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Demystifying the Concept of the Right to Health

Abstract

In the world of rapid general-social development, due to the emergence of questions about new holders of legal rights and the emergence of new forms of legal rights in general, the discussion about moral and legal rights has always been, is and will be an increasingly topical issue. It is not, however, disputed that law per se, in enabling a wide range of legal rights, has always been centred around the issue of human life and health in the first place. The achievement of human welfare is undoubtedly predicated upon good health, and fostered by a unique “mechanism” – the right to health. Although we live in an era of great glorification of the cult and value of health (healthism), the current epoch raises a series of human-health-focused questions and controversies. However, the primary and very crucial question we can ask ourselves is – what would health even be? Precisely because of the great questionability of the above question, the protection of human health and the exercise of the right to health may represent one of the most challenging matters of law itself. The right to health, as a legal and inclusive right, epitomizes not only the rights asserted by human beings as such, but also environmental and nature protection as an inseparable denominator of the status of human health. Although prominent legal/political philosophers and theorists were pessimist about the realisation and enforcement of the right to (the highest attainable standard of) health, this paper elaborates on the possibility of its realisation, which largely depends on the way in which the concept of health is understood. Health should be understood exclusively as an idea-value category to be aspired to, as a should (sollen), by no means as a pure and categorical reflection of reality (sein). Given the inclusiveness specific to the legal right to health, which undoubtedly contains certain problematic elements, this paper aims to grasp and consider the right to health in its conceptual and normative entirety premised upon the following question: how does law protect human health and its constitutive elements? The same question invokes interesting interdisciplinary (legal and philosophical) points of view.

Keywords

right to health, health, right, legal rights, law, philosophy, environment, legal enforcement, bioethics

**1. Preliminary Considerations – Contemporary
Legal and Bioethical Issues Regarding Human Health**

In current social development, the debate on moral and legal rights is becoming an increasingly topical issue. In addition to the emergence of new entities of holders of legal and moral rights in the context of legal personhood¹ (foetuses, machines, AI, animals, trees, etc.), the problem also refers to the emergence of numerous “new rights” that we are still discussing in terms of whether they can even be called rights at all. The vast majority of the mentioned “new rights” have in common that, in terms of Hohfeldian analysis of

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See: e.g. Visa A. J. Kurki, *A Theory of Legal Personhood*, Oxford University Press, Oxford 2019; Visa A. J. Kurki, Tomasz Pietrzykowski

(eds.), *Legal Personhood. Animals, Artificial Intelligence and the Unborn*, Springer, Cham 2017.

rights,² one of the main correlatives of rights is missing or possibly disputed, and this often refers to duties. The right to health is precisely one of those rights where it is very difficult to determine the duties and obligations of those who should ensure the said right, as well as to determine in general what the legal enforceability of the said right would consist of.

Every day each one of us strives to be(come) healthy and to contribute to the overall health of people around us. The right to health and its exercise might become a challenging task for humankind in the current epoch. The aspect of bioethics considering the human being intrinsically, raises the issue of the right to health and human health, in general, as one of the most pressing contemporary bioethical issues. As it is visible in the COVID-19 crisis where the question of the well-being of human health is continuously raised, there is probably no concept that is, at the moment, more relevant than the concept of the right to health and the concept of health in general. In relation with the COVID-19 crisis and the issue of health World Health Organisation (hereinafter: WHO), in one of the “key messages”, warns that

“... it is now more critical than ever to take stock of the lessons learned and progress made in improving population health, and more importantly, to identify and address the gaps that persist where progress is not on track.”³

The intervention of a state and the international community through special legal acts that guarantee the right to health is a crucial point in the realisation of the same right. Although it seems that the right to health is a category that emanates only from the issues of human life and health, the right to health is a concept that includes the co-existence of the human being with the environment, nature, and other living beings. As it is said in the most recent 2020 Annual Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health:

“... the rich links between mind, body and the environment have been well-documented for decades.”⁴

The realisation of the right to health is therefore related to the main principles of biocentrism where human health *depended*, *depends*, and *will depend* on the valid co-existence of the human being with the whole of nature. Consequently, the right to health is an inclusive right, meaning that it does not only include the right to healthcare but a wide range of human rights and freedoms.

Law is one of the “support-pillars” of modern bioethics, where, through various biomedical research and discoveries, the issue of human rights is continuously establishing new, very interesting, but also very controversial questions. The adoption of UNESCO’s “Universal Declaration on Bioethics and Human Rights”⁵ on the international level is clear proof of the same statement. It is precisely bioethics, and its humane aspect, that is oriented towards health protection. The legal aspect of bioethics, of course, has its specificities. The relationship between law and ethics has always been a very challenging issue in the field of jurisprudence and philosophy of law. Since the time of Roman law, the Latin maxim of Roman lawyer Paulus (*Digesta*, 50, 17, 144), *non omne quod licet honestum est*⁶ (*not everything that is permissible, is also honest/just/moral*), was setting up the concept of “dividing the law (in legal positivists way, as opposed to natural law view) from all other, entities: moral (ethics), virtues, justice and freedom”.⁷ Despite all differences between the nature of legal and ethical norms, the harmonisation of the legal and ethical

norms is one of the most important tasks of legal aspects of bioethics. It is important to emphasize that the legal questions arising from the (integrative) bioethics cannot be solved merely by a “one-dimensional” legal approach, which means that it is important for the law to adopt multi/inter/transdisciplinary and pluriperspective approach that is crucial for solving all bioethical controversies.

The peculiarity of the right to health, and its normative approach, has two main aspects. The first is reflected in the difficulty of defining health in general, and the second is that it is an inclusive right that includes various human rights and freedoms. These two aspects make the right to health as a very challenging topic and issue “worth” demystifying. Given the inclusiveness specific to the legal right to health, this paper aims to grasp and consider the right to health in its conceptual entirety and scope premised upon the following question: how does law protect human health and its constitutive elements? The same question invokes interesting interdisciplinary (legal and philosophical) points of view.

Hence, the main aim of this paper branches in four directions: (1) to analytically elaborate the concept and determination of health itself, with its interdisciplinary, and even transdisciplinary, view; (2) to examine what are (international) legal acts that regulate it and in which way they regulate it; (3) to determine what is the object of protection and what rights and freedoms it consists of, with a particular observation of each freedom or right; (4) to elaborate legal enforcement and realisation of the right to health, especially in the context of legal and political philosophy/theory (theory of human rights), European and Croatian case-law practice and Croatian public and private law provisions.

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See: Heidi M. Hurd, Michael S. Moore, “The Hohfeldian Analysis of Rights”, *The American Journal of Jurisprudence* 63 (2018) 2, pp. 295–354, doi: <https://doi.org/10.1093/ajj/auy015>; Ivana Tucak, “Rethinking the Hohfeld’s Analysis of Legal Rights”, *Pravni vjesnik* 25 (2009) 2, pp. 31–41; Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *The Yale Law Journal* 23 (1913) 1, pp. 16–59, doi: <https://doi.org/10.2307/785533>; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *The Yale Law Journal* 26 (1917) 8, pp. 710–770, doi: <https://doi.org/10.2307/786270>.

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World Health Organisation, “World Health Statistics 2020. Monitoring Health for the SDGs. Sustainable Development Goals”, *who.int* (13 May 2020), p. vii. Available at: <https://apps.who.int/iris/bitstream/handle/10665/332070/9789240005105-eng.pdf?ua=1> (accessed on 3 December 2022); see also: World Health Organisation, “World Health Statistics 2022. Monitoring

Health for the SDGs. Sustainable Development Goals”, *who.int* (19 May 2022). Available at: <https://www.who.int/publications/item/9789240051157> (accessed on 3 December 2022).

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United Nations, “Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, *Official Document System of the United Nations* (2020), p. 3. Available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc4448-right-everyone-enjoyment-highest-attainable-standard-physical> (accessed on 3 December 2022).

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UNESCO, “Universal Declaration on Bioethics and Human Rights”, *unesco.org* (2005). Available at: http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 3 December 2022).

2. The Term *Health* and Its ('Pluri')perspectives

The question of being and perseverance of the health had been raised since ancient times. In Greek mythology, Ὑγίεια (Hygieia, in Roman mythology Salus)⁸ was the goddess of health, welfare, but also cleanliness and hygiene. It is not imperceptible how the word “hygiene” was formed precisely from her name, but also how the notion of health was still at that time considered connectable to hygiene and environmental determinants, such as cleanliness.⁹ Hippocrates was one of the first medical thinkers and practitioners who confronted health and disease (pain) claiming that medicine itself was discovered

“... for the health of man, for his nourishment and safety, as a substitute for that kind of diet by which pains, diseases, and deaths were occasioned.”¹⁰

In form of Socratic dialogue, Xenophon was emphasising the importance of physical health and fitness¹¹ for the perseverance of not only physical but mental health as well.¹² As another student of Socrates, Plato is comparing just and unjust acting in the context of health¹³ (justice) and disease (injustice), where he integrates body and soul as a whole.¹⁴ Stoics emphasise the importance of the connection between health and virtue, in the sense that good health also refers to the proper moral judgment of the individual.¹⁵ In Roman thought, Cicero developed the phrase¹⁶ that welfare and safety (in some occasions also health)¹⁷ must be the supreme law, and Juvenal in *Satire X* wrote that “you should pray for a healthy mind in a healthy body”.¹⁸

Francis Bacon devoted one essay to the question of the preservation of health,¹⁹ while Locke claimed that

“... law teaches all mankind [...] no one ought to harm another in his life, health, liberty, or possessions.”²⁰

One of the most detailed depictions of the understanding of health in (contemporary) philosophical thought, was given by Hans-Georg Gadamer. Gadamer, in a hermeneutical way, sees health as an “enigma”.²¹ He writes about how the physician should approach to the patient (“the art of medicine and healing”) by opposing a narrower understanding of health that emanates exclusively from the sphere of healthcare, claiming that there is much “abundant evidence”, even in Greek medicine, suggesting all possible climatic and environmental factors that were used to help the physician to restore health.²² Gadamer does not observe health in a form of an object, but rather through the patient (i.e. the person who is in pain) and considers how health

“... allows us to live in the happiness of forgetting, in a state of well-being, of lightness and ease.”²³

It is noticeable that modern scientific considerations also conceive health not only in the form of healthcare²⁴ but in the form of complete human integrity dependent on many environmental and social factors. One of the elementary approaches to determining health is observing it in a negative and positive way.²⁵ Negatively, we consider a person as “healthy” in the absence of every kind of physical and mental disease, or every kind of phenomenon that is related to the description of a “sick person”. To determine and designate health in a positive way, and as “more than just the absence of disease and as a fundamental human right”,²⁶ the WHO Constitution from 1946 defines the health as “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity”. If we look at the same sentence carefully,

we could say that the term “health” is still a pretty undetermined term, but also very important, and pretty widely oriented.

