

THE RIGHT TO HEALTH PROTECTION VERSUS ECONOMIC FREEDOM

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Abstract

Our assertion is that our freedom exists and can be manifested as long as we do not infringe upon anyone else's freedom. But is this contention still valid when we aim to protect our health by exercising our rights in this direction and, in the process, we encroach on another fundamental right such as economic freedom? The establishment, through fundamental national and international regulations, of the right to health preservation, entitles every human being to exist, to develop, as health, alongside life, is a goal that each and every one of us strives for. However, exercising economic freedom ensures our development and the chance to lead a better life. In this article our focus is on the analysis of some aspects regarding the limitations of exercising such fundamental rights.

Keywords: right, protection, health, economic freedom, regulations

1. Introduction

Law No. 349/2002 on the prevention and control of the effect of tobacco product use¹, as provisioned by article 1, adopted some measures regarding the prevention and control of the use of tobacco products by such means as: smoking bans in closed public spaces, tobacco product warning labels, organizing awareness and education campaigns for the population in order to protect the health of smokers and non-smokers from the harmful effects of smoking. We consider that this legislative act, which was passed during the pre-accession period to the European Union, precisely in order to be in full accordance with Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products², outlined, for the first time, a fairly comprehensive legal framework to ensure the prevention and control of the effects of

tobacco product use, with a view to guaranteeing the fundamental right to health protection³.

Amendments and additions were brought to this law by means of primary legislative acts, specifically one Government emergency ordinance, two Government ordinances issued on the basis of an enabling law and six laws, two of which approved the two ordinances but they also brought amendments and additions to them. The last two laws were adopted by the Parliament of Romania in 2016, mostly in order to transpose into national law Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, published in the Official Journal of the European Union No L 127, of 29.04.2014, the transposition deadline being 20 May 2016, according to article 29, section 1 of the Directive. The measures adopted by the European law and, consequently, by the national law were also determined by the need to guarantee a high level of health-related quality of life

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¹ This law was published in the Official Gazette of Romania, Part I, no. 335 of 21.06. 2002.

² This Directive was published in the Official Journal of the European Communities No L 194 from 18.07.2001, and in the Official Journal of the European Union No 15/vol. 7, pp.125-134.

³ The process of the transfer and implementation of the Community acquis regarding tobacco products also complied with other directives such as: Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, published in Official Journal of the European Communities No L 359, of 08. 12. 1989, amended by Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, published in the Official Journal of the European Communities No L 158 of 11.06.1992, transposed by Order no. 853/2000 issued by the Ministry of Public Health regarding the formulation and dimensions of the health warning text to be used in tobacco advertisements, published in the Official Gazette of Romania, Part I, no. 667 of 15.08.2000, respectively the Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, published in the Official Journal of the European Communities No L 213 of 30.07.1998 (which was repealed in 2000), and also the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, published in OJEC No L 298 of 17.10.1989, were transposed in the Government Emergency Ordinance no. 55/1999 regarding the banning of tobacco advertisement in cinemas and the ban on selling tobacco products to minors, approved by Law no. 151/2000 or by the Audio-visual Law no. 48/1992, published in the Official Gazette of Romania no. 104 of 25.05.1992. See also *A Study on Smoking and Public Health in Romania* (Studiul Fumatul și sănătatea publică în România) http://stopfumat.eu/wp-content/uploads/2014/10/Studiu_CPSS_04.pdf, accessed 15.03.2017, from p. 12 onwards.

as well as consumer protection, without overlooking the observance of other fundamental, acknowledged and secured rights of the citizens of the European Union member states, and had to be consonant with the well-functioning of the European single market⁴, by also taking into account the latest scientific research pointing to the harmful effects of tobacco use on health and to the health benefits of using electronic cigarettes instead of tobacco⁵. At point 59 of its Preamble, the above mentioned Directive admits that this legislative act will impact upon a series of fundamental rights, which does not however entail that the obligation to observe the fundamental rights and legal principles established by the Charter of Fundamental Rights of the European Union will be modified.

The research that has been conducted so far revealed, beyond a shadow of a doubt, the harmful effects of tobacco use not only on the health of those who smoke these products but also on the health of those who passively inhale the toxic cigarette smoke⁶. Unfortunately, the studies revealed the great number of smokers but also of those who, rather paradoxically, support the increase of tax on tobacco products or who support the banning of cigarette advertisements in stores or who advocate for the banning of on-line selling of cigarettes. Moreover, among other aspects⁷, it has been noted that in spite of the European Union's "consistent policy of tobacco control", structured on several segments, smoking remains "the most widely-spread avoidable cause of death in Europe, amounting to approximately 700 000 deaths per year"⁸.

