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THE RIGHT TO HEALTH IN INTERNATIONAL PUBLIC LAW, CONSTITUTIONS OF EUROPEAN COUNTRIES WITH SPECIAL REFERENCE TO SERBIA[1]

As a matter of fact, states have universally recognised the right to health in international agreements, but protection of this right at the national level remains incomplete. At a time of renewed interest in the international human right to health, it is useful to identify and examine the provisions of the constitutions throughout Europe regarding right to health. These provisions indicate a national commitment towards the assurance of access to high quality and affordable health care for all peoples. In addition, such constitutional provisions may be important factors in the international campaign to promote the recognition and implementation of the international human right to health domestically throughout the world. Scientific criteria used to evaluate the Constitutions of European countries as well as the Constitution of Serbia are based on the normative and comparative method. Also, in this paper is analyzed the Constitution of Serbia in order to determine potentially problems aiming to help resolving them properly.

***Keywords**: constitutions, international public law, Serbia, right to health.*

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1. Introduction

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 (Nedić, p. 278; See Tintor; Stanila). As Đipalo (p. 161) describes, "the spread of epidemics beyond national borders has led to awareness of the breadth of the problem, not only from the perspective of concern for human health, but also from an economic point of view. The negative impact, among other things, on international trade, required the joint action of a large number of interested or affected countries. At the beginning of the 1830s, cholera arrived in Europe for the first time, and in parallel with it, the development of steam engines and railways enabled a greater connection between people and space than ever before, which makes for a dangerous combination. Encouraged by such developments, on the initiative of France, in 1851, the first of 14 international conferences on sanitary issues (International Sanitary Conferences) was organized. The goal of those conferences was to standardize quarantine rules in cases of certain infectious diseases, primarily the aforementioned cholera, which dominated as a topic, but also plague and yellow fever, which came on the agenda a little later. The conferences were held seven times until 1938. In 1892, the first International Sanitary Convention was adopted in Venice, which in 1951 the World health organization will take over as its own sanitary rules. From the initial 12 participating countries, conferences had grown to around 50 participants by 1938, showing the growing tendency of the importance of discussing health issues at the international level. Although the discussions at the conferences were characterized by considerable disagreements about some basic scientific assumptions, the fact that they were held at all showed that health protection was indeed a topic for international discussion and regulation".

Generally speaking, 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 (Nedić, p. 279). The right to health is an inclusive right and is a broader concept than a person's right to be healthy; it includes the rights to drinking water, food, housing, healthy environmental and working conditions, education and information, and gender equality. The spectrum of the right to health is much broader and goes beyond the biological and social characteristics of an individual. The breadth of the

concept can be compared with the breadth of the concept of international solidarity, from which we can draw a conclusion about their connection and interdependence, as well as interdependence and connection with other rights (Trgovčić, 76). The Constitution of the World Health Organization (WHO) defines health in its preamble as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The preamble further 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 opinion, economic or social condition, thereby implying the principle of non-discrimination as one of the fundamental principles related to the right to health and international solidarity (Trgovčić, p. 75). All World Health Organization members accept this definition, so health should therefore be the subject of their special legal protection (Sjeničić, p. 125). It will also depend on the worldview and on the legal and cultural understanding of the protection of social rights in general. 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. 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. 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 (Nedić, pp. 303-304). Therefore, it is legally protected by many international and regional acts, is part of the constitutional order of 115 countries, and is the subject of legislative regulation and many action plans (Trgovčić, p. 76).

2. Right to health in the international public law

As a matter of fact, the state, as a modern phenomenon, began to assume a role in social action in the field of health, so that the awareness of public health and its importance gained importance, like many other phenomena, in moments of greatest danger – in the age of industrialization, when living and working conditions lead to particularly severe health problems, both new epidemics and other non-communicable diseases. The establishment of international organizations to deal with health issues began in the early years of the 20th century (Đipalo, pp. 160-162). As it is already mentioned, a large number of international acts deal with the protection of health and its specific manifestations (Sjeničić, p. 125), and the list of international documents regulating the right to health protection is long and, it is believed, not final, cause the right to health is one of the fundamental human rights. Modern understandings of health transcend national borders

