

The right to health

A comparative law perspective

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Honor Pledge:

I, **Patrícia Alexandra da Silva Domingues**, by my honor declare that the submitted work is original and adheres to the University' highest standards of academic integrity.

Abstract:

The follow work is a comparative analysis of the protection of the right to health with reference to the Portuguese and U.S.' System.

The tremendous scientific and technological advancements made in medicine and other fields of science and health today- perhaps unimaginable just a few decades ago- produce in society both awe and amazement as well as a great deal of optimism. This due to a number of illnesses that previously were serious scourges and caused epidemics able to kill entire communities if their defenses and remedies were not in place found out. In addition, 20th century diagnoses of new and uncommon illnesses. Additionally, they can now be treated or managed, which relieves patients of some of their burden.

Therefore, all of this leads to a tremendous deal of confidence over the future of humanity and the hope on controlling and conquering illnesses. Since Public health is the classic government services, it is also a key administrative law practice area.

The main goal of administrative law has been protecting the rule of law and the liberty of the citizens by making sure that agencies (in the United States) and entities (in Portugal) follow develop their programs taking in consideration this extremely important right, follow and respect the law, always with the ambition of preserving the human dignity. In fact, the agencies were attacked as an unconstitutional "fourth branch" of government.

According to World Health Organization, *«States must, for instance, adopt a national health policy or a national health plan covering the public and private sectors; ensure the provision of health care, including immunization programs against infectious diseases and services designed to minimize and prevent further disabilities; ensure equal access for all to the underlying determinants of health, such as safe and nutritious food, sanitation and clean water; ensure that public health infrastructures provide for sexual and reproductive services and that doctors and other medical staff are sufficient and properly trained; and provide information and counselling on health-related issues, such as HIV/AIDS, domestic violence or the abuse of alcohol, drugs and other harmful substances.»*¹

Comparing the two administrative systems- the Portuguese and the American- we will find some differences that are important to mention.

Firstly, is definitely important to highlight the two different government systems. Quoting CARLOS BLANCO DE MORAIS, we can define government system as:

*«modelo or paradigm of governance, through which common and permanente attributes are grouped between different forms of organization of power, which its inclusion in a given category»*².

In the United States of America runs, the Presidential government system, which is a democratic and republic system of government where a head of government leads and executive branch that is separate from the legislative branch. The executive is elected and is not responsible to the legislature. The head of the executive in this case is the President.

On the other hand, in Portugal, predominates a Semi-presidential system, also known as dual executive system. In this kind of systems, the president exists alongside a prime minister and a cabinet, with the last two controlling the legislature of the State.

Comparing the two systems we do find some big differences that might influence (or not), the way the law protects the right to health.

¹ World Health Organization, *The Right to Health*, Fact Sheet No. 31

² Translation to Portuguese: *«Modelo ou um paradigma de governação, através da qual se agrupam atributos comuns e permanentes entre diversas formas de organização do poder, que possibilitam a sua inclusão numa dada categoria»*.

Being the executive branch attributed, exclusively, to only one person, the President, in a crises moment, we might find some serious problems. In Portugal we will find a government formed with different political ideas which will definitely benefit the protection of the people believes.

Despite this aspect, it is crucial that we recognize that, in both countries, we will find a democracy and all the citizens will find people representing their believes in the legislative branch (the American Senate and Congress in the United States of America and the Republic Assembly in Portugal).

However, as analyzed by Professor Vasco Pereira da Silva, the evolution of the administrative law, we will find their traumatic³ birth around the eighteenth century, in France.

First, we have the French Revolution (1789), which turnout to became a giant trauma⁴ in the history of the administrative law. In fact, in order to start practicing their new principles, *Liberty, Equality, Fraternity*⁵ and the separation of powers, a doctrine that started in France, but soon other European countries used the same model of division to guarantee the equality their population have been fighting for.

In fact, the first modern formulation of the doctrine brought by the French political philosopher MONTESQUIEI in *The spirt of Law*⁶(1748). Although, the English philosopher John Locke has earlier argued that legislative power should be divided between the king and the Parliament.

The separation of powers is a doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate. This is also knowing as the system of checks and balances, because each branch is given certain powers so as to check and balance the other branches.

This new way of thinking, unfortunately, affected the administrative law in such a negative way because, given the separation of powers, the judicial courts were not allowed to judge the administration, in order not to bother it (*trouble l'administration*). According to Charles Debbash, this brought a total confusion into the system because the administration would judge their own acts.

The second trauma regards the polemic case Blanco. In the opinion of the Professor Sabino Cassese, this case is a sad episode, not only to the world, but specially to the traumatic childhood of the Administrative Law. This was the first situation where we can confirm that the rules that where created where to protect the administration and not the citizens.

This case is extremely important for the evolution of the Administrative Law because it will evidence the idea of power of the administration and non-existence of rights to the population. In fact, this opinion is followed by important authors, such as, OTTO MAYER, SANTI ROMANO and HAURIOU by neglecting the idea of any kind of subjective rights.

In fact, this is something that does not correspond to nowadays. However, I believe it is important to mention this traumatic childhood of the Administrative Law in sequence of allowing us analyze the evolution of it and how we reached what we have today.