In these studies, there were also evaluations of the economic impact of tobacco use with regard to the expenses incurred by the financial support of this habit, but also for the prevention and control of the consequences that tobacco use has on health, costs that are sustained not only by those suffering from such illnesses and/or by their families, but also by the public health systems.

Nonetheless, one must not disregard the fact that the adoption of any prevention and control measures of tobacco use, its decrease in sales, the actual reduction

of tobacco use, are not factors that economically affect businesses, the veritable industry which is organized and operated in connection with tobacco use.

But however affected the tobacco industry and commerce might be, thus even affecting a fundamental right stipulated by article 45 of the Constitution of Romania, republished, these are not comparable, in our opinion, to the impairment of the health of human beings and, implicitly, of their right to health protection, established by article 34 of the same instrument.

Bearing this situation in mind, one can only wonder what prevails in this world whose most prominent feature is mercantilism and where the fundamental rights of any human being are perceived as a luxury by some - is it the right to health preservation, to health care or the liberty to conduct economic activity?

2. Content

2.1. Aspects regarding the right to health protection

Health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"⁹, as the very Constitution of the World Health Organization define the state that we pursue and to which every individual is entitled at any moment of their existence. However, through the same act, the World Health Organization admitted, as early as 1946, that the right to health cannot be viewed solely as an individual right of every human being as it also has a collective aspect due to the fact that states are, first and foremost, the ones that have to contribute actively to assure the health of their citizens, without any discrimination whatsoever, by means of coherent policies and strategies.

Hence, in the Preamble of this Constitution, it is acknowledged that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,

⁴ As the above mentioned Directive stipulates at points (1) – (59) of its Preamble, especially at point 59.

⁵ In this direction, article 1 of Law no.349/2002, as amended in 2016, provides that the object of this legislative act consists in the adoption of „various measures regarding the prevention and control of tobacco product use, by completely banning smoking in all closed public spaces, in the closed spaces from workplaces and on playgrounds, by labelling tobacco product packages, by carrying out awareness and education campaigns for the population, by informing consumers of the tobacco products that they intend to purchase by indicating the tar, nicotine and carbon monoxide content in the final products, by some measures regarding the use of ingredients in tobacco products”. The same article also identifies the goal pursued by the adoption of such measures, namely a threefold goal: the protection of the health of smokers and non-smokers from the damaging effects of smoking, preventing the spread of smoking among minors and ensuring an adequate quality of life for the Romanian population, respectively.

⁶ In this sense see, for instance, the European Commission, Eurobarometer, *Attitudes of Europeans towards Tobacco and Electronic Cigarettes*, http://ec.europa.eu/public_opinion/archives/ebs/ebs_429_fact_ro_en.pdf, accessed on 16.03.2017, or A case study within the National No Smoking Day campaign – 20th November 2015 (*Analiza de situație în cadrul campaniei cu ocazia zilei naționale fără tutun - 20 noiembrie 2015*), a study conducted by the National Institute of Public Health via the National Health Evaluation and Promotion Centre, available at: <http://insp.gov.ro/sites/cnepss/wp-content/uploads/2016/01/Analiza-situatie-Campania-antifumat-2015.pdf>, accessed 16.03.2017.

⁷ In this sense see A case study within the National No Smoking Day campaign – 20th November 2015 (*Analiza de situație în cadrul campaniei cu ocazia zilei naționale fără tutun - 20 noiembrie 2015*), a study conducted by the National Institute of Public Health via the National Health Evaluation and Promotion Centre, op. cit., p.23.

⁸ Ibidem.

⁹ This definition is from the Preamble of the Constitution of the World Health Organization which was adopted at the International Health Conference and signed on 22 July 1946, and entered into force on 7 April 1948. Amendments were adopted by the World Health Assemblies and these resolutions came into force between 1977 and 2005. See http://www.who.int/governance/eb/who_constitution_en.pdf, accessed on 16.03.2017.

religion, political belief, economic or social condition”. Conversely, it is claimed that “the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States”, and that “the achievement of any State in the promotion and protection of health is of value to all”.