and become an integral part of international instruments, which also have their foundation at the global level. In international law, the right to health is cited as one of the special issues of human rights protection (Slavnić, Majhenšek, p. 8). When it comes to terminology, we should be aware that the terms right to healthcare and right to health protection, which have a narrower meaning than the right to health, are also used as synonyms for "right to health" (Slavnić, Majhenšek, p. 9). The chronology of international legal documents related to the protection of health as a basic human right points to the need of the international community after the end of the Second World War, when millions of victims and sufferings caused by violence were recorded, to ensure the protection of the rights and freedoms of the affected population (World Health Organization, p. 1; Čiplić, Đuričić, Bulatović, Spasojević, p. 773). During the founding of the United Nations and the drafting of its constitutive act, health was not yet declared a right, but the Charter does not remain without its mention and contains the seeds of support of human rights, including economic, social and welfare rights (Jamar, p. 10). Thanks primarily to the efforts of the Brazilian and Chinese delegations during the drafting of the Charter, health is mentioned in four places in its text as an area or topic of activity of the new organization (Đipalo, p. 163). The right to the enjoyment of the highest attainable standard of physical and mental health, internationally, was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further 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" (World Health Organization, 1).

After that, the right to health was recognised in the United Nations foundational document, the 1948 Universal Declaration of Human Rights (UDHR), and has been reaffirmed in numerous subsequent conventions. Article 25 of the UDHR establishes that all human beings have the right to a healthy standard of living, medical treatment and assistance in case of illness. Subsequent global agreements that focus on the rights of specific populations have repeatedly included the right to health. For example, the Convention on the Rights of the Child in 1989, agreed to by all but two UN member states, protects children's right to 'the highest attainable standard of health' as well as to medical treatment when they are sick. Similarly, a series of conventions and declarations designed to prevent discrimination and promote equality guarantee the right to health. Article 25 of the Convention on the Rights of Persons with Disabilities in 2006 includes commitments to provide equitable and affordable access to public health programmes, sexual and re-

productive health services, health insurance and other health measures (Heymann, Cassola, Raub, Mishra, p. 639). In addition, the right to health is included in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination in 1966, Articles 10H and 12 of The Convention on the Elimination of All Forms of Discrimination against Women (UN General Assembly, 1979) and Articles 39 and 43 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN General Assembly, 1990). While some conventions speak in broad terms about the right to health, others are quite specific about its components (Heymann, Cassola, Raub, Mishra, p. 640; Sjeničić, p. 126).

The Covenant on Civil and Political Rights does not include a right to health, but it does include provisions which affect the right to health such as the right to life, to freedom from torture to liberty and the security of the person, to humane treatment of prisoners, to freedom of thought, conscience and religion, and to freedom "to seek, receive and impart information." These rights help everyone attain health or enjoy the right to health, but the right to health is not contained within or bound by these rights (Jamar, p. 14). However, the drafters of the later International Covenant on Economic, Social and Cultural Rights went much further, declaring a universal right to the highest attainable standard of physical and mental health (Nampewo, Heaven, Wolff, p. 3; Jamar, p. 12). For instance, Articles 7, 11 and 12 of The International Covenant on Economic, Social and Cultural Rights detail what the right to health for all would mean: . . . the enjoyment of the highest attainable standard of physical and mental health [. . .] the reduction of [. . .] infant mortality and [. . .] the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Heymann, Cassola, Raub, Mishra, p. 640; Sjeničić, p. 126; World Health Organization, p. 1).

The field of health care, that is, and more broadly, the protection of public health in the European Union is largely within the competence of the Union member states. However, in a large number of subdomains, through the coordination of the members, the regulations that make up the health-legal acquis were adopted, along with the existence of a number of programs and initiatives aimed at improving public health in the area (Sjeničić, p. 125). According to Slavnić and Majhenšek (p. 5) "the Charter of Fundamental Rights of the European Union (2007), a type of inter-institutional agreement between the European Parliament, the Council and the Commission, establishes as a principle that a high level of health protection is ensured during the determination and implementation of Union policies in all areas (Article 35) and that a high level of environmental protection

and improvement of its quality must be integrated into Union policies and ensured in accordance with the principle of long-term development (Article 37)".

Although, as it is already mentioned, in its basic legal documents, the European Union has defined itself very clearly with regard to the protection of human health. A high level of health care is a social goal of the European Union and an important segment of the "European Social Model. "In the distribution of competences established by the Treaties, guaranteeing the right to health protection is left to national regulation, and the Union determines the standards for this legal area with its directives. Although protecting and improving human health is the responsibility of the member states, in this legal area the Union has a very important coordinating role. Namely, a large part of threats to health cannot be eliminated only through national health policies, primarily because they usually do not stop at national borders. Then, the protection of human health is the goal of the Union's policy in the field of environmental protection, in which a high level of protection is also proclaimed as the goal. Before mentioned, the Charter of Fundamental Rights of the EU is particularly significant in terms of health protection aspects. It is considered to be in favor of the "social Europe concept" and for ensuring the direct effect of basic social rights, which includes the right to health protection. Therefore, the Charter has become a legally binding act of the same rank as the founding treaties ensured during the determination and implementation of Union policies in all areas" (Slavnić, p. 32).