³ VASCO PEREIRA DA SILVA, *Em Busca do Acto Administrativo Perdido*, Edições Almedina, 1996

⁴ VASCO PEREIRA DA SILVA, *Em Busca do Acto Administrativo Perdido*, Edições Almedina, 1996

⁵ Translation to French: *Liberté, Égalité, Fraternité*

⁶ Translation to French: *The spirt of Law*, 1748

The Administrative Law we have today, still suffers from this traumatic beginning, but it has definitely changes. Its mechanism and causes of action are now being used to enforce human rights by ensuring that the public power is exercised fairly.

We are certain that a change as occurred. Actually, multiple official documents proof that. The administration has now the task of protecting the Human Rights, by creating instruments and mechanisms for their implementation and preservation. One of the mechanisms to guarantee, for example, equality is the fair trial, which can include multiple rights, such as, the right to legal assistance, the right to remain silent, the right to effective legal assistance in death penalty cases, prohibition on the use of evidence obtained through unlawful means/treatment, ...

After this enunciation, we can easily conclude that the citizen has definitely rights against the administration, which means, if we analyze the perspectives, the administration also has obligations to the human.

To differentiate, we will define the administrative law of the twenty-first century as the new governance in order to emphasize the difference between the administration of the ninetieth century and the administrative system of the twenty first system.

New governance is now facing, directly and indirectly, with new challenge regarding the rights-based model of legal liberalism. For progressives seeking to strengthen norms such as antidiscrimination, the road to success of this new type of governance is not by «claiming rights», but «solving problems».

As mentioned in this paper, administrative law is the law of government. Administrative law focus on their people's safety. In order to achieve that, administrative law guides regulation of food safety, water quality, housing conditions, pharmaceuticals and chemicals, occupations safety and health, and medical practice, among other areas.

Governments are determined to implement and enforce public health policies and programs, including retail licensing, lead paint inspections, quarantine orders and determinations of who is eligible to receive public benefits and how much they can benefit. One of the most known programs is, precisely, the Special Supplemental Nutrition Program for Women, Infants and Children(WIC).

«The Special Supplemental Nutrition Program for Women, Infants, and Children(WIC) provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age 5 who are found to be at nutritional risk»⁷.

The administrative law can limit agencies, forcing them to act in a certain way in order to exercise powers over individuals and private entities. Since the law has such a big influence on the right to health we consider imperative that public health practitioners have a understanding of administrative law, such as the principles of administrative law, the scope of administrative law and why it is important for public health and, least but no last, recognize how critical legal principles influence the broad range of public health powers and set appropriate limits on those powers in order to protect individuals rights.

The World Health Organization(1946) envisages that *«the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition»*.

⁷ Food and Nutrition Service, U.S. Department of Agriculture <https://www.fns.usda.gov/wic>

The fact that this law was written back in 1946 gives the governments even more assurance that the right to health is extremely important and, acknowledging health as a human right recognizes a legal obligation on states to ensure access to timely, acceptable, and affordable health care, an obligation that is reviewed through various international human rights mechanisms.

But before we proceed we must ask ourselves what a human right actually is.

According to Cerf, for something to be considered a human right, it “must be among the things we as humans need in order to lead healthy, meaningful lives.” In that end, he argues that access to the Internet should be an enabler of rights, but not a right itself.

Primarily the Human Rights exist because there are human beings in the world. However, they are not granted by every state. The universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, region, language, sexual orientation, or any other status. Despite the much effort or activists put into the divulgation of the importance of the Human Rights and how everyone is worth of owing them.

The first legal document to set and universal protection for the human rights was the **Universal Declaration of Human Rights**, adopted by the United Nations General Assembly in 1948. The UDH, together with 2 covenants- The International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights- make up the International Bill of Rights.

These Rights were set by multiple principles, such as, Invisibility and Independence and, Equality and non-discrimination.

According to an article published by the United Nations the states have multiple obligations, including:

- Obligation to respect: The states must not interfere with the enjoyment of human rights
- Obligation to protect: The states need to protect individuals and groups against human rights abuses
- Obligation to fulfill: The states must take positive action to facilitate the enjoyment of basic human rights.

As individuals, we are entitled to our human right, but have the obligation to respect and protect everyone’s human rights. However, this task may be harder to accomplish when the state we live in does not protect our human rights. Unfortunately, of the 197 countries of the world, there still 20, including three territories, considered to be the most societally repressive. Besides being extremely abusive to their citizens, the government is also an ultimate abuser of the human rights.

Before adding more human rights to the list I believe it is imperative that actions are taken to convert the context these people live under. Reciting *Erika Wright* «The way the governments of global powers have responded to the atrocities is disappointing, illuminated by a lack of transparency and accountability and acceptance of both blatant malevolence and disregard for human life. Many countries have been criticized for failing to refer these matters to the International Criminal Courts to rectify human rights violation. The UN has deployed peacekeeping troops in such countries to bolster its efforts to protect civilians. Despite such efforts, UN compounds have been targeted and raided as recently as this year- an indication of the prolonged continuation of human rights violations».

Not only do I share the same opinion, but I also believe it requires more than a government to change the environment that the Human Rights are forced to exist and try to survive in. In fact, I am sure that this is something that should take more of a personal action and should start by the

power of unlearning. «The Power of Unlearning» was a project started by Dr. Benice A. King that soon became a global movement to try to make a change in the world and accept every people not matter their color or religion. According to this Dr.'s statement, the inequality started when people *learned* that they were in fact different. They were not wrong but the way they used that difference to create an elite that controls the world was not correct at all. If we transfer the way of thinking to the human rights, we would achieve a similar solution. Some states do not respect the human rights because they *learned* how different their population is from the government which mean they do not deserve to be entitled to these rights. However, if they *unlearn* it and promote a nonviolent social change, I truly believe we would get more understanding minds around the world and, consequently, States will finally respect and protect their people's human rights.