The right to health and its preservation is established by international regulations even prior to the adoption of the Universal Declaration of Human Rights¹⁰, which does not expressly allot an article to this right. However, by the provisions of article 25 on the right to a satisfactory living standard, the Declaration stipulates that one of the defining components of this right is health care provision, necessarily including medical care among the issues of interest. Then, article 12 of the International Covenant on Economic, Social and Cultural Rights¹¹, settles the two dimensions of the right to health care by clearly stipulating in paragraph (1) that all countries should recognize the right of every individual to benefit from the best attainable physical and mental state. Paragraph (2) of the same article conveys the collective dimension of this right and indicates several necessary measures that the states should adopt with a view to fully exercise this right.

From the aforementioned issues, one can consider the right to health and to its protection¹² not exclusively from the perspective of this right because many of its other facets can be highlighted¹³. Hence, there is the medical aspect owing to which the international community, by the organizations founded precisely for this aim, such as the World Health Organization, and

by their specifically established attributions¹⁴, but mostly the states have to contribute to the provision of hygiene and public health by systematizing medical assistance and the medical insurance system as well as by devising measures for the protection of the physical and mental health of all individuals, according to the provisions of Article 35 (2) and Article 35 (3) of our Constitution¹⁵.

Moreover, this right has a dimension which is echoed by the right to a satisfactory living standard with regard to health, medical care, health insurance policies that every human being should benefit from, a view which is also shared by the provisions of article 47 of the Constitution of Romania, republished.

But the consideration of this right from the point of view of the right to a healthy environment, as the health of human beings is totally dependent upon the health of their environment, should not be disregarded. Hence, reasserting and aiming to expand the Declaration issued at the United Nations Conference on the Human Environment adopted in Stockholm on 16 June 1972, the United Nations Conference on Environment and Development, through the Rio Declaration on Environment and Development¹⁶, which was adopted during the proceedings of the conference held between 3 June and 14 June 1992, stated in its first principle that people “are entitled to a healthy and productive life in harmony with nature”. Also, in Principle 14, the same organization demanded the states to “cooperate effectively for discouraging and preventing the movement and transfer to other states of any activities and substances that could cause severe

¹⁰ This Declaration was adopted by the UN General Assembly on 10 December 1948, by its Resolution 2171 A/III. Romania signed the Declaration on 14 December 1955, when it became member of the United Nation Organization, as it is settled by the Resolution R 955 (X) of the UN General Assembly.

¹¹ This Covenant was adopted and opened for signature by the United Nations General Assembly on December 16th 1966, Resolution 2200 A (XXI), entered into force on January 3rd 1976, according to art 27. Romania has ratified the International Covenant on Economic, Social and Cultural Rights on October 31st 1974, by Decree no 212 which was published in the Official Gazette of Romania, Part I, no 146 from November 20th 1974.

¹² As regards the name given to this right, it varies from the right to health to only a reference to the respective right as a dimension of another right such as the right to a satisfactory or decent living standard. But by a Fact Sheet, WHO names this fundamental right the right to health, but it gives its full name - the right to the enjoyment of the highest attainable standard of physical and mental health. See Office of the United Nations High Commissioner for Human Rights and World Health Organization, Fact Sheet No. 31 from 2008, p. 1, at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, accessed on 07.03.2017.

¹³ I. Cloșcă, I. Suceavă, *Tratat de drepturile omului, „Treaty of Human Rights”*, Europa Nova Publishing House, Bucharest, 1995, p.293 and onwards.

¹⁴ Hence, for instance, in article 2 of its own Constitution, WHO has provided some of its functions such as: to act as the directing and co-ordinating authority on international health work, to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate, and to assist Governments, upon request, in strengthening health services.