At the level of the Council of Europe, the right to health is not part of the European Convention on the Protection of Human Rights and Fundamental Freedoms, but is part of the European Social Charter, where the signatory states are invited to promise to accept as the goal of their policy the achievement of conditions in which certain rights, including "the right to use all measures that enable him to achieve the best available health standard", can be effectively realized. Article 11 of the Charter specifically prescribes the right to health care (Đipalo, p. 174). As a so-called "Social Constitution of Europe" the Charter is intrinsically connected with the "European Convention on Human Rights" (Nedić, p. 303). When it comes to the practice of the European Court of Human Rights Slavnić (p. 33) writes that Court "expresses the complex legal aspects of the principle of a high level of protection of human health and confirms the high level of respect, protection and realization of that right. Protecting the right to health, the Court broadly interpreted the provisions of Art. 8. of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which establishes the right to respect for private life and family life. From his rich practice of leading cases, two decisions clearly focused on the protection of human health in the context of the right to a healthy environment stand out: the Judgment of Lopez Ostra v. Spain of December 9, 1994, and the

Judgment of the case of Fadeyev v. Russian Federation of June 9, 2005, which has tracing significance for the protection of human health and the protection of the environment".

3. The right to health in the constitutions of European countries

As a matter of fact, the right to health is relevant to all states, because every state has ratified at least one international human rights treaty recognizing the right to health. Moreover, as we already have seen, states have committed themselves to protecting this right through international declarations, domestic legislation and policies, and at international conferences. In recent years, increasing attention has been paid to the right to the highest attainable standard of health, for instance by human rights treaty monitoring bodies, by World health organization and by the Commission on Human Rights (Heymann, Cassola, Raub, Mishra, p. 640; Sjeničić, p. 126; World Health Organization, p. 1). Generally, the obligations of the state are dimensioned in achieving the prescribed minimum of health protection in its territory, as well as in achieving the highest attainable standard of health. The obligation of the state regarding the right to health includes three dimensions: first, the obligation to respect the right; secondly, the obligation to protect rights; and third, the obligation to perform (Slavnić, Majhenšek, p. 10).

Therefore, this right is enshrined in numerous national constitutions: over 100 constitutional provisions include the right to health or health-related rights (Hunt, p. 604). Every country has ratified at least one of the international acts that protect and promote the protection of the right to health. Regardless of their economic and financial capabilities, states are obliged to provide basic health care to their citizens as a prerequisite for achieving a quality and dignified life (Trgovčić, p. 76). The state's obligation to provide individuals with health care is of strategic importance, because the health of a human being is included in the highest social values, as foreseen, for example, in the Constitution of Ukraine, while the Italian constitution-maker defines it as a "fundamental right of the individual" and a "collective interest" (Mikić, p. 263). Constitutions addressed the concept of preventive or public health in various ways. The most common formulations outlined the state's duty to conserve or defend the health of citizens, bound the state to prevent disease or illness, guaranteed access to preventive or prophylactic services, or simply protected the right to public health itself (Heymann, Cassola, Raub, Mishra, p. 642).

The constitutions regulate the right to health and health care in scope from one sentence to an entire paragraph, and are therefore of different levels of detail. If the constitutions of the Anglo-Saxon countries are considered, it can be noted that they do not

directly grant the right to health or health care, but deal in more detail with health insurance or forms of health care that are available to citizens (Sjeničić, p. 127). Interesting, outside the Europe, in the USA, the conclusion of courts and other scholars that the U.S. Constitution does not explicitly or implicitly recognize health as a right. One might suggest that the right to health is implicitly and necessarily subsumed within the right to life. But no court has been willing to read the Constitution so broadly. Rather, the Court has expressly declined to recognize other asserted fundamental welfare rights, including financial assistance, housing and education. Federal courts have been increasingly reluctant to recognize new fundamental constitutional rights bearing on individual health, such as the right of terminally ill patients to assisted suicide or to access unapproved drugs to prolong their lives. Several reasons justify that conclusion and point toward state constitutions as more likely sources of fundamental guarantees of health. First, the U.S. Constitution is primarily concerned with protecting individual liberties and freedom from government intrusion, not specifying governmental duties or obligations. Second, protection of health, safety, and welfare falls squarely within states' Tenth Amendment reserved powers (Leonard, pp. 1328-1330).