Also, the term “health” cannot be merely oriented and defined only by the medicine itself. It is a term that does not emanate from the sphere of medicine and health sciences, but the broad spectre of sciences. We can also observe

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“The Enactments of Justinian. The Digest or Pandects. Book L”, in: S. P. Scott, *The Civil Law*, vol. XI. Available at: https://droitromain.univ-grenoble-alpes.fr/Anglica/D50_Scott.htm#XVII (accessed on 4 December 2022).

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Tomislav Nedić, “Bioethics, law and aging – legal and ethical challenges of aging and organ transplantation”, in: Ivana Barković Bojanić, Aleksandar Erceg (eds.), *Aging and Society – Rethinking and Redesigning Retirement*, Josip Juraj Strossmayer University of Osijek, Faculty of Economics, Osijek 2020, pp. 251–271.

8

Salus was the goddess of health and wellbeing to whom the temple was dedicated (302 BC) on the Roman hill of Quirinal. A special religious rite of augurium salutis, in the period of the Roman Republic, was dedicated *saluti populi*, i.e. to the welfare of the people about which Cicero himself writes in his work *De Divinatione*. It is significant that, especially given the crisis situations and the above translations of *salus* (“salvation”, “welfare”, “security”), the rite could take place only on a day free from wars. More about Ὑγίεια and *Salus* in: Simon Hornblower, Antony Spawforth, Esther Eidinow, *The Oxford Classical Dictionary*, 4th ed., Oxford University Press, Oxford 2012, p. 205, 1312.

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Today, (right to) clean water, air and environment are the main determinants of (the right to) health. See chapters below: “3.2.4. Right to a Healthy Environment” and “3.2.5. Right to an Adequate Standard of Living”.

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Hippocrates, “Part 3”, in: Hippocrates, Charles Darwin Adams (ed.), *De prisca medicina. The Genuine Works of Hippocrates*, Dover, New York 1868. Available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0248%3Atext%3DVM%3A-section%3D3> (accessed on 6 December 2022).

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“... in all uses of the body it is of great importance to be in as high a state of physical efficiency as possible (3.12.5.) [...] Besides, it is a disgrace to grow old through sheer

carelessness before seeing what manner of man you may become by developing your bodily strength and beauty to their highest limit. But you cannot see that, if you are careless; for it will not come of its own accord.” – From: Xenophon, Edgar Cardew Marchant, Otis Johnson Todd (ed.), *Memorabilia* [Xen. Mem. 3.12.8.], *Xenophon in Seven Volumes*, trans. Edgar Cardew Marchant, Harvard University Press – William Heinemann Ltd., Cambridge – London 1923. Available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0208%3Abook%3D3%3Achapter%3D12%3Asection%3D8> (accessed on 7 December 2022).

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“And because the body is in a bad condition, loss of memory, depression, discontent, insanity often assail the mind so violently as to drive whatever knowledge it contains clean out of it.” – From: Xenophon, E. C. Marchant, O. J. Todd (ed.), *Memorabilia* [Xen. Mem. 3.12.6]. Available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0208%3Abook%3D3%3Achapter%3D12%3Asection%3D6> (accessed on 7 December 2022).

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Plato, like Hippocrates, is using the verb (in *Euthydemus*, 279a) *ὕψαινεῖν* which means not only to be healthy, but also to be sound. Also, in the *Republic* [Plat. Rep. 4.444c] noun *ὕγεια* (health, soundness) and adjective *ὕγιενός* (good for the health, wholesome, sound, healthy).

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“‘Then’, said I, ‘to act unjustly and be unjust and in turn to act justly the meaning of all these terms becomes at once plain and clear, since injustice and justice are so.’ ‘How so?’ ‘Because,’ said I, ‘these are in the soul what the healthful and the diseaseful are in the body; there is no difference.’ ‘In what respect?’ he said. ‘Healthful things surely engender health and diseaseful disease.’” – Plato, *Republic* [Plat. Rep. 4.444c], *Plato in Twelve Volumes*, Vol. 5 & 6, trans. Paul Shorey, Harvard University Press – William Heinemann Ltd, Cambridge – London 1969. More about the body/soul analogy and Plato’s thoughts (*Crito* 47e–48a, *Gorgias* 464a–466a) about mental health in: Kenneth Seeskin, “Plato and the origin of mental health”, *International Journal of Law*



health as a whole “higher” concept and holistic idea of the complete welfare of the human being, his self-awareness and balanced “body-mind-spirit” (“physical, spiritual, mental and emotional health”)²⁷ concept. That kind of determination does not depend only on the acts, thoughts, and values of the exact human being, but on society, state, and entire environmental and natural surroundings. Therefore, Johannes Bircher sees health as:

“... a dynamic state of wellbeing characterised by a physical, mental and social potential, which satisfies the demands of a life commensurate with age, culture, and personal responsibility. If the potential is insufficient to satisfy these demands the state is disease.”²⁸

In a similar direction, Maarten Boers and Alfonso J. Cruz-Jentoft suggest “a new concept of health depicted as ‘tetrahedron’, where the health is seen ‘as the resilience or capacity to cope and to maintain and restore one’s integrity, equilibrium, and sense of wellbeing in three domains: physical, mental, and social’, and the frailty as the “weakening” of these elements.²⁹ Also, some researchers point out that there is a different understanding of health by rural and non-rural (urban) residents,³⁰ but also by indigenous people who perceive health in a more holistic way.³¹ As a global phenomenon, health can be observed as a public health, international or even global health that “derived from the public and international health” and that “involves many disciplines within and beyond the health sciences and promotes interdisciplinary collaboration”,³² meaning that health cannot be observed from the one standpoint of view. One of the first definitions of public health, and health in general that observes health as more than just an absence of disease with a pure standpoint that realisation of the human welfare depends of many different factors, was given by Charles-Edward Amory Winslow 100 years ago:

“Public health is the science and art of preventing disease, prolonging life and promoting physical health and efficacy through organised community efforts for the sanitation of the environment, the control of communicable infections, the education of the individual in personal hygiene, the organisation of medical and nursing services for the early diagnosis and preventive treatment of disease, and the development of social machinery which will ensure every individual in the community a standard of living adequate for the maintenance of health; so organising these benefits in such a fashion as to enable every citizen to realize his birth right and longevity.”³³

Winslow notices well that “community efforts for the sanitation of environment”, especially clean air, drinkable water and safe food, are significant factors of the physical health itself. As a part of so-called global health, international health, according to Michael H. Merson, Robert E. Black and Anne, J. Mills, is defined as

“... the application of the principles of public health to problems and challenges that affect low and middle-income countries and to the complex array of global and local forces that influence them.”³⁴

In various definitions and understandings of health, we could agree that there is no and cannot be a “one-dimensional” definition of “the health” and it is also questionable can we derive a universal definition of health itself. There really could be numerous debates on the definition of the term “health”, and not only strictly speaking in the field of medicine and health sciences. This kind of approach can further complicate all further discussions and attempts to legally characterize health by giving it that meaning in the form of the right to health. Especially in the legal way, the approach must not be to define the health itself, but to rather determine it and to see what are the parameters that

make up the health itself, and after that, perceive the whole conception of the right to health.

In that sense, certain researches state that determinants of health are the physical, economic and social conditions³⁵ – or, to be more precise,

and *Psychiatry* 31 (2008) 6, pp. 487–494, doi: <https://doi.org/10.1016/j.jljp.2008.09.004>.

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According to Roberto Polito, “it is an established Hellenistic topos that philosophy is the ‘medicine’ of the soul, in charge of ‘healing’ the soul in the same way as medicine is in charge of healing the body”, – Roberto Polito, “Competence Conflicts between Philosophy and Medicine: Caelius Aurelianus and the Stoics on Mental Diseases”, *The Classical Quarterly* 66 (2016) 1, pp. 358–369, doi: <https://doi.org/10.1017/S0009838816000148>. More about the connection between effective health care and individual moral development in: Lawrence C. Becker, “Human Health and Stoic Moral Norms”, *Journal of Medicine and Philosophy* 28 (2003) 2, pp. 221–238, doi: <https://doi.org/10.1076/jmep.28.2.221.14206>.

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“(Ollis) salus populi suprema lex esto.” – Marcus Tullius Cicero, Georges de Plinval (ed.), *De legibus (Liber Tertius, III/VIII)*, Belles Lettres, Paris 1959. Available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0030%3Abook%3D3%3Asection%3D8> (accessed on 8 December 2022).

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It is necessary to be careful with the use of the same phrase with the context of health. In legal and political doctrine, Cicero’s claim about the imperative supremacy of welfare and salvation of the people refers on states of emergency (crisis) and a delegation of authority to the executive. With the noun *salus*, Cicero is more referring to the welfare and salvation of people, not the legal protection of the health in context of healthcare as some authors are invoking. More about the same distinction in: Tomislav Nedić, “Suvremena recepcija Ciceronove prirodnopravne postavke o vrhovnosti dobrobiti i spasa naroda u kontekstu izvanrednih stanja aktualiziranih pandemijom COVID-19” [“Contemporary Reception of Cicero’s Natural Law Postulate on the Supremacy of Well-Being and Salvation of the People In the Context of States of Emergency Actualised by the COVID-19 Pandemic”], *Politička misao* 58 (2021) 3, pp. 105–131, doi: <https://doi.org/10.20901/pm.58.3.04>.

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“...orandum est ut sit mens sana in corpore sano.”

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Francis Bacon, “Of Health”, in: Francis Bacon, “Essays of Francis Bacon. The Essays or Counsels, Civil and Moral, of Francis Ld. Verulam Viscount St. Albans”, *authorama.com* (2003). Available at: <http://www.authorama.com/essays-of-francis-bacon-31.html> (accessed on 8 December 2022).

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In that way, John Locke is clearly distinguishing the question of everybody’s right to health given by the (natural) law and the state of prerogative where he is invoking Cicero’s thought *salus populi suprema lex (esto)*. See: John Locke, “Second Treatise of Government”, *gutenberg.org* (2021). Available at: https://www.gutenberg.org/files/7370/7370-h/7370-h.htm#CHAPTER_II (accessed on 8 December 2022).

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Hans-Georg Gadamer, *The Enigma of Health. The Art of Healing in a Scientific Age*, trans. Jason Gaiger, Nicholas Walker, Stanford University Press, Stanford 1996.

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“We possess abundant evidence from Greek medicine to show us how the weather and the seasons, how temperature, water and general sustenance, in short how all possible climatic and environmental factors were seen to make up the concrete ontological constitution of what it is that the physician helps to restore, namely health.” – *Ibid.*, p. 41

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Ibid., p. 87.

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The above is present, for example, in: Timothy Goodman, “Is there a right to health?”, *Journal of Medicine and Philosophy* 30 (2005) 6, pp. 643–662, doi: <https://doi.org/10.1080/03605310500421413>.

