

# Current challenges of the right to health protection in El Salvador

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Madam Editor.

I refer to the correspondence “Relevance of sanitary law in health legislation”<sup>i</sup>, published in volume 7, issue 2 of *Alerta*. It is possible to affirm that the right to health protection is an example of progress in the relationship between social rights and fundamental rights, whose inclusion in constitutional texts is one of the greatest achievements of 20th-century constitutionalism. This right, an authentic ethical-legal demand derived from the inherent dignity, freedom, and equality of the human person, has given rise to debates about its justiciability and the competence of the courts to protect it.

The recognition of the right to health protection is closely linked to the development of the social state, which emerged as a response to the shortcomings of classical liberalism and is characterized by state intervention to reduce social inequalities and promote general welfare. The Salvadoran Constitution of 1950 was the first in the country to explicitly recognize social rights, elevating the right to health protection to the category of public good, established in Article 206.

## Constitutionalization of the social state and the right to health protection

The 1983 Constitution, successor to the 1950 and 1963 Constitutions, continues to recognize and protect social rights. In particular, in article 65, it establishes that the health of the inhabitants constitutes a public good, which obliges both the State and private individuals to ensure its conservation and restoration.<sup>ii</sup>

## The right to health protection


Although it is understood as a fundamental right, it presents a complex object, which includes both positive (or to do) and negative (or not to do) obligations addressed to the State and to individuals.<sup>iii</sup> However, its content and scope have been the subject of doctrinal debate, as some consider it too abstract, while others argue that it implies significant obligations for the State.<sup>iv</sup>

## Justiciability of the right to health protection

The justiciability of this right is a controversial issue since the legitimacy and competence of the courts for its protection have been questioned.<sup>v</sup> In addition, it faces difficulties related to the lack of specification of its content and the inadequacy of traditional procedural mechanisms.<sup>vi</sup> For this reason, new ways of expanding access to and protection of this right have been proposed, including the active legitimacy of diffuse interests in Amparo proceedings,<sup>vii</sup> the justiciability of the right against individuals,<sup>viii</sup> and the process of unconstitutionality by omission.<sup>vii</sup>

## The importance of international law in expanding the scope of the right to health protection

International law within the framework of human rights plays a crucial interpretative role in defining the content and scope of the right to health protection.<sup>viii</sup> Instruments such as the International Covenant

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on Economic, Social and Cultural Rights and the Protocol of San Salvador<sup>ix</sup> have been fundamental in establishing a normative framework that complements and reinforces the content of this right in El Salvador. Therefore, it is necessary to promote the formulation of ethical-legal regulations to increase access and guarantee the protection of the right to health.

### **The importance of the right's prohibition of retrogression**

The principle of prohibition of regressivity is crucial for the right to health protection, as it prevents the derogation or reduction of the level of recognition and protection of this right. It also establishes a presumption of invalidity for any regressive measure adopted by the legislator and serves as a standard of analysis for the constitutional jurisdiction.<sup>x</sup>

In conclusion, the right to health protection faces significant challenges in its guarantee and justiciability related to the legitimacy and competence of the courts for its protection, the lack of specification of its content, and the inadequacy of traditional justiciability mechanisms for its protection. Therefore, it is necessary to analyze measures other than the traditional ones within the framework of constitutional law to improve their access and scope, ensuring effective protection that responds to the needs of individuals in response to the ethical-legal requirements derived from the dignity, freedom, and equality of individuals. International law offers valuable interpretative tools that can help strengthen the constitutional framework and ensure more robust protection of the right to health.

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