The core principles of human rights, and shared by World Health Organization are:

- Accountability: *«States and other duty-bearers are answerable for the observance of human rights. However, there is also a growing movement recognising the importance of other non-state actors such as businesses in the respect and protection of human rights».*;
- Equality and non-discrimination: *«The principle of non-discrimination seeks '...to guarantee that human rights are exercised without discrimination of any kind based on race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status such as disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation'».*;
 - According to World Health Organization, *«the principle of non-discrimination and equality requires WHO to address discrimination in guidance, policies, and practices, such as relating to the distribution and provision of resources and health services. Non-discrimination and equality are key measures required to address the social determinants affecting the enjoyment of the right to health. Functioning national health information systems and availability of disaggregated data are essential to be able to identify the most vulnerable groups and diverse needs.».*
- Participation: *«Participation requires ensuring that all concerned stakeholders including non-state actors have ownership and control over development processes in all phases of the programming cycle: assessment, analysis, planning, implementation, monitoring, and evaluation. Participation goes well beyond consultation or a technical addition to project design; it should include explicit strategies to empower citizens, especially the most marginalized, so that their expectations are recognised by the state».*

As recognized on 2030 Agenda for Sustainable Development and Universal Health Coverage⁸, a rights-based approach to health demands that health policy and programs prioritize the ones who need the most in order to achieve equity.

According to World Health Organization, *«The right to health is one of a set of internationally agreed human rights standards, and is inseparable or 'indivisible' from these other rights. This means achieving the right to health is both central to, and dependent upon, the realization of other human rights, to food, housing, work, education, information, and participation».*

⁸ UN General Assembly, *Transforming our World: The 2030 for Sustainable Development*, October 21st, 2015, UN Doc. A/RES/70/1

As mentioned earlier, every right includes both freedoms and entitlements. Concerning the right to health we can recite as freedoms the right to control one's health and body and to be free from interference, such as non-consensual medical treatment and experimentation. The entitlements on the other hand include the right to a system of health protection that allows everyone an equal access and opportunity to enjoy the highest attainable level of health.

In order to achieve equality, marginalization can be an impediment since it excludes population from enjoying good health care. In accordance to World Health Organization, three of the most deadly diseases (malaria, HIC and tuberculosis) affect mostly the poorest populations and *«non-communicable diseases- often perceived as affecting high-income countries- is increasing disproportionately among lower-income countries and populations, and is largely associated with lifestyle and behavior factors as well as environmental determinants, such as safe housing, water and sanitation that are inextricably linked to human rights»*. In fact, report show that these populations have higher levels of mortality given the lack of access to healthcare prevention, treatment and rehabilitation and care services.

Since health it is considered a human right, before we compare both the Portuguese and U.S.' System it is imperative that we do a quick analyze of the consequences of the violations of human rights in health, since it can have serious health consequences which can lead to one of the biggest human rights assaults.

Violations of human rights not only worsen and cause illness, but they also put many people at risk, specially if we are talking about people with disabilities, indigenous populations, women living with HIV, sex workers, people who use drugs, transgender and intersex people, setting this individuals to a highest risk of human rights abuse, including coercive and force treatment and procedures.

The main element of a right to health is a progressive realization using maximum available resources, which requires that government take immediate steps to defend these rights. In order to fulfill this obligation, governments can work on eliminate discrimination and also improve the legal and juridical system.

Article 12 of the Covenant on Economic, Social and Cultural Rights⁹ and General Comment 14 of the Committee on Economic, Social and Cultural Rights¹⁰ defined 4 core components of the right to health:

«Availability

Refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all. Availability can be measured through the analysis of disaggregated data to different and multiple stratifiers including by age, sex, location and socio-economic status and qualitative surveys to understand coverage gaps and health workforce coverage

Accessibility

Requires that health facilities, goods, and services must be accessible to everyone. Accessibility has four overlapping dimensions:

- *non-discrimination*
- *physical accessibility*

⁹ General Assembly resolution 2200^a(XXI), December 16th, 1966

¹⁰ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)

- *economical accessibility (affordability)*
- *information accessibility.*

Assessing accessibility may require analysis of barriers – physical financial or otherwise – that exist, and how they may affect the most vulnerable, and call for the establishment or application of clear norms and standards in both law and policy to address these barriers, as well as robust monitoring systems of health-related information and whether this information is reaching all populations.

Acceptability

Relates to respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater for the specific needs of diverse population groups and in accordance with international standards of medical ethics for confidentiality and informed consent.

Quality

Facilities, goods, and services must be scientifically and medically approved. Quality is a key component of Universal Health Coverage, and includes the experience as well as the perception of health care. Quality health services should be:

- **Safe** – *avoiding injuries to people for whom the care is intended;*
- **Effective** – *providing evidence-based healthcare services to those who need them;*
- **People-centred** – *providing care that responds to individual preferences, needs and values;*
- **Timely** – *reducing waiting times and sometimes harmful delays.*
- **Equitable** – *providing care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status;*
- **Integrated** – *providing care that makes available the full range of health services throughout the life course;*
- **Efficient** – *maximizing the benefit of available resources and avoiding waste»*

We will now proceed to the comparative law perspective of this right regarding both the US and Portuguese System.

