

Chapter 2

Health Protection and Reasonable Balancing of Interests

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ABSTRACT

Fundamental rights are born in the form, width, and with the limits that the constitution gives them. Concretely, in single laws and in concrete situations, every right claimed by one person is limited by the other rights and rights of others. In concrete situations, two or more rights cannot be satisfied at the same time; systemic and coherent protection can be given by reasonably balancing interests in the resolution of a specific conflict. As far as health protection is concerned, proportionality assessments are based primarily on the use of the precautionary principle and the determination of the so-called acceptable risk threshold. The aim of the contribution is therefore to illustrate the techniques of balancing interests in the field of health protection with particular focus on the Italian constitutional order.

CONFLICTS BETWEEN RIGHTS AND BALANCING

As stated by the Italian Constitutional Court in its first judgment, n.1 of 1956, in a general way, the rule which confers a right does not exclude the regulation of the exercise of it. A regulation of the methods of exercising a right, so that the activity of a person aimed at the pursuit of his own objectives is compatible with the pursuit of the objectives of other persons, would not be considered in itself a violation or denial of the right. And even if someone would think that from the discipline of exercise can also indirectly derive a certain limit to the right itself, it should be remembered that the concept of limit is inherent in the concept of right and that in the context of the legal system the various juridical 'spheres' must necessarily limit each other, so that they can coexist in the orderly civil coexistence. Thus, rights are born in form and scope and with the limits that the Constitution gives them;

The limits of a right can be classified as follows:

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- ‘Internal’ limits and other general counter-interest
- ‘External’ limits i.e. the other rights and rights of other persons

However, the protection of rights must always be systemic and not divided into a series of uncoordinated rules that are potentially in conflict with each other. If this were not the case, there would be the unlimited expansion of one of the rights, which would become a “tyrant” in relation to the other constitutionally recognized and protected juridical situations, which constitute, as a whole, an expression of the dignity of the person.

The implementation of the system of rights in the legal system and especially in the Constitution follows a very precise logic:

1. Identification in the Constitution of the typical hypothesis of the object of protection, (‘head’ of law).
2. Identification in the Constitution of the typical hypothesis of counter-interest, (‘internal’ limit).
3. Development of discipline in other sources and, in particular, in ordinary legislation (‘body’ of law) and balance with other rights or interests (so-call ‘external’ limits).

As for health protection, it can be said that the ‘head’ and the typical counter-interest are indicated in the text of art. 32 Cost, while the ‘body’ is found e.g. in l. 132/1968 (so-called hospital law), in law 833/1978 (establishment of the National Health Service), in law 119/2017 (mandatory vaccinations).

The right to health, pursuant to Article 32 of the Constitution, in fact, it has at least 4 dimensions (Bartole-Bin 2008)

1. Negative claim that public authorities or individuals refrain from conducts that could affect their physical integrity.
2. Positive demand for the public authorities to provide facilities, therapeutic means and free treatment for the most deprived.
3. Negative claim not to be forced to undergo certain health treatments beyond those of a mandatory nature.
4. Collective claim that each individual has care of his health in order not to cause damage to the psycho-physical integrity of other members of the community.

In the abstract, rights do not conflict. The Constitution sets out in absolute terms the rights and interests it recognises and protects and does not offer an unambiguous solution to the problems of reconciliation between them. It sets the “tolerance limits” with which the various legislative choices have to deal. (Onida 1988)

However, rights do not live in isolation, but they are in a situation of potentially continuous conflictual interaction. In such situations, two or more rights cannot be met at the same time, and traditional antinomies resolution criteria (chronology, hierarchy, specialty) cannot be used. The purpose of balancing is to reach a solution to a specific conflict between rights and/or interests that has manifested itself in a concrete case. (Pino 2010, 187)

Traditionally, conflict hypotheses are classified as follows:

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