¹⁵ In Fact Sheet No. 31 from 2008, WHO identified a number of 115 states in the Constitutions of which the right to health or the right to health protection is regulated, and other six states identify, by means of their constitutional norms, the duties of the state regarding the development of public medical care services or regarding the allocation of funds from the state budget for this objective. See Fact Sheet No. 31 from 2008, op. cit., p.10. Moreover, it has been pointed out in various studies that more than a third of the world’s countries have included provisions regarding the right to health or to the protection of health in their fundamental laws. In this sense, see H. Matsuura, *The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970–2007: the Role of Democratic Governance*, in Program on the Global Demography of Aging - Working Paper Series, pp. 2-3, at: https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1288/2013/10/PGDA_WP_106.pdf, accessed on 10.03.2017, or G. Backman, P. Hunt, et al., *Right to Health - Health systems and the right to health: an assessment of 194 countries*, at: http://www.who.int/medicines/areas/human_rights/Health_System_HR_194_countries.pdf, accessed on: 17.03.2017. Hence, for instance, the Constitution of Bulgaria, in article 52, takes into consideration both the individual as well as the collective dimension of this right. Therefore the right to medical insurance guaranteeing affordable medical care and free medical care to citizens is ratified; but it is also established that State shall protect the health of all citizens, and shall exercise control over all medical facilities and over the production and trade in pharmaceuticals, biologically active substances and medical equipment. This Constitution also provides that Medical care shall be financed even from the state budget. Furthermore, article 40 of the Constitution of Slovakia provisions that every person shall have the right to protect his or her health, but also that through medical insurance, the citizens shall have the right to free health care and medical equipment for disabilities under the terms to be provided by law. These constitutions are available at: <https://www.constituteproject.org/search?lang=en>, accessed on: 17.03.2017.

¹⁶ See <http://www.un.org/documents/ga/conf/151/aconf15126-1annex1.htm>, accessed on: 17.03.2017.

environmental damage or which could be harmful to people's health".

One cannot overlook the fact that, at European level, the European Convention on Human Rights does not expressly establish the right to health or to its protection¹⁷. Yet, by its case law, the European Court of Human Rights increasingly resorts to the vague notion of "private and family life", thus encompassing in this frame-concept not only the right to live in a healthy environment, among other things, but also the right to health¹⁸. The physical and moral integrity of the individual, as a dimension of private life protection, but in some circumstances, it is chiefly the physical one that comprises the dimension of the right to health¹⁹, according to the Court's case law²⁰.

On the other hand, the Charter of Fundamental Rights of the European Union acknowledges the existence of this right-*lien*²¹, by stating that the right to health protection entails the right of every individual to have access to preventive medical assistance and to benefit from medical care, according to national legislation and practice. Furthermore, article 25, in its second sentence, also orders that a high level of protection of human health should be furnished by means of policies and actions at European Union level. Therefore, nowadays, there is an increasingly poignant orientation towards the need to secure the right to the highest possible health standard, but in order for this to materialize the characteristics of health systems must be identified, but working our way through this process is similar to the implementation of the right to a fair trial²².

In fact, in the constitutional definition of the right to health, three criteria can be identified²³, namely the purpose of this right, "the right to health must contain the guarantee of the right to access health care rather than the right to a healthy environment or health

insurance for all citizens of the country"²⁴, then that this "right must be an individual right enforceable through the independent judicial review or specific complaint process if no judicial review process is available for a country"²⁵, and in the end such a right has to be explicitly written in one or more provisions.

In light of all the above, we hold that, legitimately, "the right to health provides a framework that can be used across disciplines, communities and cultures (and, indeed, with sectors outside health) for developing, delivering and evaluating health-related policies, services and programmes to ensure they are robust, sustainable, effective, and equitable"²⁶.

Consequently, it is utterly undeniable that saving life is a basic element of social justice (and the access to life-saving treatment is a basic human right), but, at the same time, due to the ever more sophisticated and expensive means of modern medicine, this also constitutes a fundamental economic and political problem²⁷. Or, in other words, universal health care is about more than our health—it is also a prescription for economic transformation, budget and tax reform, and public sector strengthening²⁸.

The securing and protection of health rely on policies, strategies and rules that are instated through national and international legislation, the public health system being bound and able to guarantee "a minimum level of health" to all human beings even when, by exercising their economic freedom, their health had been endangered by the manufacture and sale of goods and products that were harmful to their own health and to the health of others. Notwithstanding, economic freedom is exercised precisely for ensuring and protecting health, especially in the private sector.

¹⁷ Nevertheless, the European Social Charter (Revised) adopted on 3 May 1996 in Strasbourg, which guarantees, in article 11 and article 13, both the right to health protection and the right to medical and social assistance, bearing upon both the individual and the collective dimensions of the right to health, entered into force at the level of the Council of Europe and was afterwards ratified by Romania through Law no. 74/1999, published in the Official Gazette of Romania, Part I, no. 193/1999.

¹⁸ F. Sudre, *Drept european și internațional al drepturilor omului*, "European and International Law of Human Rights", Polirom Publishing House, Iasi, 2006, p.315.