According to Article 25 of the Universal Declaration of Human Rights¹¹:

«1. Everyone has a right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, and disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.»

Many nations specifically include a right to health or a right to health care in their Constitution. Portugal is not an exception:

«Article 64

¹¹ The Universal Declaration of Human Rights is a milestone document in the history of human rights. It declares that human rights are universal- to be enjoyed by all people, no matter who they are or where they live. The Universal Declaration includes civil and political rights.

(Health)

- 1. Everyone has the right to the protection of health and the duty to defend and promote health.*
- 2. The right to the protection of health shall be fulfilled:*

a) By means of a universal and general national health service which, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge;

b) By creating economic, social, cultural and environmental conditions that particularly guarantee the protection of childhood, youth and old age; by systematically improving living and working conditions, and promoting physical fitness and sport at school and among the people; and also by developing the people's health and hygiene education and healthy living practices.

3. In order to ensure the right to the protection of health, the state is charged, as a priority, with:

a) Guaranteeing access by every citizen, regardless of his economic situation, to preventive, curative and rehabilitative medical care;

b) Guaranteeing a rational and efficient nationwide coverage in terms of human resources and healthcare units;

c) Working towards the socialisation of the costs of medical care and medicines;

d) Disciplining and inspecting entrepreneurial and private forms of medicine and articulating them with the national health service, in such a way as to ensure adequate standards of efficiency and quality in both public and private healthcare institutions;

e) Disciplining and controlling the production, distribution, marketing, sale and use of chemical, biological and pharmaceutical products and other means of treatment and diagnosis;

f) Establishing policies for the prevention and treatment of drug abuse. 4. Management of the national health service shall be decentralised and participatory»¹²

¹² Translation to Portuguese: «Artigo 64.º

(Saúde)

1. Todos têm direito à protecção da saúde e o dever de a defender e promover.

2. O direito à protecção da saúde é realizado:

a) Através de um serviço nacional de saúde universal e geral e, tendo em conta as condições económicas e sociais dos cidadãos, tendencialmente gratuito;

b) Pela criação de condições económicas, sociais, culturais e ambientais que garantam, designadamente, a protecção da infância, da juventude e da velhice, e pela melhoria sistemática das condições de vida e de trabalho, bem como pela promoção da cultura física e desportiva, escolar e popular, e ainda pelo desenvolvimento da educação sanitária do povo e de práticas de vida saudável.

3. Para assegurar o direito à protecção da saúde, incumbe prioritariamente ao Estado:

a) Garantir o acesso de todos os cidadãos, independentemente da sua condição económica, aos cuidados da medicina preventiva, curativa e de reabilitação;

b) Garantir uma racional e eficiente cobertura de todo o país em recursos humanos e unidades de saúde;

c) Orientar a sua acção para a socialização dos custos dos cuidados médicos e medicamentosos;

It is general understanding that article 24 of the Portuguese Constitution protects health, not as much as a duty, but more as a universal right. In order to guarantee the fulfillment of this duty, it was created the Serviço Nacional De Saúde(SNS)¹³ in 1979. On September 15th 1979 it was approved a law that created the SNS, implementing the right to health protection, the provision of global health care and access to all citizens, regardless of their economic and social condition, in accordance with the constitution.

Before 1979 the right to health was already recognized in Portugal. Without getting into much detail is it important to name the most important laws thought the years:

- Decree of December 28, 1899
- General Health and Public Charity Services Regulations of 1901
- Decree-Law No. 35108, of November 7, 1945
- Law No. 2011, of April 2, 1946
- Decree-Law No. 41825, of August 13, 1958
- Law No. 2120, of July 19, 1963
- Decree-Law No. 48357, of April 27, 1968
- Decree-Law No. 48358, of April 25, 1968
- Decree-Law No. 413/71, of September 27, 1971
- Decree-Law No. 414/71, of September 27, 1971
- Decree-Law n°584/73, of November 6, 1973
- Decree-Law No. 704/74, of December 7, 1974
- Article 64 of the Constitution of the Portuguese Republic (1976)
- Ministerial Order in Diário da República, 2nd Series, of July 29, 1978
- Law No. 56/79, of September 15th.

In these 40 years of hard work, SNS contributed to people's happiness reassuring them a supportive system in terms of healthcare, also ensuring that equity was established in the country.

d) Disciplinar e fiscalizar as formas empresariais e privadas da medicina, articulando-as com o serviço nacional de saúde, por forma a assegurar, nas instituições de saúde públicas e privadas, adequados padrões de eficiência e de qualidade;

e) Disciplinar e controlar a produção, a distribuição, a comercialização e o uso dos produtos químicos, biológicos e farmacêuticos e outros meios de tratamento e diagnóstico;

f) Estabelecer políticas de prevenção e tratamento da toxicodependência.

4. O serviço nacional de saúde tem gestão descentralizada e participada.»

¹³ National Health Service(NHS)

¹⁴ Translation to Portuguese:

- Decreto de 28 de dezembro de 1899;
- Regulamento Geral dos Serviços de Saúde e Beneficência Pública, de 1901;
- Decreto-Lei n°35108, de 7 de novembro de 1945;
- Lei n°2011, de 2 de abril de 1946;
- Decreto-Lei n° 41825, de 13 de agosto de 1958;
- Lei n°2120, de 19 de julho de 1963;
- Decreto-Lei n° 48357, de 27 de abril de 1968;
- Decreto-Lei n°48358, de 25 de abril de 1968;
- Decreto-Lei n° 413/71, de 27 de setembro de 1971;
- Decreto-Lei n° 414/71, de 27 de setembro de 1971;
- Decreto-Lei n°584/73, de 6 de novembro de 1973;
- Decreto-Lei n°704/74, de 7 de dezembro de 1974;
- Artigo 64° da Constituição da República Portuguesa (1976);
- Despacho Ministerial em Diário da República, 2ª Série, de 29 de julho de 1978;
- Lei n° 56/79, de 15 de setembro

The Portuguese Constitution not only recognized a right to health but also gives orientations on how the governments must work for the purpose of protecting the Portuguese people's health. The Government and health organizations are obliged to promote healthy practices, such as physical exercise, education, and nutrition.