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Bettina Piko, “Teaching the Mental and Social Aspects of Medicine in Eastern Europe. Role of the WHO Definition of Health”, *Administration and Policy in Mental Health and Mental Health Services Research* 26 (1999) 6, pp. 435–438, doi: <https://doi.org/10.1023/A:1021385807826>.

“... conditions in which people live that impact opportunities to be healthy, including factors such as economic circumstances, housing, transportation, access to health-promoting resources, social norms, and social and environmental stressors.”³⁶

In that way, the right to health must be designed as a scope of many elements (human rights) formed by all listed determinants of health. Considering the given definitions and determinants of health, we can conclude that health includes the welfare of the human being’s integrity (physical, mental, and spiritual condition), but also socio-economic and environmental factors that have a significant impact on the balance and stability of the human being’s integrity. It is necessary to examine further whether the law also follows this kind of determination.

3. The Legal Right to Health – Provisions, Scope, and Legal Concept

3.1. Right to Health in International Legal Sources – Systematic Review

3.1.1. United Nations

In the discourse of international law and in general, one of the first definitions of health, as it is already stated, was established in 1946 by the WHO in the Preamble of the Constitution of the WHO³⁷ with the thought that health is crucial for international peace and security.³⁸ In the preamble, health is defined as “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity”. The next sentence of the preamble also states 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”, where health is perceived as a fundamental human right. The same extensive definition (latterly called the “Health-For-All concept”)³⁹ gave a demanding and challenging assignment to regulate the whole concept of the right to health on an international level.

One of the first mentions of the whole concept of the right to health that is since then widely accepted as a fundamental human right,⁴⁰ appears in 1948 in the “Universal Declaration of Human Rights”⁴¹ (hereinafter: UDHR) where it is recognised that the whole concept of health is more than just well-established healthcare. According to the same art. 25. of the “Universal Declaration of Human Rights”:

“... everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care”.

In interference with the first definition of the right to health established by the art. 25 of the UDHR, but also with an “ambitious” perspective of health defined by the WHO, the “International Covenant on Economic, Social and Cultural Rights”⁴² (hereinafter: ICESCR) in art. 12. regulates the right to (the highest attainable standard of) health with its two main and “not always compatible goals” of “providing a right to individuals (art.12(1)) and obligation of the State to ensure it (art. 12(2))”.⁴³ The art. 12(1) states that:

“... the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

Additionally, paragraph 2 of the same article prescribes explicit measures of realisation and application of the provision listed in paragraph 1, which includes:

“(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

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Marion Habersack, Gero Luschin, “WHO-definition of health must be enforced by national law: a debate”, *BMC Medical Ethics* 14 (2013), article no. 24, pp. 1–3, doi: <https://doi.org/10.1186/1472-6939-14-24>.

27

Gro Harlem Brundtland, “International Consultation on the Health of Indigenous Peoples”, *gos.sbc.edu* (23 November 1999). Available at: <http://gos.sbc.edu/b/brundtland.html> (accessed on 6 November 2022).

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Johannes Bircher, “Towards a Dynamic Definition of Health and Disease”, *Medicine, Health Care and Philosophy* 8 (2005), pp. 335–341, doi: <http://dx.doi.org/10.1007/s11019-005-0538-y>.

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Maarten Boers, Alfonso J. Cruz-Jentoft, “A New Concept of Health Can Improve the Definition of Frailty”, *Calcified Tissue International* 97 (2015) 5, pp. 429–431, doi: <https://doi.org/10.1007%2Fs00223-015-0038-x>.

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Charles Gessert *et al.*, “Rural definition of health: a systematic literature review”, *BMC Public Health* 15 (2015), article no. 375, pp. 1–14, doi: <https://doi.org/10.1186/s12889-015-1658-9>.

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Estefanía Bautista-Valarezo *et al.*, “Towards an indigenous definition of health: an explorative study to understand the indigenous Ecuadorian people’s health and illness concepts”, *International Journal for Equity in Health* 19 (2020), article no. 101, pp. 1–8, doi: <https://doi.org/10.1186/s12939-020-1142-8>.

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Jeffrey P. Koplan *et al.*, “Towards a common definition of global health”, *The Lancet* 373 (2009), pp. 1993–1995, doi: [https://doi.org/10.1016/S0140-6736\(09\)60332-9](https://doi.org/10.1016/S0140-6736(09)60332-9).

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Charles-Edward Amory Winslow, “The Untilled Field of Public Health”, *Science* 9 (1920) 51, pp. 23–33, doi: <https://doi.org/10.1126/science.51.1306.23>.

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Michael H. Merson, Robert E. Black, Anne, J. Mills (eds.), *International public health: Diseases, programs, systems, and policies*, 2nd ed, Jones and Bartlett Publishers, Sudbury, Mass 2006.

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Elizabeth Kelley Sohn *et al.*, “Avenues of Influence: the Relationship between Health Impact Assessment and Determinants of Health and Health Equity”, *Journal of Urban Health* 95 (2018), pp. 754–764, doi: <https://doi.org/10.1007/s11524-018-0263-5>; Michael Marmot, “Social determinants of health inequalities”, *The Lancet* 365 (2005), pp. 1099–1104, doi: [https://doi.org/10.1016/S0140-6736\(05\)71146-6](https://doi.org/10.1016/S0140-6736(05)71146-6); Paula Braveman, Laura Gottlieb, “The Social Determinants of Health: It’s Time to Consider the Causes of the Causes”, *Public Health Rep.* 129 (2014), pp. 19–31, doi: <https://doi.org/10.1177/00333549141291S206>; Laura McGovern, George Miller, Paul Hughes-Cromwick, “Health policy brief. The relative contribution of multiple determinants to health outcomes”, *Health affairs.org* (21 August 2014). Available at: https://www.healthaffairs.org/doi/10.1377/hpb20140821.404487/full/healthpolicybrief_123.pdf (accessed on 5 November 2022).

36

Elizabeth Kelley Sohn *et al.*, “Avenues of Influence: the Relationship between Health Impact Assessment and Determinants of Health and Health Equity”, *Journal of Urban Health* 95 (2018), pp. 754–764, doi: <https://doi.org/10.1007/s11524-018-0263-5>; Michael Marmot *et al.*, “Closing the gap in a generation: health equity through action on the social determinants of health”, *The Lancet* 372 (2008), pp. 1661–1669, doi: [https://doi.org/10.1016/S0140-6736\(08\)61690-6](https://doi.org/10.1016/S0140-6736(08)61690-6); Paula Braveman, “What Are Health Disparities and Health Equity? We Need to Be Clear”, *Public Health Rep.* 129 (2014), pp. 5–8, doi: <https://doi.org/10.1177/00333549141291s203>.

37

United Nations, General Assembly, “Entry into force of the constitution of the World Health Organisation”, *digitallibrary.un.org*. Available at: <https://digitallibrary.un.org/record/209903> (accessed on 5 November 2022).

In 2000, Committee on Economic, Social and Cultural Rights (hereinafter: CESCR) issued General Comment No. 14 about “substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights” with respect to Article 12 and “the right to the highest attainable standard of health”. General Comments of the UN CESCR “draw upon a rich tapestry of sources of law” as one method of interpretation of economic, social and cultural rights.⁴⁴ The General Comment No.14, elaborated and analysed the whole idea and concept of the right to health set in the art. 12 of the ICESCR. One of the main conclusions are that the right to health is not confined with the right to healthcare, that the right to health “is not to be understood as a right to be healthy”, and that the right to health is an inclusive right with a special legal (obligation to respect, protect and fulfill), international and core obligations of a State to ensure it. In terms of international criminal law, according to Evelyn Schmid, the crime against humanity of persecution can be committed by severe violations of the right to health under the terms of art. 12 of the ICESCR.⁴⁵ As a pure example of violating the right to health as a part of the crime against humanity, the author analysed the controversial Chinese example of killing prisoners of the Falun Gong movement, banned in China, to harvest their organs.⁴⁶ In China, organ removal is allowed from executed criminals “provided they give prior consent or if no one claims the body”.⁴⁷ That kind of accusations of killing and torturing the Falun Gong practitioners were recorded in the UN report of Special Rapporteur on the question of torture,⁴⁸ which abuse is one of the elements of the right to health. Additionally, in 2008 Office of the United Nations High Commissioner for Human Rights (OHCHR) and WHO published a special publication called “The Right to health”⁴⁹ with an explicit aim to

“... shed light on the right to health in international human rights law as it currently stands, amidst the plethora of initiatives and proposals as to what the right to health may or should be.”

Many of the arguments and conclusions in the same publication are based on Comment No.14 that is clearly stated in the first reference of the publication. In 2002, one of the facts that gave pure significance to the whole idea of the right to health was the establishment of the UN Special Rapporteur on the right to health⁵⁰ with an assignment to report, monitor and promote the States realisation of the right of

“... everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁵¹

As to other international acts, the “International Convention on the Elimination of All Forms of Racial Discrimination”⁵² in art. 5 (e) (iv) “without distinction as to race, color, or national or ethnic origin, to equality before the law” guarantees “the right to public health, medical care, social security and social services”. “Convention on the Elimination of All Forms of Discrimination against Women with the purpose of elimination discrimination against women”,⁵³ based on equality of men and women guaranteed in art. 3., both ICESCR and “International Covenant on Civil and Political Rights”,⁵⁴ guarantee “the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction” (11(1)(f)), elimination of “discrimination against women in the field of health care in order to ensure [...] access to health care services, including those related to family planning”, but also “appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation” (art. 12), and “access to adequate

health care facilities, including information, counselling and services in family planning; 14 (2) (b)”. Art 24. (1) of the “Convention on the Rights of the Child”⁵⁵ states that “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” with explicitly listed and

38

Roger Scruton, *WHO, What and Why? Trans-national Government, Legitimacy and the World Health Organisation*, Institute of Economic Affairs, London 2000.

39

Halfdan Mahler, “The Meaning of ‘Health for All by the year 2000’”, *World Health Forum* 2 (1981) 1, pp. 5–22.

40

Navanethem Pillay, “Right to health and the Universal Declaration of Human Rights”, *The Lancet* 372 (2008), pp. 2005–2006, doi: [https://doi.org/10.1016/S0140-6736\(08\)61783-3](https://doi.org/10.1016/S0140-6736(08)61783-3).

41

United Nations, “Universal Declaration of Human Rights”, General Assembly resolution 217 A, 1948, *un.org*. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 8 November 2022); Jody Heymann *et al.*, “Constitutional rights to health, public health and medical care: The status of health protections in 191 countries”, *Global Public Health* 8 (2013) 6, pp. 639–653, doi: <https://doi.org/10.1080/17441692.2013.810765>.

42

United Nations, “International Covenant on Economic, Social and Cultural Rights”, General Assembly resolution 2200A (XXI), 1966, *ohchr.org*. Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed on 8 November 2022).

43

Ben Saul, David Kinley, Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, Oxford University Press, Oxford 2014, p. 979.