¹⁹ J. F. Renucci, *Tratat de drept european al drepturilor omului*, "Treaty of European Law of Human Rights", Hamangiu Publishing House, Bucharest, 2009, pp. 241-242

²⁰ See: McGinley and Egan v. The United Kingdom (case no.10/1997/794/995-996), June 9th 1998, B2, § 101 at: http://www.hrcr.org/safrica/access_information/ECHR/McGinley.html, accessed on: 17.03.2017. In this case, ECHR stated that "where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information". Thus, a positive obligation of the states to engage in securing this dimension of the right to uphold private and family life by supplying necessary and relevant information was instated.

²¹ I. Muraru, E.S. Tănăsescu, coordinators, *Constituția României. Comentariu pe articole*, "Romanian Constitution. Comment on articles", C. H. Beck Publishing House, Bucharest, 2008, p.319.

²² G. Backman, P. Hunt, et al., op. cit., pp. 2047-2048.

²³ H. Matsuura, op. cit., pp. 16-17.

²⁴ Ibidem.

²⁵ Ibidem.

²⁶ A. J. Blaiklock, *The Right to Health: An Introduction*, p.4, article available at: <https://cdn.auckland.ac.nz/assets/humanrights/Research/Right-to-health-blaiklock.pdf>, accessed on: 10.03.2017.

²⁷ Wolfgang Hein and Lars Kohlmorgen, Global Health Governance: Conflicts on Global Social Rights in Working Papers. *Global and Area Studies*, pp. 7-8, article available at: https://www.giga-hamburg.de/de/system/files/publications/wp07_hein_kohlmorgen.pdf, accessed on: 10.03.2017.

²⁸ A. Rudiger, *Human Rights and the Political Economy of Universal Health Care: Designing Equitable Financing in Health and Human Rights Journal*, vol 18, No 2, December 2016, p. 68, available at: <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2016/12/Rudiger-final-1.pdf>, accessed 10.03.2017.

2.2. Aspects regarding economic freedom

Whereas the right to health protection is considered a third-generation right, economic freedom is included into the category of first-generation rights²⁹, being regulated by the Constitution of Romania only after its revision in 2003.

Legally speaking, economic freedom is of interest inasmuch as concerns its content as well as its limitations because article 45 of the republished Constitution of Romania³⁰ expressly provides that one's right to conduct economic activities, to exercise free enterprise and to conduct all within the limitations of the law are guaranteed³¹. This constitutional provision also indicates the fact that this freedom is not an absolute one³². Actually, by its very case law, the Constitutional Court of Romania has confirmed the constitutional provisions whereby the free access of a person to an economic activity, free enterprise as well as their enactment can be pursued only according to the conditions expressly provided by the law. Hence, by Decision no. 556/2007³³, the Constitutional Court held that the state is required to instate economic conformity regulations that economic agents have to abide by and, conversely, it is the prerogative of the lawmaker to decide upon the adequate sanctions to be applied for their breach, as the people's free access to economic activities and the free enterprise are guaranteed under the "conditions expressly provided by the law". Also, by Decision no.162/2011³⁴, the same constitutional court reiterated that the principle of economic freedom is not an absolute right of the individual, but it is conditioned by the observance of the limitations laid down by law, boundaries that target the assurance of a certain economic conformity or the protection of general interests as well as the guarantee that the rights and legitimate interests of all individuals are being respected. Therefore, any state, especially through Government and Parliament, has a central role to play in advancing and defending economic freedom and non-economic rights, such as the right to health³⁵.

However, as economic freedom is considered a fundamental freedom, it represents a type of economic right, but this freedom does not include all types of economic rights, otherwise distinctly regulated by the Constitution, even though it is their grounding and their very reason of existence³⁶. Therefore, this type of freedom also comprises economic freedom as delineated by article 135 of the Constitution of Romania (Republished) as being "the general principle of the Romanian state, on which the organization of economic activities on its territory is founded"³⁷.

On the other hand, we have to mention that the objectives of European Union, as found in TFEU and foremost in TEU, article 1 and 3 Par. 3, indicate, among others, the aim to sustain an internal market and to promote social justice³⁸. In this sense, article 16 of the Charter of Fundamental Rights of the European Union established the freedom to conduct commercial activities, which is acknowledged according to the law of the European Union and to national laws and practices. If economic freedoms are held to promote the internal market of the EU, where free trade and movement configure to aid the mutual aims and objectives of the member states of the EU, social rights, such as the right to health, advert to those serving to balance circumstances for citizens of the EU, conditions that are considered essential for human beings to live their life in dignity³⁹.