The Portuguese Constitution also consecrates the right to protect the health, namely, ensure equitable access to all citizens, regardless of their economic condition, to preventive, curative and rehabilitative health care, ensure equal access in financial and geographic terms, guide its actions towards public financing of health costs, regulate supervise and coordinate the public and private provision of healthcare, in order to ensure its efficiency and quality, regulate and supervise activities related to medicines, complementary diagnostic and therapeutic means and other health products, and also establish policies for the prevention and treatment of drug addiction.

Considering Health is recognized as a constitutional right, the access to healthcare can not be limited due to economic reasons, which means that both the administrative e legal branch have the obligation to guarantee access to free healthcare¹⁵. Quoting Professor Jorge Reis Novais¹⁶ *the existence of an NHS, with a certain set of characteristics, is not something that is at the mercy of the Government's free political decision, but rather something that has the nature of a constitutional imposition*¹⁷.

However, it is imperative that after article 64 of the Portuguese Constitution was reviewed, National Health Care was no longer free, but tends to be free¹⁸. After this subtle yet tremendous change, the government has now a new duty: funding the healthcare. Nevertheless, this change allowed the private sector to take action in the health field since the Government was formerly bound to produce the medication and now the private sector could produce medicine and the State would provide funding.

This constitutional obligation was later, as already mentioned, concretized with the creation of SNS in 1979. According to Article 4 of the law that creates SNS, «Access is guaranteed to all citizens, regardless of their economic and social status»¹⁹, including «*estrangeiros, em regime de reciprocidade, aos apátrida e aos refugiados políticos que residiam ou se encontram em Portugal*» «*foreigners, on a reciprocal basis, to stateless persons and political refugees who resided or are in Portugal*»²⁰.

Now that we have studied the most important legal instruments regarding the right to health, we will now analyze what in fact happens in reality.

Since its creation, SNS follows the principle of universality, which means that every citizen has the right to access to a Health National System that, as we have already concluded, is not fully free. However, as Professor Reis Novais wonders²¹, «*the possibility of admitting the*

¹⁵ Article 7 of Law no. 56/79, September 15th, 1979

¹⁶ Jorge Reis Novais, *Constituição e Serviço Nacional de Saúde*, em J. Simões (org.), 30 Anos do Serviço Nacional de Saúde. Um percurso Comentado, Coimbra, Edições Almedina, pp. 239-270

¹⁷ Translation to Portuguese: «*a existência de um SNS, com um determinado conjunto de características, não é algo que esteja à mercê da livre decisão política do Governo, mas antes algo que reveste a natureza de uma imposição constitucional*»

¹⁸ Translation to Portuguese: *tendencialmente gratuito*

¹⁹ Translation to Portuguese: «*o acesso é garantido a todos os cidadãos, independentemente da sua condição económica e social*»

²⁰ Translation to Portuguese: «*estrangeiros, em regime de reciprocidade, aos apátrida e aos refugiados políticos que residiam ou se encontram em Portugal*»

²¹ Jorge Reis Novais, *Constituição e Serviço Nacional de Saúde*, em J. Simões (org.), 30 Anos do Serviço Nacional de Saúde. Um percurso Comentado, Coimbra, Edições Almedina, pp. 239-270

departure of beneficiaries from the NHS to other health subsystems or to insurance, of a private or public nature, on a voluntary basis or compulsorily imposed by the State [...] raises, however, legal and constitutional doubts related not only to the current universal nature of the NHS, but also to the guarantee of the right to health protection of all citizens»²²

Nonetheless, the Professor understands that we cannot conclude that free choice to the private health system violates the right to health: *«those who leave and those who stay- to the protection of health. In fact, an opting out policy of the NHS would have associated a risk of limiting access to health care, both for those who leave (access is more dependent on citizens' ability to pay and on the coverage contracted with insurers), or for those who remain (due to the decrease in NHS funding, the probable increase in the average cost per beneficiary - the individuals at higher risk remain - and, consequently, the greater difficulty in ensuring the financial sustainability of the NHS»²³*

As is the case in many OECD countries, whether tax-funded or social insurance systems, the percentage of the Portuguese population covered by basic public coverage is currently 100%. The Portuguese Constitutional Court has a very specific interpretation of this principle. Regardless the uncountable interpretations of this principle, what happens in reality is more limited because allowed budget to healthcare. According to OECD data, Portugal has the highest percentage of household expenditure on health, as a function of disposable household income. In addition, Portugal has public expenditure on health below the OECD average, regardless of the indicator used- health expenditure per capita, government expenditure on health as a percentage of GDP, percentage of health expenditure in total expenditure.

The expenditure on private healthcare associated to a high risk of social exclusion can have serious consequences on healthcare, aggravating discrimination.