44

Janelle M. Diller, “Economic, Social and Cultural Human Rights: The Journey towards Peremptory Norms in International Law”, *Nordic Journal of Human Rights* 36 (2018) 1, pp. 19–37, doi: <https://doi.org/10.1080/18918131.2018.1444065>.

45

Evelyn Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, Cambridge 2015, p. 126.

46

David Matas, David Kilgour, *Bloody Harvest. The Killing of Falun Gong for Their Organs*, Seraphim Editions, Woodstock 2009.

47

Andrew Jacobs, “China Still Presses Crusade Against Falun Gong”, *The New York Times* (27 April 2009). Available at: <https://www.nytimes.com/2009/04/28/world/asia/28china.html> (accessed on 7 November 2022).

48

United Nations, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2012, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.61.Add.3_EF_Sonly.pdf (accessed on 7 November 2022).

49

United Nations, High Commissioner for Human Rights and World Health Organisation, *The Right to health*, Fact Sheet No. 31, United Nations, Geneva, 2008.

50

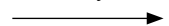
United Nations, Human Rights Council resolution 6/29 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dec 14, 2007. The mandate was endorsed and extended by the Human Rights Council resolutions 6/29 of 14 December 2007, 15/22 of 6 October 2010, 24/6 of 8 October 2013, and 33/9 of 6 October 2016.

51

United Nations, Human Rights Council, “Resolution 6/29. Right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, *ap.ohchr.org*. Available at: https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_29.pdf (accessed on 7 November 2022).

52

United Nations, “International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19”, *un.org*. Available at: <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/>



concrete measures in paragraph 2. It is similar to art. 25. of the “Convention on the Rights of Persons with Disabilities”⁵⁶ where “States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination based on disability” also with all appropriate measures listed in paragraph 2.

3.1.2. Regional Legal Acts

There are also significant regional legal acts that are regulating the right to health. On the basis of the Council of Europe, the core instrument concerning the right of everyone⁵⁷ is the European Social Charter (Council of Europe, ETS No.035, 1961, revised). As a so-called “Social Constitution of Europe”⁵⁸ that is intrinsically connected⁵⁹ with the “European Convention on Human Rights”, in art. 11 regulates the right to protection of health with three primary States obligation and measures:

“1) to remove as far as possible the causes of ill-health; 2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.”

Although “European Convention on Human rights” is primarily protecting the concept of civil rights and not economic, social and cultural rights, some provisions are closely related to the protection of human health, such as: (1) the right to life (art. 1), (2) the prohibition of torture (art. 3) and the forced labor (art. 4), and (3) right to respect for private and family life (art. 8).

“African Charter on Human and Peoples’ Rights”⁶⁰ in art. 16. similarly regulates the right to health as ICESCR:

“Every individual shall have the right to enjoy the best attainable state of physical and mental health (1). State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick (2).”

Realisation of the right to health is one of the primarily aims of the “African Commission on Human and Peoples’ Rights”, which has held that

“... states parties to the African Charter have to take ‘concrete and targeted steps’, while taking full advantage of their available resources, to ‘ensure’ that economic, social and cultural rights such as the right to health are fully realised in all aspects without discrimination of any kind.”⁶¹

An interesting fact is that the “Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights”,⁶² separately and explicitly regulates not only the right to health (art. 10) but also the right to a healthy environment (art. 11) and the right to food (art. 12), which are all part of the right to health as an “inclusive right” described in General Comment No. 14. The same fact is a great “bridge” to the scope of the right to health and the question – which is the exact scope of the right to health?

3.2. Inclusiveness of the Right to Health

3.2.1. In Observing Concrete Object of Protection

As it is already emphasised and that can be noticed in the above international law acts, the right to health is an inclusive right, which is also stated in the General Comment No. 14 (paragraph 11):

“The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”

So, what are exact and legally grounded and determined rights that make up the right to health? First of all, it is also important to say that the right to health consists not only of certain rights (entitlements) but also freedoms (paragraph 8):

“The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”

[globalcompact/A_RES_2106\(XX\).pdf](#) (accessed on 7 November 2022).

53

United Nations, General Assembly, “Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979”, *orchr.org*. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed on 7 November 2022).

54

United Nations, General Assembly, “Convention on the Rights of the Child”, International Covenant on Civil and Political Rights, 16 December 1966, Treaty Series. vol. 999. p. 171.

55

United Nations, “Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49”, *un.org*. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_44_25.pdf (accessed on 8 November 2022).

56

United Nations, “Convention on the Rights of Persons with Disabilities”, *ohchr.org*. Available at: <https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx> (accessed on 8 November 2022).

57

Henriette Roscam Abbing, “The Right to Care for Health: The Contribution of the European Social Charter”, *European Journal of Health Law* 12 (2005), pp. 183–191, doi: <https://doi.org/10.1163/157180905774857907>.

58

Council of Europe, “The European Social Charter”, *coe.int*. Available at: <https://www.coe.int/en/web/european-social-charter> (accessed on 11 November 2022).

59

Régis Brillat, “The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact”, in: Gráinne de Burca, Bruno de Witte (eds.), *Social Rights in Europe*, Oxford University Press, Oxford 2005, pp. 31–44, doi: <https://doi.org/10.1093/acprof:oso/9780199287994.003.0003>.

60

African Charter on Human and Peoples’ Rights, Organisation of African Unity, Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982, *refworld*. Available at: <https://www.refworld.org/docid/3ae6b3630.html> (accessed on 11 November 2022).

61

Manisuli Ssenyonjo, “Reflections on state obligations with respect to economic, social and cultural rights in international human rights law”, *The International Journal of Human Rights* 15 (2011) 6, pp. 969–1012, doi: <https://doi.org/10.1080/13642981003719158>; Based on Communication 241/2001, Sixteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 2002–2003, Annex VII; (2003) African Human Rights Law Reports 96.

62

“Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. ‘Protocol of San Salvador’”, 1988, *oas.org*. Available at: <https://www.oas.org/juridico/english/treaties/a-52.html> (accessed on 11 November 2022).

Regarding the entitlements, Fact Sheet, No. 31 (page 3 and 4) of the Office of the United Nations High Commissioner for Human Rights and WHO is more comprehensive where entitlements of the right to health are:

“The right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; The right to prevention, treatment and control of diseases; Access to essential medicines; Maternal, child and reproductive health; Equal and timely access to basic health services; The provision of health-related education and information; Participation of the population in health-related decision making at the national and community levels.”

Given all of the above, it can be concluded that the right to health consists of a not small range of human rights and freedoms. According to UN legal acts, “the core” of the right to health consists of abuse of non-consensual medical treatment and experimentation, the right to healthcare, the right to reproductive health, and the right to a healthy environment, but also inseparable in terms of health, the right to an adequate standard of living of art. 11 of ICESCR. In General Comment No. 14, the CESCR makes a connection between art. 11 (the right of everyone to an adequate standard of living) and art. 12 of the ICESCR, in a form that the right to health also consists of the right to access to safe and potable water, the right to an adequate sanitation, the right to an adequate supply of safe food, nutrition, the right to clothing and the right to adequate housing, and which all can be summed in one right – right to an adequate standard of living. Although every of the stated right can be a particular topic for independent research, for the purpose of this paper, it is essential to make a general review of every human right that is a core part of the right to health.

3.2.2. *Abuse of Non-Consensual Medical Treatment and Experimentation*

In legal history, e.g., in *Habeas Corpus Act* (1679) and *Bill of Rights* (amendment VIII), abuse of torture and non-humane treatments were one of the first prohibitions with the aim to secure to the individual his right to life and physical integrity. Preservation of the physical integrity of a human being in the form of abuse of torture and non-humane treatments is one of the first key elements in securing the right to health. Abuse of torture and non-humane treatments also refers to non-consensual medical treatments and experimentation, forced and compulsory labour, and restrictions of the individual’s freedom. Abuse of torture and non-consensual medical treatments are protected in main international acts as fundamental freedom – article 5 of the “Universal Declaration of human rights”, article 7 of the “International Covenant of Civil and Political Rights”, article 3 of the “European Convention of Human Rights”, etc.

Biomedical experimentations are progressing daily and carry out many controversial ethical and legal issues. Therefore, UNESCO’s “Universal Declaration on Bioethics and Human Rights”, UNESCO’s “Universal Declaration on the Human Genome and Human Rights”,⁶³ and UNESCO’s “International Declaration on Human Genetic Data”⁶⁴ are one of the main international acts that are regulating the whole process of valid biomedical research, especially in the field of genomics. Therefore, the concept of “informed consent” (art. 6 and 7 of UNESCO’s “Universal Declaration on Bioethics and Human Rights”) is a main “dam” from every kind of non-consensual medical treatment and experimentation that entitles patients to be prior informed about

specific medical treatment and experimentation and to give their explicit consent for that kind of act. Proper medical treatment is one of the preconditions for the health of the individual (patient) and is also part of another human right – the right to healthcare.

3.2.3. *Right to Healthcare and Reproductive Health*

As one of the elements of the right to health, the right to healthcare is one of the main social rights that is secured to every human being according to all the above provisions of the international law. Within the context of the broader right that is the right to health, according to Factsheet No. 31 (p. 3 and 4), the right to healthcare in international law includes “the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health, the right to prevention, treatment and control of diseases and access to essential medicines”; The right to healthcare belongs to the category of social rights and is guaranteed to every individual following special laws governing healthcare. With the extraordinary measures and health policies, State Parties to the above acts of international law must secure a health system accessible to everyone with the main principle of non-discrimination. But, these kinds of measures and steps are dependent on the resources that every state has available. According to General Comment No. 14, there are also “minimum core obligations” that every state must fulfil independently on their complete welfare. These are:

“(a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; [...] (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; [...] (e) To ensure equitable distribution of all health facilities, goods and services.”

Gorik Ooms *et al.*⁶⁵ summarised that the right to healthcare under the provision of ICSECR and General Comment No. 14 includes: (1) access to health facilities, (2) essential medicines, (3) the decision-making process of all inhabitants, and (4) minimum threshold to provide assistance of the international community or states and other in a position. From the moral viewpoint, Yvonne Denier⁶⁶ and Allen Edward Buchanan (partially)⁶⁷ see the statement that there is a basic human right to healthcare from a perspective of four elements: “(1) collective moral obligation” (“an obligation on the part of society

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UNESCO, “Universal Declaration on the Human Genome and Human Rights”, *portal.unesco.org*. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on 11 November 2022).

64

UNESCO, “International Declaration on Human Genetic Data: collection, processing, use, storage”, *unesdoc.unesco.org*. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000136112> (accessed on 11 November 2022).

65

Gorik Ooms, *et al.*, “Is universal health coverage the practical expression of the right to

health care?”, *BMC International Health and Human Rights* 14 (2014), article no. 3, pp. 1–7, doi: <https://doi.org/10.1186/1472-698X-14-3>.