Economic freedom includes our freedoms to create, to explore our capabilities and talents through our choice of vocation, and to provide for ourselves and our family, but also involve the opportunity to acquire and own property, to exchange our goods and services with others in free markets at prices that are mutually agreeable, and to transact when and where we choose, but not least this freedom also involves our decisions that nurture those capacities, especially education and training, but also our lifestyle choices, health care, and nutrition⁴⁰.

²⁹ M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *Constituția României revizuită – comentarii și explicații*, „Romanian Constitution revised – comments and explanations”, All Beck Publishing House, Bucharest, 2004, p. 97.

³⁰ Other constitutions also regulate this fundamental freedom. Thus, for instance, in article 31, the Constitution of Estonia provides that Estonian citizens, but also Citizens of foreign states and stateless persons who are in Estonia, unless otherwise provided by law, have the right to engage in enterprise and to form commercial undertakings and unions, but conditions and procedure for the exercise of this right may be provided by law. Also, article 18 of the Constitution of Finland acknowledges, alongside the right to work, the freedom to engage in commercial activity that consists in everyone's right to earn his or her livelihood also by commercial activity of his or her choice.

³¹ I. Muraru, E.S. Tănăsescu, coordinators, *op. cit.*, p. 461.

³² *Idem*, p. 463.

³³ Decision no. 556 of 7 June 2007 on the constitutional challenge of the provisions of article 51(1), Par. A, of the Competition Law no.31/1990 on commercial companies, of the Constitutional Court of Romania, was published in the Official Gazette of Romania, Part I, no.560 of 15.08.2007.

³⁴ Decision no. 162 of 8 February 2011 on the constitutional challenge of the provisions of article 136 of the Law no. 31/1990 on commercial companies, of the Constitutional Court of Romania, was published in the Official Gazette of Romania, Part I, no. 272 of 19.04.2011.

³⁵ See J.D. Foster, J. A. Marshall, *Freedom Economics and Human Dignity. Economics for the Good of People*, p. 22, available at: http://thf_media.s3.amazonaws.com/2011/pdf/Freedom_Economics.pdf, accessed 10.03.2017.

³⁶ G. Gârleşteanu, Considerații privind libertatea economică, „Considerations regarding the economic freedom”, published in Revista de Științe Juridice nr. 2/2006, pp. 151-152, available at: <http://drept.ucv.ro/R SJ/images/articole/2006/R SJ2/0302GeorgeGarlesteanu.pdf>, accessed 10.03.2017.

³⁷ *Ibidem*, p. 152.

³⁸ J. Andersson, *The economic freedoms and social rights within the EU – a study of the transformation and interplay between these two interests*, JAEM01 Master Thesis, available at: <https://www.mysciencework.com/publication/download/2d8abe3b5c41b9e378593a0830562262/471d3a0579dd562d5b23acb8d0849811>, accessed on: 10.03.2017.

³⁹ J. Andersson, *op. cit.*, p. 11.

⁴⁰ J.D. Foster, J. A. Marshall, *op. cit.*, pp. 7-8.

The beneficiary of this fundamental right is, first and foremost, the individual who, when being considered from a legal perspective, is assimilated to the natural person⁴¹. However, taking into account the European legal framework, by article no.1, sentence I⁴² of the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms as well as the case law of the European Court of Human Rights, and the content of economic freedom, the congruity of the normative components of this freedom with the constitutional principle of pluralism⁴³, including the rather inconsistent case law of the Constitution of Romania⁴⁴, we also consider that “economic freedom concerns all the participants from the economic field, namely the natural person but mostly the moral person”⁴⁵. In this context, the moral person is both the private as well the public person. On the other hand, economic freedom also involves state obligations that are subsumed to the principle of economic freedom⁴⁶, the fundamental lawmaker⁴⁷ implicitly ruling in this direction by characterizing the Romanian economy as a market economy within which the state must also guarantee the freedom of trade but it also has to create the necessary conditions for the improvement of the quality of life. Hence, in our opinion, it is mandatory that the state should intercede through the adoption of the necessary legislative measures, either on its own initiative or by enforcing policies which are in accordance with the objectives of the European Union regarding the warranty, safeguarding and protection of such fundamental rights as the right to health protection, even if it would thus infringe upon the exercise of others, such as economic freedom.

