categories of personal data, such as health data, is permitted only if the Principles of Purpose Restriction and Data Minimization are met and the provisions of Article 9(2) of the General Data Protection Regulation (GCPD), which exceptionally allow the processing of such data'. The Commissioner for Administration and the Protection of Human Rights made only one intervention/update over the course of the quarantine regarding the measures taken to prevent the spread of COVID-19 in areas where people are being deprived of their liberty or are being restricted.

vidual rights. A spontaneous handshake, a momentary lack of caution in observing health measures, or an individual, antisocial behaviour can prove fatal. The coordinated State is called upon to curb behaviour that, until recently, was inviolable by the law (e.g. the number of people who could visit our home). The pandemic highlights on an international scale that the protection of health and therefore of life in peacetime is the most important benefit; the synonym of public interest.¹⁰⁰

In this context, the Republic of Cyprus undoubtedly guarantees the rule of law, and the relevant mechanisms (administrative, political, and judicial) are called upon to cope with an unprecedented (at least for the 21st century) health crisis management. Only then does the coordinated State have an adequate constitutional and institutional arsenal at its disposal to be able to react immediately to unforeseen circumstances, without—at least intentionally—violating individual rights.

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¹⁰⁰ Evangelos Venizelos, 'Pandemic, Fundamental Rights and Democracy - The Greek Example' (28 April 2020) *COVID-DEM*, available at <https://ssrn.com/abstract=3626248> (last accessed 21 June 2021).

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