66

Yvonne Denier, “On Personal Responsibility and the Human Right to Healthcare”, *Cambridge Quarterly of Healthcare Ethics* 14 (2005) 2, pp. 224–234, doi: <https://doi.org/10.1017/S0963180105050309>.

67

Allen Edward Buchanan, “Philosophic perspectives on access to health care: Distributive justice in health care”, *The Mount Sinai Journal of Medicine* 64 (1997) 2, pp. 90–95.

to ensure that everyone has access to some level of healthcare services”), that is (2) “stringent” (Dworkin’s consideration of right as “trump” that “overrides countervailing considerations”), (3) “access to healthcare that is owed to those who have the right” and a fact that as a human right, (4) “it is ascribed to all individuals because they are human”.

One of the aims of the whole healthcare system is to preserve maternal health and the improvement of sexual and reproductive health services. Provision of a General Comment No. 14 (paragraph 14, note 12) points out the same fact:

“Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate healthcare services that will, for example, enable women to go safely through pregnancy and childbirth.”

Although it is strongly connected with the right to healthcare, according to the same interpretation, the right to reproductive health is a social right that includes many entitlements that are also in the strong connection with other rights, especially labor rights. In that sense, the “Maternity Protection Convention”⁶⁸ of the International Labour Organisation is one of the main international sources of the right to maternity in correlation with labour rights.⁶⁹ In the preamble of the same “Convention” stands that: “the circumstances of women workers and the need to provide protection for pregnancy” are “the shared responsibility of” not only “government” (s) but also complete “society” that is one of the main ideas, not only of the right to healthcare but social rights itself.

3.2.4. *Right to a Healthy Environment*

One of the most challenging contemporary issues of humankind, in general, is the protection of the environment. In the “Annual report 2019 of the UN Environment Programme”,⁷⁰ it is emphasised that “we either cut greenhouse gas emissions by 7.6 percent every year from now until 2030 or accept that our world will warm by more than 3°C by the end of the century”, also that “the extraction and processing of materials, fuels and food make up about half of total global greenhouse gas emissions and more than 90 percent of biodiversity loss and water stress”. That kind of situation forced global policies to look more eco- and bio-centric. The protection of nature and the environment represents a crucial element in the maintenance of the natural biosphere, which is also important for the health of the human being. That kind of protection means all kinds of measures that are also related to the valid co-existence of the human being with nature and other living world. That is also stated in the “Annual report 2019 of the UN Environment Programme” – “nature is the most effective and cost-efficient solution to many of the challenges we face”. It is a pretty disappointing fact the same report warned that “the pace of nature’s decline is unprecedented in human history”, where “the average abundance of native species in most major land-based habitats has fallen by at least 20 percent, mostly since 1900”. Indeed, because of the same fact, there is also contemporary research that suggests international crime of a more specific crime of ecocide – animal ecocide.⁷¹ (Environmental) law has the challenging and not-easy task to seek the environmental rule of law and protection of the whole living and unliving world, especially natural habitats. The situation of the huge fire catastrophe in the Amazon area has again opened the question

of the legal aspect and consequences of the ecocide⁷² since there is already an initiative in the scientific circles to establish ecocide as a “fifth international ‘Crime against Peace’ under a proposed amendment⁷³ to the Rome Statute of the International Criminal Court”.⁷⁴

These are all facts that affect human health, especially the right to an adequate standard of living and its elements. That is why the right to a healthy environment goes inseparably together with the right to an adequate standard of living. As a third-generation human right, the right to a healthy environment is recognised as a constitutional right in many world constitutions.⁷⁵ But, Erin Daly and James R. May emphasise that “of the more than 100 countries that have recognised an expressed or implied environmental right, many lack independent judiciaries to enforce them”,⁷⁶ which is one of the main issues when it comes to the application of the right to a healthy environment. Although it is also controversial can the right to a healthy environment be considered as an *ius cogens* (as a *peremptory norm*), especially in terms of international environmental law,⁷⁷ the right to a healthy environment is recognised as a human right on the international level (Stockholm, Rio, Kyoto and Paris Conventions) and is one of the main elements of the right to health.

68

International Labour Organisation. C183 – Maternity Protection Convention. 2000 (No. 183). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 (accessed on 1 December 2022).

69

Csilla Kollonay-Lehoczy, “The Right of Women to Maternity Protection”, in: Niklas Bruun, Klaus Lörcher, Isabelle Schömann, Stefan Clauwaert (eds.), *The European Social Charter and the Employment Relation*, Hart Publishing Ltd, London 2017, pp. 307–326, doi: <https://doi.org/10.5040/9781509906345.0008a>.

70

United Nations, Environment Programme. Annual report. Letter from the Executive Director, 2019, Available at: <https://www.unenvironment.org/annualreport/2019/index.php> (accessed on 9 November 2022).

71

Debbie Legge, Simon Brooman, “Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime of Animal Ecocide?”, *Liverpool Law Review* 41 (2020), pp. 201–218, doi: <https://doi.org/10.1007/s10991-020-09253-0>.

72

Malayna Raftopoulos, Joanna Morley, “Ecocide in the Amazon: the contested politics of environmental rights in Brazil”, *The International Journal of Human Rights* 24 (2020) 10, pp. 1616–1641, doi: <https://doi.org/10.1080/13642987.2020.1746648>.

73

Polly Higgins, Damien Short, Nigel South, “Protecting the planet after Rio – the need for a crime of ecocide”, *Criminal Justice Matters* 90 (2012) 1, pp. 4–5, doi: <https://doi.org/10.1080/09627251.2012.751212>.

74

United Nations, General Assembly, “Rome Statute of the International Criminal Court (last amended 2010)”, *icc-cpi.int*. Available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (accessed on 8 November 2022).

75

David R. Boyd, “The Implicit Constitutional Right to Live in a Healthy Environment”, *Review of European Community & International Environmental Law* 20 (2011) 2, pp. 171–179, doi: <https://doi.org/10.1111/j.1467-9388.2011.00701.x>.

76

Erin Daly, James R. May, “Learning from Constitutional Environmental Rights”, in: John H. Knox, Ramin Pejani (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge 2018, pp. 42–58, doi: <https://doi.org/10.1017/9781108367530.003>.

77

Louis J. Kotzé, “In Search of a Right to a Healthy Environment in International Law. Jus Cogens Norms”, in: John H. Knox, Ramin Pejani (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge 2018, pp. 136–154, doi: <https://doi.org/10.1017/9781108367530.008>.

3.2.5. *Right to an Adequate Standard of Living*

Related to environmental issues, the right to an adequate standard of living is one of the main rights on which the realisation of the right to health depends and which also has a wider scope of other rights – the right to access to safe and potable water, the right to an adequate sanitation, the right to an adequate supply of safe food, nutrition, the right to clothing, and the right to adequate housing. Except for the right to health and right to an adequate standard of living, according to Bart Wernaart, the right to food has “a far broader scope than the article 11 of the ICESCR” and can be observed in a context with at least other five human rights:

“... the right to self-determination, the right to healthcare, the right to life, non-discrimination provisions and the right to social security.”⁷⁸

The right to adequate food, precisely the right to availability and accessibility of adequate food, is more elaborated in the General Comment No. 12⁷⁹ (paragraph 5), where CESCR “makes the fundamental point”⁸⁰ that “the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, *inter alia* because of poverty, by large segments of the world’s population” with the further elaboration that (paragraph 8):

“The Committee considers that the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”

In relation to the right to food is also the right to water, which was, according to Benjamin Mason Meier *et al.*, recognised “explicitly for the first time”⁸¹ at the 1977 UN Water Conference in Mar del Plata.⁸² CESCR elaborated on the right to water in the General Comment No. 15⁸³ (paragraph 12) in detail, where the main elements of the same rights are: adequacy, that may vary according to different conditions, but also availability, quality, accessibility (physical, economic, non-discrimination and information) which all apply in all circumstances. The CESCR underlines that “water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health) “where the right to water is often mentioned in a context of a right to sanitation, as “confirmed in the wording of the 2010 UN General Assembly (UNGA)⁸⁴ and UN Human Rights Council (UNHRC) resolutions.⁸⁵ The right to clothing and the right to housing are also one of the primary rights crucial for the realisation of the right to health. The right to housing must not be understood only in the scope of the right to home and inviolability of the home, but to a much wider sense, that is also stated by the CESCR in the General Comment No. 4 (paragraph 7):

“In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.”⁸⁶

Although it may seem at first, that this kind of right to housing is legally pretty undetermined and “utopistic”, CESCR identifies certain elements of the right to adequate housing (“legal security of tenure, the availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy”, General Comment No. 4, para. 8) as a measure that State Parties have to apply. The same fact, with a broad view

in the frame of the right to an adequate standard of living, was recognised by the European Court of Human Rights in the case *Yordanova and Others v Bulgaria*:

“Indeed, the Bulgarian authorities have recognised, as can be seen from their long-term programmes and declarations on Roma inclusion and housing problems, as well as from projects realised in other parts of Sofia or elsewhere in the country, that a wide range of different options are to be considered in respect of unlawful Roma settlements. Among those are legalising buildings where possible, constructing public sewage and water-supply facilities and providing assistance to find alternative housing where eviction is. While some of these options are directly relevant to achieving appropriate urban development and removing safety and health hazards, the Government have not shown that they were considered in the case at hand.”⁸⁷

Living in a place in “security, peace, and dignity” is a precondition to an adequate standard of living and the general health of the individual. The right to housing is not only related to the physical building where the person inhabits but to all other elements in and around the person’s home, which influence on his general state and well-being.

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Bart Wernaart, “The plural wells of the right to food”, in: Otto Hospes, Irene Hadiprayitno (eds.), *Governing Food Security. Law, Politics and the Right to Food*, Wageningen Academic Publishers, The Netherlands 2010, pp. 43–81.

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United Nations, “CESCR General Comment No. 12: The Right to Adequate Food (Art. 11)”, *refworld.org*. Available at: <https://www.refworld.org/pdfid/4538838c11.pdf> (accessed on 8 November 2022).

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Kate Cook, “The Right To Food And The Environment”, *Environmental Law Review* 12 (2010) 1, pp. 1–11, doi: <https://doi.org/10.1350/enlr.2010.12.1.072>.

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Benjamin Mason Meier *et al.*, “Translating the Human Right to Water and Sanitation into Public Policy Reform”, *Science and Engineering Ethics* 20 (2014) 4, pp. 833–848, doi: <https://doi.org/10.1007/s11948-013-9504-x>.

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United Nations, Report of the United Nations water conference, Mar del Plata 14–25 March 1977, UN Pub. EE77 II A 12. <http://www.ielrc.org/content/e7701.pdf> (accessed on 8 November 2022).

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United Nations, CESCR, “General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)”. E/C.12/2002/11. 20 January 2003. Available at: <https://digitallibrary.un.org/record/486454> (accessed on 11 November 2022).

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The Human Right to Water and Sanitation, UNGA Resolution A/64/ 292, 3 August 2010.