The law that created the Health National System it was also created the principle of generality. According to the legislation The NHS involves all integrated health care, including health promotion and surveillance, disease prevention, diagnosis and treatment of patients, and medical and social rehabilitation²⁴. According to Professor Reis Novais interpretation, we can conclude that SNS includes every public health service and all kinds of medical treatments. Despite this principle, this is not something that happens in reality since some healthcare services are not covered by SNS(for example, non-conventional therapy).

We can conclude that the right to health is an extremely important right to the Portuguese Constitution and the entire system works together to assure that the citizens not only have in fact access to a national health system, but also have protection in case that does not happen, since citizens have the right to access to the courts in case they find a violation of their rights:

²² Translation to Portuguese: *«a possibilidade de admitir a saída dos beneficiários do SNS para outros subsistemas de saúde ou para seguros, de natureza privada ou pública, a título voluntário ou compulsivamente imposto pelo Estado [...] coloca, no entanto, dúvida, jurídico-constitucionais relacionadas, não apenas com a atual natureza universal do SNS, mas também com a garantia do direito à proteção da saúde de todos os cidadãos»*

²³ Translation to Portuguese: *«os que saem e os que ficam- à proteção da saúde. De facto, uma política de opting out do SNS teria associado um risco de limitação no acesso aos cuidados de saúde, quer para quem sai (o acesso fica mais dependente da capacidade para pagar dos cidadãos e das coberturas contratualizadas com as seguradoras), quer para quem fica (por via da diminuição do financiamento do SNS, do provável aumento do custo médio por beneficiário- permanecem os indivíduos com maior risco- e, consequentemente, da maior dificuldade em assegurar a sustentabilidade financeira do SNS»*

²⁴ Translation to Portuguese: *«O SNS envolve todos os cudiados integrados de saúde, compreendendo a promoção e vigilância da saúde, a prevenção da doença, o diagnóstico e tratamento dos doentes e a reabilitação médica e social»*

«Article 20

(Access to law and effective judicial protection)

1. *Everyone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice may not be denied to anyone due to lack of sufficient financial means.*

2. *Subject to the terms of the law, everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority.*

3. *The law shall define and ensure adequate protection of the secrecy of legal proceedings.*

4. *Everyone has the right to secure a decision in any suit in which he is intervening, within a reasonable time limit and by means of fair process.*

5. *For the purpose of defending the personal rights, freedoms and guarantees and in such a way as to secure effective and timely judicial protection against threats thereto or breaches thereof, the law shall ensure citizens judicial proceedings that are characterised by their swiftness and by the attachment of priority to them.»²⁵*

It is important to mention that the right to access to law and effective judicial protection is a fundamental right according to article 17 of the Portuguese Constitution. The Portuguese Constitution, in article 20, enshrines a right of access to the courts for everyone to defend their legally protected rights and interests. This right of access to the Courts, origination from British constitutionalism, is entirely related to the idea of justice present in a Democratic State of Law. Article 268, paragraph 4²⁶ also guarantees effective judicial protection of rights and interests of

²⁵ Translation to Portuguese: **Artigo 20.º - (Acesso ao direito e tutela jurisdiccional efectiva)**

1. *A todos é assegurado o acesso ao direito e aos tribunais para defesa dos seus direitos e interesses legalmente protegidos, não podendo a justiça ser denegada por insuficiência de meios económicos.*

2. *Todos têm direito, nos termos da lei, à informação e consulta jurídicas, ao patrocínio judiciário e a fazer-se acompanhar por advogado perante qualquer autoridade.*

3. *A lei define e assegura a adequada protecção do segredo de justiça.*

4. *Todos têm direito a que uma causa em que intervenham seja objecto de decisão em prazo razoável e mediante processo equitativo.*

5. *Para defesa dos direitos, liberdades e garantias pessoais, a lei assegura aos cidadãos procedimentos judiciais caracterizados pela celeridade e prioridade, de modo a obter tutela efectiva e em tempo útil contra ameaças ou violações desses direitos.»*

²⁶ «Artigo 268.º

(Direitos e garantias dos administrados)

1. *Os cidadãos têm o direito de ser informados pela Administração, sempre que o requeiram, sobre o andamento dos processos em que sejam directamente interessados, bem como o de conhecer as resoluções definitivas que sobre eles forem tomadas.*

2. *Os cidadãos têm também o direito de acesso aos arquivos e registos administrativos, sem prejuízo do disposto na lei em matérias relativas à segurança interna e externa, à investigação criminal e à intimidade das pessoas.*

3. *Os actos administrativos estão sujeitos a notificação aos interessados, na forma prevista na lei, e carecem de fundamentação expressa e acessível quando afectem direitos ou interesses legalmente protegidos.*

4. *É garantido aos administrados tutela jurisdiccional efectiva dos seus direitos ou interesses legalmente protegidos, incluindo, nomeadamente, o reconhecimento desses direitos ou interesses, a impugnação de*

those administered, the existence of procedural means for the recognition of rights or interests, the challenge of administrative acts that harm them, the determination of the practice of legally due administrative acts and the adoption of appropriate precautionary measures.

Many nations include the right to health care in their Constitution. However, the United States does not. Ironically, the origins of this right are in the United States. Nevertheless, the majority of Americans have benefited from decades of federal government funding for healthcare. The employer-sponsored coverage has been covered by the U.S. Government for over seventy years, making it the third most expensive federal health care program. Medicare for the elderly and disabled and Medicaid for the poor have also been helping families for over half a century. According to Timothy Stoltzfus Jost²⁷, «*the only Americans who did not receive help from the federal government for health care were consumers who purchased coverage in the individual market and the uninsured*».