Therefore, the human rights frame thus occupies the intersection between universal values and vision on one side, and particular political demands and policy prescriptions on the other⁴⁸. In the quest for universal health care, rights can be marshalled both as a normative and as an analytical force to be deployed on a politically contested terrain⁴⁹.

More than that, we must admit that today we are witnessing conflicts between neoliberalism, the dominant economic policy framework in the world

today, and the international human right to health⁵⁰. In this context a human rights approach rests on a conception of health and health care as social or public goods of special importance that are designed to benefit the whole population⁵¹. In contrast, neoliberalism tends to promote the view of health care as a commodity whose price, availability, and distribution, like other consumer goods, should be left to the marketplace⁵².

2.3. Decision no. 29 of 27 January 2016 on the constitutional challenge of the provisions of the Law for the completion and amendment of Law no. 349/2002 on the prevention and control of the effects of the use of tobacco products, of the Constitutional Court of Romania⁵³

Subsequent to the formulation of a constitutional challenge by 33 senators regarding the alleged unconstitutionality of the Law for the completion and amendment of Law no. 349/2002 for the prevention and control of the effects of the use of tobacco products, at point 31 of its Decision, the Constitutional Court of Romania held that “the right to economic freedom has to be understood in connection with the observance of other rights and fundamental freedoms such as the right to life, the right to health and to a healthy environment” and “smoking bans in closed public spaces does not constitute, per se, a limitation of economic freedom but it represents a condition for conducting economic activities” in the sense of the constitutional text of article no.45 in which this right is established.

Moreover, making reference to the case law of the Constitutional court of Macedonia, which is relevant to the case in question, the Court laid emphasis on the fact that “smokers are granted access to all the places that the lawmaker defined as public spaces in which smoking is banned, but they must correlate their conduct with the conduct of the other non-smoking citizens, in a manner which is conformant to the conditions laid down by the law and which regard all the citizens” precisely because “the aim of such regulations is to protect life and health (as supreme

⁴¹ G. Gârleşteanu, op. cit., p. 152.

⁴² According to this provision, the right to the protection of personal assets is an entitlement of every natural or legal person.

⁴³ This principle is established by article 8 of the (Republished) Constitution of Romania.

⁴⁴ For further details see G. Gârleşteanu, op. cit., pp. 153 -155.

⁴⁵ G. Gârleşteanu, op. cit., p.155

⁴⁶ *Idem*, pp.155-156.

⁴⁷ Article 135 (1) and (2), Par. a), b) and f) of the (Republished) Constitution of Romania stipulates that Romania's economy is a free market economy, based on free enterprise and competition, but also that the State must secure a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production, protection of national interests in economic, financial and currency activity, and creation of all necessary conditions so as to increase the quality of life.

⁴⁸ A. Rudiger, op. cit., p.70.

⁴⁹ *Ibidem*.

⁵⁰ G. MacNaughton, *Advancing Global Health and Human Rights in the Neoliberal Era* – book review of A. R. Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies*, published by Cambridge University Press, 2016, in *Health and Human Rights Journal*, Vol. 18, No 2, december 2016, p. 255, available at: <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2016/12/MacNaughton-final-1.pdf>, on: 10.03.2017.

⁵¹ A. R. Chapman, op. cit., p. 85, paper quoted by G. MacNaughton, op. cit., p. 256.

⁵² *Ibidem*.

⁵³ This decision was published in the Official Gazette of Romania, Part I, no. 196 of 16.03.2016.

values) which could be jeopardized by the irresponsible behaviour of smokers⁵⁴.

Actually, not only the law adopted by the Parliament of Romania for the amendment of Law no. 349/2002⁵⁵, but also the decision of the Constitutional Court of Romania are conformant to the provisions of the above mentioned Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, whose main objective, provisioned by article no.1, is to approximate the laws, regulations and administrative provisions of the Member States in order to: facilitate the smooth functioning of the internal market for tobacco and related products, take as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the WHO Framework Convention for Tobacco Control ('FCTC')⁵⁶.

The constitutional regulations that guarantee the right to life and to living in a healthy and safe environment incur certain positive obligations of the state, yet smoking in public spaces is detrimental not only for the health of smokers but also to the health of others⁵⁷. Many countries considered the smoking ban in public spaces a necessary step towards the protection of public health⁵⁸. The smoking ban in pubs was considered to be a necessary and legitimate precaution for the protection of the right to live in a healthy environment, regarded, in our view, as a dimension of the right to health protection, as the commercial rights of the pub owners are not breached⁵⁹.