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United Nations, Human Rights Council (HRC), Human Rights and Access to Safe Drinking Water and Sanitation. UN Doc. A/HRC/RES/15/9, 6 October 2010. Available at: <https://digitallibrary.un.org/record/687002> (accessed on 12 November 2022); Pedi Obani, Joyeeta Gupta, “The Evolution of the Right to Water and Sanitation: Differentiating the Implications”, *Review of European Community & International Environmental Law* 24 (2015) 1, pp. 27–39, doi: <https://doi.org/10.1111/reel.12095>.

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United Nations, CESCR, “General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant”, *refworld.org*. Available at: <https://www.refworld.org/docid/47a7079a1.html> (accessed on 12 November 2021); Benjamin Davy, Sony Pellissery, “The citizenship promise (un)fulfilled: The right to housing in informal settings”, *International Journal of Social Welfare* 22 (2013) 1, pp. 68–84, doi: <https://doi.org/10.1111/ijsw.12033>.

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European Court of Human Rights, *Yordanova and Others v Bulgaria*. Application No 25446/06, Merits and Just Satisfaction, 24 April 2012. See: Adélaïde Remiche, “Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One’s Home”, *Human Rights Law Review* 12 (2012) 4, pp. 787–800, doi: <https://doi.org/10.1093/hrlr/ngs033>.

3.3. Legal Protection of Health – (How) Can It Be Exercised?

3.3.1. Legal Enforcement – Criticism of Legal and Political Philosophers/Theorists

With regard to the analytical assumptions and a detailed breakdown of the right to health, it is evident that the aforementioned right nevertheless entails certain disputed issues and controversies. The above-mentioned questions primarily relate to the exact determinants of the right to health (for example, the right to clean water, and the right to adequate food), and also, to the ontology of the (legal) right *per se*. The question can be raised as to what exactly certain adjectives would mean. For example, what does the word “clean” (water and air) mean, or “adequate” (food), or what is even more controversial, what exactly are the obligations (even duties) of those which said right should enable? Who is the one who, for example, should enable the mentioned right to adequate food and how should it be done? Political philosopher Onora O’Neil believes that in the latter lies the difficulty of not only the right to health, but also the emergence of numerous (new) legal and moral rights that give certain guarantees to legal entities, and the question is how much they are truly able to do so.⁸⁸ In this regard, Onora O’Neill points out that it is unknown to whom exactly the concept of the right to health refers, because it does not provide what are the exact obligations of those who should provide these rights (e.g., a doctor in the form of healthcare or a farmer in the form of the right to adequate food). She states that the stated right is overly *aspirational* and *prescriptive*, rather than *normative*.⁸⁹

“Rights are seen as one side of a normative relationship between right-holders and obligation-bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honor as null and void, indeed undefined. [...] There cannot be a claim to rights that are rights against nobody, or nobody in particular: universal rights will be rights against all comers; special rights will be rights against specifiable others.”⁹⁰

In addition, according to other influential legal and political theorists, one of the main controversies of the right to health is its enforcement. Robert Alexy points out the objection to the enforceability of the set of welfare rights in general,⁹¹ while Cass R. Sunstein signifies welfare rights as “absurd” and that they may lead to “disaster”.⁹² Richard D. Lamm and Philip Barlow write that even the right to healthcare should not have the status of a “right” at all.⁹³ Moreover, Sunstein finds absurd the constitutional provisions on the “highest possible level of physical health” (but also the right to a clean environment) by asking the question: “how could courts enforce this right?”⁹⁴ A further question that arises is whether the law can truly protect human health and whether the said concept is even founded and sustainable.

3.3.2. How to Properly Observe the Right to Health?

Perhaps the last question should be pointed in a different direction, in the direction that refers to the proper view of the concept of the right to health. The specificity of (legal) language is reflected in the attempt to delimit and formalize certain occurrences in the form of words, although it is questionable whether such a thing is sometimes possible, and thus certain difficult-to-determine phenomena should not be taken too literally and limited. In the legal discourse, it is not unnoticeable how those words that do not have a one-dimensional meaning (equality, freedom, justice) are used very often, but

also how the legal regulation frequently tries to regulate certain phenomena, without even trying to define them *a priori*, or even determine. For example, the Croatian Family Act⁹⁵ and the Law on Sports⁹⁶ do not provide an explicit definition or even a definition of *family* or *sports*,⁹⁷ precisely because these are terms that are quite difficult to define or even determine. Words like “nature”,⁹⁸ “environment”⁹⁹ or “euthanasia”¹⁰⁰ are also used very often in legal discourse, although their definitions are not absolute.

In a legal way and in the form of the whole elaboration of the right to health, we must observe the right to health as an inclusive right as the unity of the entire scope of human rights that are securing to the individual all necessary conditions that are necessary to achieve an appropriate standard of health. Therefore, the aim of law must not be strictly to define health, but to determine it and to ask the question: what can a state do to secure to every human being a decent surrounding that could sustain his complete physical and mental welfare? In that kind of sense, the right to health in international legal acts consists of a whole scope of human rights and elements (parameters of health) with the already stated aim to secure the complete welfare of every human being. The same is said in the General Comment No. 14 on The Right

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Onora O’Neill, “The dark side of human rights”, *International Affairs* 81 (2005) 2, pp. 427–439.

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Ibid.

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Ibid.

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Robert Alexy, *Theory of Constitutional Rights*, Oxford University Press, Oxford 2004, p. 340.

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Cass R. Sunstein, “Against Positive Rights Feature”, *East European Constitutional Review* 35 (1993), pp. 35–38.

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See: Richard D. Lamm, “The Case Against Making Healthcare a ‘Right’”, *Human Rights* 25 (1998) 4, pp. 8–11; Philip Barlow, “Health care is not a human right”, *The BMJ* (1999), pp. 319–321, doi: <https://doi.org/10.1136/bmj.319.7205.321>.

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Ibid. More about the topic of nature of welfare rights in: Ivana Tucak, “The Nature of Welfare Rights”, *Dignitas* 69–79 (2016), pp. 133–156. As a counter-answer to the above question, look at the research: Oscar A. Cabrera, Ana S. Ayala, “Advancing the right to health through litigation”, in: José M. Zuniga, Stephen P. Marks, Lawrence O. Gostin (eds.), *Advancing the Human Right to Health*, Oxford University Press, Oxford 2013, pp. 25–38, doi: <https://doi.org/10.1093/acprof:oso/9780199661619.003.0002>.

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Family Act, Official Gazette, No. 103/15, 98/19, 47/20.

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Law on Sports, Official Gazette, No. 71/06, 150/08, 124/10, 124/11, 86/12, 94/13, 85/15, 19/16, 98/19, 47/20, 77/20.

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More on the topic about the difficulty of determination of sports in: Tomislav Nedić, Matija Mato Škerbić, “Definiranje sporta u hrvatskim i međunarodnim pravnim aktima – na razmeđu prava i filozofije”, *Studia ethnologica Croatica* 32 (2020) 1, pp. 155–181, doi: <https://doi.org/10.17234/SEC.32.5>.

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See the definition in the Nature Protection Act, Official Gazette, No. 80/13, 15/18, 14/19, 127/19.

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See the definition in the Environmental Protection Act, Official Gazette, No. 80/13, 153/13, 78/15, 12/18, 118/18, Art. 4, p. 34.

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More on the topic about the difficulty of determination of euthanasia from the aspect of bioethics, law and medicine in: Tomislav Nedić, Lada Zibar, Borko Baraban, “Terminološko određenje pojma eutanazija – pravne, bioetičke i medicinsko-postupovne implikacije”, *Filozofska istraživanja* 42 (2022) 1, no. 165, pp. 69–86, doi: <https://doi.org/10.21464/fi42104>.

to the Highest Attainable Standard of Health (paragraph 8 and 9) of the UN Committee on Economic, Social and Cultural Rights (hereinafter: CESCR):

“... the right to health is not to be understood as a right to be healthy [...] good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health [...] the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.”

The entire concept of the right to health should not be viewed exclusively within the category of what is (*sein; de iure lato*), but also of what should be (*sollen; de iure ferendo*). In his “Philosophy of Law” (*Rechtsphilosophie*), Gustav Radbruch dualistically reduces his own legal philosophical thought to the *concept* and *idea of law*.¹⁰¹ *The concept of law* is a given fact whose meaning is the realisation of the *idea of law*,¹⁰² that is, the realisation of *justice*.¹⁰³ As a cultural concept, the *concept of law* is the concept of a reality whose purpose is to serve some value. That (legal) value is the *idea of law* towards which the *concept of law* is oriented. It is visible exactly how the *idea of law* follows from the *concept of law*.

“The concept of law is a cultural concept, that is, a concept of a reality related to values, a reality the meaning of which is to serve a value. Law is the reality the meaning of which is to serve the legal value, the idea of law. The concept of law thus is oriented toward the idea of law.”¹⁰⁴

Health itself should be understood as an idea-value component to be aspired to. In the previous parts of the work, it was determined that health includes a physical component, a psycho-mental component, an environmental-natural component, a healthy social environment, self-awareness, care, and attention of an individual. It is visible how the mentioned components come out of the sphere of state control and enabling. The state cannot guarantee health, but it can try to protect it to the extent that is possible with precisely determined means of public and private law. Art. 12. of the ICESCR expressly states “the right to the highest attainable standard of health”, which would imply the highest possible level of health that can be reached. Such aspiration is reflected in the numerous mechanisms and legal regulations that have been listed and will be listed, with which the state tries to protect the right to health. In the aforementioned General Comment No. 14 (paragraphs 8 and 9) clearly emphasised that the right to health should not be understood as “a right to be healthy”. Regardless of the difficulty of definition, any deliberate and malicious attempt to relativize health as a concept, idea and value represent a threat to the social and legal order. The mentioned judgment of the European Court of Human Rights shows that the right to health does not even have to be explicitly prescribed in order to be protected, because the protection of the right to health derives from already existing legal regulations. Therefore, one of the tasks of the legal order is the protection of health, understood not as a mere reality, but as a possibility, value and ideal to be aspired to. In the following subsections presented is the way in which the right to health has been implemented in Croatian public and private law and in which way the courts have tried to enforce the same right.

3.3.3. Implementation of the Right to Health in (Croatian) Public Law

In addition to provisions guaranteeing the prohibition of torture and torture, the right to health care and other rights, the “Constitution of the Republic of

Croatia¹⁰⁵ expressly regulates the right to a healthy life. According to Article 70 of the “Constitution”:

“Everyone shall have the right to a healthy life. The state shall ensure conditions for a healthy environment. Everyone shall, within the scope of his/her powers and activities, accord particular attention to the protection of human health, nature and the human environment.”