The strategy of expanding the coverage was successful throughout the second half of the twentieth century, but it never reached its final goal, mostly because healthcare costs increased year after year, which forced some individuals to stop having insurance since they were not able to afford it.

In 2008, with the election of former President Barack Obama, supported by democratic majorities in the House and Senate, new legislation was developed in order to start working on

quaisquer actos administrativos que os lesem, independentemente da sua forma, a determinação da prática de actos administrativos legalmente devidos e a adopção de medidas cautelares adequadas.

5. Os cidadãos têm igualmente direito de impugnar as normas administrativas com eficácia externa lesivas dos seus direitos ou interesses legalmente protegidos.

6. Para efeitos dos n.os 1 e 2, a lei fixará um prazo máximo de resposta por parte da Administração.»//
Translation to English: «Article 268

(Citizens' rights and guarantees)

1. Citizens have the right to be informed by the Administration, whenever they so request, as to the progress of the procedures and cases in which they are directly interested, together with the right to be made aware of the definitive decisions that are taken in relation to them.

2. Without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy, citizens also have the right of access to administrative files and records.

3. Administrative acts are subject to notification of the interested parties in the form laid down by law, and when they affect rights or interests that are protected by law, must be based on express and accessible grounds.

4. Citizens are guaranteed effective jurisdictional oversight of those of their rights and interests that are protected by law, particularly including the recognition of the said rights and interests, the impugnation of any administrative act that harms their rights and interests, regardless of its form, the issue of positive decisions requiring the practice of administrative acts that are required by law, and the adoption of adequate provisional remedies.

5. Citizens also have the right to challenge administrative norms which have external force and harm those of their rights or interests that are protected by law. 6. For the purposes of paragraphs (1) and (2) the law shall lay down a maximum time limit for responses by the Administration

6. For the purposes of paragraphs (1) and (2) the law shall lay down a maximum time limit for responses by the Administration.»

²⁷ Timothy Stoltzfus Jost, *Health Care in the United States and the Affordable Care Act*

an American Health care system. In march of 2010 the Patient Protection and Affordable Care Act was signed by President Obama.

The Affordable Care Act, also known as Obamacare, addressed a wide range of topics beyond health care access, such as the quality and cost of care, fraud and abuse in public programs, the workforce in the healthcare industry, public health and prevention, the approval of biosimilars, and additional taxes to fund the expansion of coverage. However, the first two sections of the Affordable Care Act, which restructured the insurance markets, extended Medicaid, and provided federal support to health with the purchase of insure in the individual and small insurance markets, were the most significant and controversial.

The Medicaid program was adopted in 1965. This program provided federal funds for state programs to pay for healthcare for individuals and families eligible for public welfare programs. It covered, mainly, the elderly, disabled and families with dependent children. The program was later expanded to pregnant women and more low-income children.

We can affirm that the Affordable Care Act completed the process started by Medicaid. Thanks to the Affordable Care Act, the states were offered 100% federal support for the newly eligible enrollees for the first three years, because the Congress believed this group needed health insurance coverage and was unable to contribute any significant amount to premiums for private health coverage.

Because of the Affordable Care Act Insurance Companies were forbidden from creating any kind of discrimination, ensuring that private insurance coverage would be available to all applicants, regardless of their medical conditions. Individuals were also encouraged to get a health insurance despite being healthy.

The Affordable Care Act provided premium tax credits to help families and people with low and moderate incomes afford insurance. Even though the amount of assistance decreases as income rises, people with incomes up to 400% of the federal poverty threshold are eligible for the premium tax credits. Because the tax credits grow as premiums do, they guarantee that health insurance stays cheap. In order to keep care and coverage reasonable, individuals and families with incomes under 250% of federal poverty threshold also receive reductions in cost-sharing, such as deductibles, coinsurance, and out-of pocket limits.

However, their strategy received a major setback back in 2012 when the Supreme Court decided in *NFIB v. Sebelius*²⁸ that the Medicaid expansion provisions of the Affordable Care Act unconstitutionally coerced the states into participating in a new healthcare program under the threat of losing their existing Medicaid funding.

This program was largely a success. From 2010 to 2016 the number of uninsured fell from 48.6 million to 28 million. Several evaluations demonstrate that compared to non-expansion states, those that have extended Medicaid have had large decreases in their uninsured rates. Medicaid enrollment has increased for both those in expansion population and those in the traditional Medicaid categories as a result of the Affordable Care Act's simplification of eligibility determinations. In general, this expansion has decreased coverage gaps, especially those based on age and poverty, and has particularly produced significant coverage increases in rural areas and among vulnerable populations.

²⁸ *NFIB v. Sebelius*, 567 U.S. 519 (2012). In this decision, the Supreme Court upheld Congress's power to enact most provisions by the Affordable Care Act, and the Health Care and Education Reconciliation, including a requirement for most Americans to pay a penalty for forgoing health insurance by 2014

It is also important to mention that this expansion has increased the number of earlier diagnosed of conditions, such as cancer, and had reduced medical debt as well. According to Timothy Stoltzfus Jost²⁹, *«Hospitals in Medicaid expansion states have experienced dramatic reductions in uncompensated care burdens and improved financial performance compared to hospitals in non-expansion states»*

Despite its benefits, the Affordable Care Act is criticized by a lot of individuals, including lawyers and law teachers.