3. Conclusions

The right to health is a fundamental part of our human rights and of our understanding of a life in dignity⁶⁰. Likewise, dignity and the value of the human being are fundamental values which are acknowledged and guaranteed as such by international and national regulations⁶¹. Furthermore, the same regulations

warrant the recognition of all the rights and liberties of human beings, both collectively and individually, which does not entail that by exercising a right or liberty we are allowed to transgress the rights and liberties of others.

Economic freedom represents the condition for the achievement of other fundamental rights, such as even the right to health⁶² or to the protection of health.

Nonetheless, this freedom cannot be exercised in an absolute manner either by natural persons or by their corresponding legal persons, much less when there is a risk of infringing on other fundamental rights and liberties, such as the right to health and to its protection. In such circumstances, it is the duty of the qualified international organizations and of the state to exercise their positive obligation to intervene, principally by legislative measures, in order to set boundaries for the exercise of economic freedom or, at least, to outline a legal framework in which this freedom could be exercised indiscriminately. Therefore, the exercise of economic freedom can be restrained by the public power, the guarantor of general interests and the guardian of the liberties of all, but only abiding by the principles of the democratic rule of law and by the "proceedings" established by article 53 of the (Republished) Constitution of Romania⁶³.

Whether it is the legal framework for the use of substances or products, such as tobacco and related products that could affect people's health, or the framework for securing the right to health and to its protection, their delineation must be carried out by taking into consideration the dimensions of economic freedom according to the constitutional provisions, without, however, jeopardizing the right to health and to its protection. Actually international human rights law is neutral, in principle, with regard to the type of economic system a state pursues, provided that it is

⁵⁴ In this sense see section 33 of the Decision no. 29/2016 of the Constitutional Court of Romania.

⁵⁵ The overruling of the constitutional challenge by the above mentioned Decision issued by the Constitutional Court resulted in Law no.15/2016, which was published in the Official Gazette of Romania, Part I, no. 72 of 01.02.2016.

⁵⁶ The WHO Framework Convention on Tobacco Control (WHO FCTC) is the first treaty negotiated under the auspices of the World Health Organization. The WHO FCTC opened for signature on 16 June to 22 June 2003 in Geneva, and thereafter at the United Nations Headquarters in New York, the Depository of the treaty, from 30 June 2003 to 29 June 2004. The Convention entered into force on 27 February 2005. According to art. 3 from WHO FCTC, the objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke. In order to achieve the objective of this Convention and its protocols and to implement its provisions, the Parties must also to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration the need to take measures to protect all persons from exposure to tobacco smoke (according to art. 4 para 2 lett.b). This document is available at: <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1>, accessed on 18.03.2017.

⁵⁷ In this sense see section 33 of the Decision no. 29/2016 of the Constitutional Court of Romania, specifically the arguments brought by the Constitutional Court of the Republic of Turkey.

⁵⁸ Ibidem.

⁵⁹ Ibidem.

⁶⁰ Office of the United Nations High Commissioner for Human Rights and the World Health Organization, Fact Sheet No. 31 from 2008, op. cit., p. 1.

⁶¹ In this sense see, for instance, the Preamble to the Universal Declaration of Human Rights, or the Preamble to the Charter of Fundamental Rights of the European Union, or article 1(3) of the (Republished) Constitution of Romania, or the Preamble to the Constitution of the Czech Republic (the latter is available at: https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en, accessed 18.03.2017).

⁶² Ș. Deaconu, *Drept constituțional*, „Constitutional Law”, C. H. Beck Publishing House, Bucharest, 2011, p. 275.

⁶³ G. Gârleşteanu, op. cit., p. 163.

consistent with democracy and the realization of human rights⁶⁴.

We consider that whenever the health of a human being is affected or could be affected by any economic activities, first and foremost, it is the duty of the states to intervene in such a way as to secure this fundamental right.

Hence, under any circumstances, health, the right to health and to its protection must, in our view, prevail over economic freedom, yet without “obliterating” it if

exercised under the conditions and limitations laid down by the law.

In actual fact, we believe that the term for this right should be the right to health and to the protection of health, in order to encompass both the individual dimension of this right which regards every human being, as well as its collective dimension which entails the positive obligation of the state to guarantee its protection, ideally at the highest standard.

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⁶⁴ The UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations, UN Doc. E/1991/23 (1990), para. 8, paper quoted by G. MacNaughton, op. cit., p. 256.