Certain experts in constitutional law are also aware of the challenges of the aforementioned article of the “Constitution”. According to certain constitutional law authors, the provision from the Croatian Art. 70 of the “Constitution”:

“... is a case of guaranteeing a very broadly formulated right of positive status, which establishes a series of duties for the state and citizens.”¹⁰⁶

The realisation of the aforementioned rights “is not conditioned exclusively by affirmative or negative duties of the state, but also by the behaviour of each individual”.¹⁰⁷ There is no doubt that judicial practice plays a major role in the elaboration of how the right to health will be applied, interpreted and further realised, where it can be seen that the right to health represents an ideological-value component to which certain stakeholders of the law strive.

In the context of the COVID-19 pandemic, the Constitutional Court of the Republic of Croatia emphasizes that “according to Article 70 para. 1 of the Constitution of the Republic of Croatia,¹⁰⁸ everyone has the right to a healthy life, which means that health is a value protected by the constitution, and the legislator sanctioned the violation of this right as a criminal offense against human health – the spread and transmission of contagious disease under Article 180 of the Criminal Code”. What is more important that the Constitutional Court points out that:

“... and the constitutional obligation of the state is to ensure a healthy environment and to protect human health (Article 70, paragraphs 2 and 3 of the Constitution).”

Furthermore, the European Court of Human Rights pronounces the interpretation that the right to health does not have to be explicitly protected by a

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Although Radbruch himself explicitly advocates trialism where, in addition to the concepts of reality and the idea of law, he adds a third concept – the culture of law, more precisely, as Radbruch himself would state – “*cultural philosophy of law*”. Gustav Radbruch, “Legal Philosophy”, in: Kurt Wilk, *Legal Philosophies of Lask, Radbruch and Dabin*, trans. Kurt Wilk, Harvard University Press, Cambridge, Mass. 1950, §3, p. 70.

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“Law can be understood only within the framework of the value-relating attitude. Law is a cultural phenomenon, that is, a fact related to value. The concept of law can be determined only as something given, the meaning of which is to realize the idea of law.” – Ibid., p. 52.

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The idea of law refers precisely to *justice*; *ibid.*, p. 73.

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§4, *ibid.*

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Constitution of the Republic of Croatia, Official Gazette, No. 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

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More in: Branko Smerdel, Smiljko Sokol, *Ustavno pravo*, Narodne novine, Zagreb 2009, p. 156.

107

Arsen Bačić, “Ustavni temelji i problemi zaštite okoliša u hrvatskom i europskom pravu”, *Zbornik radova Pravnog fakulteta u Splitu* 4 (2008), pp. 727–743.

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Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

specific legal regulation,¹⁰⁹ but that it originates from already established provisions. The European Court of Human Rights in *Case of Jurica v. Croatia*¹¹⁰ states:

“It is now well established that although the right to health is not as such among the rights guaranteed under the Convention or its Protocols¹¹¹ [...] the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients’ physical integrity and, secondly, to provide victims of medical negligence with access to proceedings in which they could, where appropriate, obtain compensation for damage.”¹¹²

The above shows precisely that health represents a social ideal that the state or international (European) community will try to protect with certain mechanisms, regardless of the fact that the above is not (positivistically) expressly prescribed by legal provisions. From the aforementioned constitutional provisions, it is evident that health must be observed as an ideal-value dimension, that cannot be understood exclusively in the form of a category of positivistic legal reality.

In addition, human health is also protected by the provisions of the Criminal Code¹¹³ (Chapter XIX Offenses against human health; Chapter XX Offenses against the environment; Chapter XXI Offenses against public safety) as well as the provisions of various special laws in the field of biomedicine and environmental protection, which violation may lead to criminal liability.

3.3.4. *Implementation of the Right to Health in (Croatian) Private Law and Doctrine of Personality Rights*

According to art. 1048 of the “Croatian Civil Obligation Act”:

“... everyone has the right to demand from the court or other competent body to order the cessation of an action which violates the right of his personality and the removal of the consequences caused by it.”

In a large number of cases, Croatian courts took the position that the right to health had been violated and, on that basis, adjudicated cases in favor of the injured party.¹¹⁴ The main legal basis for this is regulated in Art. 19 of the “Croatian Civil Obligations Act”,¹¹⁵ which regulates the rights of the personality, explicitly stating that “every natural and legal person has the right to protection of his rights of personality under the preconditions established by law” (paragraph 1), and that the same protection, *in concreto*, refers to the protection of “life”, and – “physical and mental health” (paragraph 2).

However, from a certain right of personality for its holder will arise a “right-request” for the enforcement and protection of that right, only if “a certain person violates that right of personality, encroaching unauthorised in personal good that is the object of that right of personality”.¹¹⁶ In the Croatian civil law doctrine, the concept of the personal right to health has been further elaborated. Thus, in the context of healthy life and the environment, Nikola Gavella states that:

“... the life, physical integrity and health of every person are affected by their environment. The personal goods of some persons may also be endangered by generally dangerous activities and means, even though they are not directly directed against those persons.”¹¹⁷

In this respect, if a person’s health is endangered,¹¹⁸ then the same person, on the basis of and under the exact certain legal preconditions, has the possibility

of requesting: a quasi-negative claim (of which a special request related to the so-called environmental lawsuit), compensation for material damage, compensation for non-material damage, and, possibly, claim for unjust enrichment.¹¹⁹ Therefore, apart from the request to stop the violation of personality rights, each person may require, in the form of the so-called environmental lawsuits, the other person to remove the source of the danger from which substantial harm is threatened to him or her, and to refrain from the activity from which the harassment or danger of harm arises, if the harassment or damage cannot be prevented by appropriate measures.¹²⁰ At the request of the interested person, the court will order that appropriate measures be taken to prevent the occurrence of damage or disturbance or to remove the source of danger, at the expense of the owner of the source of danger, if he does not do so himself.¹²¹ If damage occurs in the performance of a general utility activity for which the approval of the competent authority has been obtained, only compensation for the damage that exceeds the usual limits (excessive damage) may be requested.¹²² But in that case, it may be required to take socially justifiable measures to prevent the occurrence of damage or to reduce it.¹²³ If damage occurs, compensation for property and non-property (sickness,

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In this case by the European Convention on Human Rights, available at: https://www.echr.coe.int/documents/convention_eng.pdf (accessed on 1 December 2022).

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Application no. 30376/13, 2 May 2017; point 84.

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See: *Fiorenza v. Italy* (dec.), no. 44393/98, 28 November 2000; *Pastorino and Others v. Italy* (dec.), no. 17640/02, 11 July 2006; and *Dossi and Others v. Italy* (dec.), no. 26053/07, 12 October 2010).

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The decision also cites judgments: “*Benderskiy v. Ukraine*, no. 22750/02, §§ 61–62, 15 November 2007; *Codarcea v. Romania*, no. 31675/04, §§ 102-03, 2 June 2009; *Yardımcı v. Turkey*, no. 25266/05, §§ 55-57, 5 January 2010; *Spyra and Kranczkowski v. Poland*, no. 19764/07, §§ 82 and 86-87, 25 September 2012; *Csoma*, cited above, §§ 41 and 43; and *S.B. v. Romania*, no. 24453/04, §§ 65-66, 23 September 2014).” Also, the right to health is also mentioned in the judgments of the Court of Justice of the European Union: *C-159/12* (9/5/2013), *C-151/17* (11/22/2018), *C-585/19* (11/11/2020).

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Croatian Criminal Code, Official Gazette, No. 144/2012, 125/2011, 61/2015, 56/2015, 101/2017, 118/2018, 126/2019, 84/2021.

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See for e.g.: County Court in Split, Gž R 184/2021-2, 7/7/2021; County Court in Osijek, Gž-3291/08-2, 6/17/2010.

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Croatian Civil Obligations Act, Official Gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21.

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Nikola Gavella, *Privatno pravo*, Narodne novine, Zagreb 2019, p. 185.

117

Nikola Gavella, *Osobna prava*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb 2000, p. 73.

118

When it comes to compensation for hazardous environmental activities, it is important to emphasize that there must be a nexus between hazardous activities and the damage itself. See court case: Supreme Court of the Republic of Croatia, Rev-3055/95, April 29, 1998; Also in: N. Gavella, *Osobna prava*, p. 73.

119

N. Gavella, *Osobna prava*, pp. 74–84.

120

According to art. 1047, paragraph 1 of the Civil Obligations Act.

121

According to art. 1047, paragraph 2 of the Civil Obligations Act.

122

According to art. 1047, paragraph 3 of the Civil Obligations Act.

123

According to art. 1047, paragraph 4 of the Civil Obligations Act.

violation of personality rights) damage comes into consideration. However, only if there is a causal link between the dangerous activity and the damage.¹²⁴ The mentioned provisions of the “Civil Obligations Act” (in addition to numerous other provisions of the medical tort law) are also applicable to numerous other aspects of human health that arise, not only from environmental issues but from the sphere of medicine in the performance of health activities, i.e. in the context of medical interventions in the human body for the purpose of treatment, such as abortion, euthanasia, protection of pregnancy (maternity), organ transplantation, etc. The main assumptions are voluntariness of treatment and informed consent (exception in urgent conditions) of the patient, in the form of self-determination of the patient as the first principle of medical ethics and medical law.

3.3.5. *The Conflict Between Private and Public (Right and Law) – Dworkin’s Argument of Principle and Policy*

However, regardless of the mentioned provisions of private (civil) law, it should be pointed out that it will not always be easy to obtain a ban on certain behaviour that violates the personality’s right to health, especially in the context of environmental issues. Even more, prohibition as an instrument of public law (constitutional, administrative or criminal law) will very often not be possible because it would violate some other right of a certain legal entity whose work is to be prohibited. The aforementioned conflict between public and private (law, rights, or interests) was staged in a graphic example by Ronald Dworkin in his work *Taking Rights Seriously*.¹²⁵ As an example,¹²⁶ Dworkin takes a certain person A, who enjoys the peace of his own house (home) with his family, and person B, who is the owner of a factory that emits emissions that endanger the health of person A. With the above example, Dworkin tries to convey how difficult it is sometimes to determine ontologically what it is in the first place right, and which legal entity in the conflict of certain rights should have primacy in the protection of its right. Thus, in the given example, in order to protect their own rights, person A or person B can highlight an argument based on *principle* or an argument based on *policy* argument. Thus, person A can state that person B violates his right to health (*principle* argument) with the harmful effects of his own factory, that is, not only does he violate his right to health, but the entire social community cannot live in the specified area that is polluted by person B’s factory (*policy* argument). However, on the other hand, person B can state that by banning the operation of his factory, he himself could declare bankruptcy because he has no other means of livelihood (*principle* argument), that is, that his employees and even the entire community benefit much more from the fact that the factory works than that it does not work because its closure would violate the economic rights of numerous legal entities. In this regard, Dworkin himself states that it is questionable whose argument is stronger and which of person A or person B has a stronger competitive right. In this regard, it is necessary to see whether we will look at the entire situation consequentialistically or deontologically.