Quoting Mary Gerisch³⁰, *«Shockingly, or maybe just realistically, the U.S. report to the UN in 2015 fails to even identify health as a human right. Instead, it refers to efforts on health “measures,” intentionally avoiding use of the word “right” relative to health. (UPR report of the U.S. government, section H, paragraphs 100 and 101.) A reading of that report generates near disbelief among health advocates; “health measures” are not even remotely akin to “health rights.” But it was the only appropriate term to use. The only progress the United States had to report was the Affordable Care Act (ACA), a health insurance law, not a health care law. The United States could not admit to the UN that it had made no progress on so basic and fundamental a right as health.»*

A study by the European Parliament revealed some instances where a limited right to health had been found in the United States:

« Estelle v. Gamble, 429 U.S. 97, 104-105 (1976) Excerpt

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain,” Gregg v. Georgia, supra, at 173 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. (Footnotes omitted.)»³¹

«Estelle v. Gamble, 429 U.S. 97, 106 (1976) Excerpt

Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend “evolving standards of decency” in violation of the Eighth Amendment. (Footnotes excluded)»³²

In the case, a Texas prisoner sustained an injury while doing a work detail and declined to go back to his job despite multiple attempts to address the injury. Because of the infraction of prison regulations, he faced administrative sanctions, but also kept receiving treatment for his illness. Since he believed that his health was not being, receiving sufficient care, he sued a number of prison officials, including the physician in charge at the prison he was housed in. Writing on

²⁹ Timothy Stoltzfus Jost, *Health Care in the United States and the Affordable Care Act*, Human Rights Magazine, Volume 43, No.3: The State of Healthcare in the United States, 2018

³⁰ Mary Gerisch, *Health Care as a Human Right*, Human Rights Magazine, Volume 43, No.3: The State of Healthcare in the United States, 2018

³¹ European Parliament, *Right to Health, a comparative law perspective-United States of America*, 2022, p. 49

³² European Parliament, *Right to Health, a comparative law perspective-United States of America*, 2022, p. 49

behalf of the Court, Justice Marshall majority overturned the jail doctor's responsibility determination but referred the matter to the court of appeals for a reexamination of whether the employees' disregard for The Eighth Amendment was broken, according to the prisoner's accusations.

When someone is detained under a civil order—for example, for contempt of court or an involuntary commitment for treatment—the Eighth Amendment analysis does not apply to them. Rather, the Due Process Clause of the Fourteenth Amendment to the Constitution provides protection. While not specifically mentioned in the Court's ruling, the *Youngberg v. Romeo* ruling by the Supreme Court acknowledged these rights.

« The United States has one of the highest costs of healthcare in the world. In 2021, U.S. healthcare spending reached \$4.3 trillion, which averages to about \$12,900 per person. By comparison, the average cost of healthcare per person in other wealthy countries is only about half as much. »³³

Since the U.S. has a health insurance system, we will now briefly analyze the current situation in the United States.

The Affordable Care Act marketplace at Healthcare.gov lets us compare health plans that are sold in the marketplace. The cost of health insurance varies by insurance company, State, which plan and metal tier the individuals choose, age and diagnosed health problems.

For example, for a 40 year-old, the average monthly price for a bronze Affordable Care Act health insurance plan is \$429/monthly. For the same individual, the average monthly cost rises to \$549 for a silver plan and \$713 for a gold plan. Those averages do not consider premium tax credits and subsidies that can reduce costs for an Affordable Care Act plan based on household income.

Since the Federal Minimum Wage for covered nonexempt employees is \$7.25 per hour, we can assume that not every individual can pay for a health insurance.

But health insurance also lacks commitment. For example, having a baby is one of the most momentous experiences of a woman's life, but it can also be one of the most expensive. Giving birth cost \$18,865 on average, including pregnancy, delivery and post partum care, according to the Peterson-Kaiser Family Foundation Health System Tracker.

Health insurance can cover most of that cost, but as we have already concluded, not everyone can afford a health insurance. But even those who do, health insurance has its limits and, sometimes, it can be fatal.

Since in the law field we work with real cases, we must take into consideration those cases. Insurance typically only covers two ultrasounds when a woman is pregnant. As history has shown, babies have died because mothers could not afford more than what insurance covers. And those who did, have mentioned that one of those ultrasounds saved their babies life.

With these studies we can conclude that both countries have a different perspective of the right to health and the way they protected it is also different.

In Portugal, for the last three decades, our Portuguese Constitution remains mainly unchanged. Despite the possibility of adaptation of the constitutional law to the most current trends in health policies, reality shows that the legal-constitutional limits of the SNS are not a

³³ Peter G. Peterson Foundation, *Why are Americans Paying More for Healthcare?*, 2023

barrier to new and better public policies, capable of ensuring the constitutional attribution of the state in terms of health protection.

On the other hand, in the U.S., Healthcare was listed in the Second Bill of Rights drafted by Franklin Delano Roosevelt. However, Roosevelt's death kept this Second Bill of Rights from being implemented. Eleanor Roosevelt, however, took his work to the United Nations, where the right to health was expanded and clarified. The United States does not have a health care system, only a health insurance system.

Although there is not a constitutional right to health in the United States, an increasing number of laws and court cases have provided basic human rights in the healthcare area. These include the freedom to obtain health insurance, which a necessity for accessing healthcare, and the freedom to exercise one's rights in the interest of one's own body, including the freedom to refuse certain medical treatments.

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