In this regard, Croatian law has tried to find a compromise between the above arguments, and therefore does not seek to ban the operation of such a factory, but the said factory would have to undergo a certain inspection to determine, for example, whether the factory emits too many exhaust gases into the air that are harmful to human health and environment. Thus, for example, in Art. 26 of the Law on the State Inspectorate¹²⁷ foresees a whole series of activities

carried out by the environmental protection inspection, as well as in Art. 27. nature protection inspection.

4. Conclusion

Concerning many challenges affecting the issue of human health that the new epoch brings, this paper aimed to normative elaboration on the concept and scope of the right to health, observe the concrete international legal acts that are regulating it, as well as to elaborate on the legal enforcement of the right to health. The right to health is a rather specific phenomenon and issue within many legal branches. As health occurs to be one of the crucial preconditions for sustainable development, on the international level, in UN 2030 Agenda for Sustainable Development, it is emphasised that one of the leading health goals is “to ensure healthy lives and promote wellbeing at all ages”.¹²⁸ Although it is elaborated that the term health has many different perspectives, it can be concluded that health is a protected legal good that is regulated by numerous international, regional and national legal acts, and which, *eo ipso*, is oriented to the protection of many aspects of human integrity in an attempt to establish the right balance in the overall functioning of human’s life.

It is shown that the right to health is an inclusive right, and that the scope of the right to health consists of abuse of torture and non-humanic treatments, abuse of non-consensual medical treatment and experimentation, the right to healthcare, the right to reproductive health, the right to a healthy environment and the right to an adequate standard of living. In the realisation of the right to health, states have to apply all the measures that are prescribed under all elaborated international legal acts. One of the most challenging indeed are the measures that are related to the environment and all elements that affect the adequate standard of living, especially issues of clean air, water, food and housing. Clean air, drinkable water and safe food are the main physiological needs of the human being.

Health should be understood exclusively as an idea-value category to be aspired to, as a *should (sollen)*, by no means as a pure and categorical reflection of reality (*sein*). According to Radbruch, the law is a reality whose purpose is to serve the idea of law, i.e. justice. This conception of justice is also reflected in the concept of health. Contours of the mentioned thinking were established yet by Plato in *The Republic*. Health is an ideal to which the entire society, and therefore the law, should strive. The state cannot guarantee health, but must be able to try to protect it to the extent it is possible with precisely determined

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Assumptions of responsibility for damage in Croatian civil law are: injurer, harmful action, damage, cause (nexus) and illegality. See the judgment of the Supreme Court of the Republic of Croatia, Rev-3055/95, dated April 29, 1998.

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Ronald Myles Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (MA) 1978.

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See the full worked-out example in: *ibid.*, pp. 294–297.

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Law on the State Inspectorate, Official Gazette, No. 115/18, 117/21.

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United Nations, “Transforming our world: the 2030 Agenda for Sustainable Development”, *sustainabledevelopment.un.org*. Available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed on 12 November 2022).

means of public and private law. Such aspiration is reflected in numerous mechanisms and legal regulations by which the state tries to protect the right to health. It will also depend on the worldview and on the legal and cultural understanding of the protection of social rights in general.

It is true that the concept of the right to health has its own shortcomings, which are mainly reflected in the difficult determination of duties and obligations of those who should ensure it. However, the paper shows the ways in which the right to health can be realised, both from the perspective of public and private law. Although the paper also pointed to numerous criticisms and difficulties from the point of legal and political philosophy/theory in determining the right to health, mainly by regulations of international law, health is an ideal and value that must be part of the modern functioning of the legal state and the rule of law. It is important to emphasize that in *General Comment No. 14*, it is pointed out that the right to health should not be understood as “a right to be healthy”, that is, as a kind of absolute. Regardless of the difficulty of definition, any deliberate and malicious attempt to relativize health as a concept and value can be marked as a threat to the social and legal order. Establishing the right to health is certainly not an easy task, especially because there may be different understandings of what it means to have the right in the context of private and public conflicts of law, rights and interests (Dworkin’s arguments of *principle* and *policy*). Nevertheless, one of the tasks of the legal order must be to strive to protect the value of health, understood not as a mere reality, but as a possibility and an ideal to be aspired to.

Tomislav Nedić

Demistificiranje koncepta prava na zdravlje

Sažetak

U realitetu rapidnoga opće-društvenog razvoja, pojavom pitanja o novim nositeljima subjektivnih prava te prodiranjem novih oblika (subjektivnih) prava općenito, rasprava o moralnim i subjektivnim (pravnim) pravima oduvijek je bila, jest i biti će aktualna društvena komponenta. Neosporno je kako pravo i (humana) bioetika primarno vlastitu usredotočenost temelje zaštiti ljudskoga života i ozbiljenju vrhovnosti ljudskoga zdravlja. Postizanje cjelokupne ljudske dobrobiti nedvojbeno je uvjetovano imanentnošću dobroga zdravlja, a u suvremenome ga društvu omogućava jedinstveni »mehanizam« – pravo na zdravlje. Iako usredotočena kulturi zdravlja (healthism), trenutna epoha oksimoronski prostire seriju izazova i kontroverzi vezanih uz pitanje ljudskoga zdravlja i njegovoga očuvanja koja su osobito došla do izražaja tijekom COVID-19 krize. No apriorno pitanje koje se može postaviti jest – što bi to samo zdravlje uopće bilo? Upravo zato zaštita ljudskoga zdravlja i ostvarivanje prava na zdravlje jedno je od najzahtjevnijih problematika s kojim se pravo (u objektivnom smislu) može susresti. Pravo na zdravlje, kao subjektivno i prilično inkluzivno pravo, utjelovljuje ne samo prava koja su antropocentrički orijentirana, već i ona prava koja teže biocentričkoj zaštiti harmonije ravnoteže okoliša i prirode kao neodvojivih nazivnika stanja ljudskoga zdravlja. Iako su istaknuti (uglavnom anglosaksonski) politički i pravni filozofi bili pesimistični glede ostvarivanja i provedbe prava na (najviši dosežni standard) zdravlja, u ovome se radu nude mogućnosti njegova ostvarivanja, koje uvelike ovise o tome na koji se način koncept zdravlja uopće shvaća. Zdravlje bi trebalo biti razmatrano u vidu idejno-vrijednosne kategorije kojoj se teži (Sollen), bez umišljaja o čistoj i kategoričkoj refleksiji zbilje (Sein). S obzirom na inkluzivnost specifičnu za pravo na zdravlje, u ovome se radu nudi obradba i razmatranje prava na zdravlje u njegovoj pojmovnoj te normativnoj cjelini i opsegu polazeći od pitanja: kako pravo štiti ljudsko zdravlje i njegove konstitutivne elemente? Isto pitanje izaziva zanimljiva interdisciplinarna (prvenstveno pravna i filozofska) gledišta.

Ključne riječi

pravo na zdravlje, zdravlje, prava, zakon, filozofija, okoliš, pravna prisila, bioetika

Tomislav Nedić

Entmystifizierung des Konzepts des Rechts auf Gesundheit

Zusammenfassung

Wenngleich wir in einer Ära leben, in der der Kult und Wert der Gesundheit verherrlicht werden (Healthismus), wird eine Reihe von Fragen und Kontroversen hinsichtlich der menschlichen Gesundheit aufgeworfen. Die Erlangung des menschlichen Wohlergehens beruht auf guter Gesundheit und wird durch einen einzigartigen „Mechanismus“ gefördert – das Recht auf Gesundheit. Der Schutz der menschlichen Gesundheit und die Ausübung des Rechts auf Gesundheit stellen allerdings aufgrund des mangelnden Verständnisses dessen, was Gesundheit überhaupt ist, eine der größten Herausforderungen für das Recht selbst dar. Das Recht auf Gesundheit als gesetzliches und inklusives Recht verkörpert nicht nur die von menschlichen Wesen als solchen geltend gemachten Rechte, sondern auch den Umwelt- und Naturschutz als untrennbaren Nenner für den Status der menschlichen Gesundheit. Obwohl prominente Rechts- und Politikphilosophen und -theoretiker die Verwirklichung und Durchsetzung des Rechts auf (den höchsten erreichbaren) Gesundheitsstandard pessimistisch beurteilten, erklärt dieser Beitrag in extenso die Möglichkeit seiner Umsetzung, die weitgehend davon abhängt, wie der Gesundheitsbegriff aufgefasst wird. Gesundheit ist ausschließlich als anzustrebende Idee-Wert-Kategorie, als Sollen und nicht im Entferntesten als reine und kategorische Widerspiegelung der Wirklichkeit (Sein) auszudeuten. Angesichts der dem Rechtsanspruch auf Gesundheit innewohnenden Inklusivität, die zweifellos einige problematische Elemente enthält, zielt dieser Artikel darauf ab, das Recht auf Gesundheit in seiner begrifflichen und normativen Gesamtheit zu erfassen und zu betrachten, wobei der Schwerpunkt auf der folgenden Frage liegt: Wie schützt das Recht die menschliche Gesundheit und deren konstituierende Elemente?

Schlüsselwörter

Recht auf Gesundheit, Gesundheit, Recht, Rechtsanspruch (-ansprüche), Gesetz, Philosophie, Umwelt, Rechtsdurchsetzung, Bioethik

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Démystifier le concept de santé juste

Résumé

Bien que nous vivions dans une ère où le culte et la valeur de la santé sont glorifiées (santéisme), un certain nombre de questions et de controverses émergent sur la question de la santé humaine. L'accomplissement du bien-être de l'homme repose sur un bon état de santé et est encouragé par un unique « mécanisme » – le droit à la santé. Toutefois, la protection de la santé humaine et l'exercice du droit à la santé pose l'un des plus grands défis à la loi elle-même en raison du manque de compréhension face à ce qu'est réellement la santé. Le droit à la santé, en tant que droit légal et inclusif, n'incarne pas seulement les droits revendiqués par l'être humain comme tels, mais également les droits pour la protection de l'environnement et de la nature en tant que dénominateurs communs inséparables du statut de la santé de l'homme. Bien que d'éminents philosophes juridiques et politiques, ainsi que théoriciens, aient été pessimistes au regard de la réalisation et l'application du droit à (aux normes les plus élevées de) la santé, le présent travail élabore la possibilité de sa réalisation, qui dépend grandement de la manière dont le concept de santé est compris. La santé doit être exclusivement comprise comme une catégorie d'idée-valeur à laquelle il faut aspirer, comme un devoir (Sollen), et en aucun cas comme un reflet pur et catégorique de la réalité (Sein). Étant donné l'inclusion propre au droit légal à la santé, qui indubitablement contient quelques éléments problématiques, l'objectif de ce travail est d'appréhender et considérer le droit à la santé dans sa totalité conceptuelle et normative, en se concentrant sur la question suivante : Comment la loi protège-t-elle la santé humaine et ses éléments constitutifs ?

Mots-clés

droit à la santé, santé, droit, droit(s) légal(aux), loi, philosophie, environnement, application légale, bioéthique