Among constitutions that addressed the health rights for specific groups, the most common protections were for individuals who are vulnerable because of their age, disability or lack of economic resources (See Milićević; Janković). All citizens benefit from health care, regardless of their economic situation or other personal circumstances, as provided for in the Polish and Portuguese Constitutions. The enjoyment of the right to health care is free, at least according to the constitutions of Georgia, Armenia, Slovakia, Italy, Lithuania, Poland, Russia, Slovenia and Ukraine. The Belarusian constitution, for example, provides that free treatment is possible only "in state health institutions", while the Moldovan Constitution guarantees free "minimum health insurance". Of course, the question of interpretation of the term "minimum health insurance" is a matter of interpretation. The Portuguese Constitution provides that the right to health care is exercised "through a universal and general national health service which shall aim to be free, with particular attention to the economic and social circumstances of the citizens who use its services". Citizens enjoy this right "in an equal manner" according to the Constitution of Albania, while in a small number of constitutions this right is not guaranteed to everyone, but only to their own citizens, as is the case in the Belarusian and Bulgarian Constitutions. When it comes to the organization of health care provision, in some complex states, or unitary states with forms of regional autonomy, the regulation of health policy is in the hands of the center, while, for example, in Switzerland, "the Confederation adopts legis-

lation on health insurance and accident insurance", and can declare these forms of insurance compulsory, generally or for certain categories of persons, and takes care of health protection, within the framework of its competences (Mikić, pp. 260-261).

Comparatively speaking, in terms of guaranteeing health care, there are three levels: 1) an individual is guaranteed health care when he gets sick, 2) he is guaranteed the highest level of health care if he gets sick while he is still healthy, 3) he is guaranteed the highest possible level of health (taking into account limitations that cannot be influenced), which is reached by ensuring the living conditions on which health depends, as well as by the availability of medical services as part of preventive and curative medicine (Slavnić, p. 29). When a right was phrased as an aim or objective, we categorised it as an aspirational protection. This included cases where constitutions declared promoting citizens' health to be a goal of the state and where the enforcement of health rights was specified to be limited by the availability of resources. Similarly, if a state's duty to protect citizens' health was explicitly stated to be non-enforceable, it was interpreted to be an aspiration rather than a guaranteed right. Constitutional articles that unequivocally protected health rights or phrased them as a duty or obligation of the state were coded as guaranteed rights. Thus, Article 64 of Portugal's constitution stated that '[e]veryone shall possess the right to health protection' (Heymann, Cassola, Raub, Mishra, pp. 643-644).

4. The right to health in Serbia

In the Opinion of the Venice Commission (2006) on the Constitution of Serbia, the key articles of the Constitution that guarantee the right to health protection were not explicitly commented on, but its general comments clearly refer to this right as well. The Commission, among other things, believes that the content of the guaranteed socioeconomic constitutional rights is in accordance with European standards, but "their implementation will depend on the way that will be foreseen by the legislator and will be subject to judicial control [...] The Venice Commission, on other occasions expressed concern that positive social and economic rights can create unrealistic expectations and recommended that they be expressed as an appropriate aspiration (aspiration), instead of as rights that can be directly enforced through court decisions [...] At the very least, these social and economic rights should be qualified with depending on the available means (resources)", and a more reasonable formulation would be as some kind of "state action guidelines" (Slavnić, p. 34). The content of the right to health protection is not regulated by the Constitution, but by law. Regulation of the content and the way of exercising this right is left to the legislator. So, all the instruments for its realization are in the hands of the legislator. The functional value of the right to health care and the level of health care

directly depend on the generosity of the legislator. Otherwise, in the application of human rights, the law always and everywhere plays a big role, among other things, because constitutional norms, as a rule, only provide a general framework for the regulation of a certain matter, so this kind of solution is quite often in comparative law. We will only mention in this sense the constitutions of Albania, Bulgaria, Georgia, Armenia, Lithuania, Luxembourg, Poland, Portugal, Slovenia, Finland, Croatia, and Spain (Mikić, p. 263).

Slavnić (p. 36) underlined that article 68 of the Constitution of the Republic of Serbia is interpreted unanimously in jurisprudence as the right to health care, i.e. as the right to protection of physical and mental health that belongs to everyone without discrimination. However, the term "each" can be interpreted narrowly and broadly. Individual human rights can belong to: 1) all people, i.e. natural persons in general; 2) only to domestic citizens; 3) certain categories of persons. Generally speaking, provisions on human rights whose subjects, i.e. users denote by the term "everyone" are interpreted so that these rights apply to all people, i.e. to all natural persons located on the territory of one state, that is, under its jurisdiction, regardless of whether these persons are its citizens, foreigners or stateless persons. In addition, at the very least, the constitutional provisions that refer to the health care of pregnant women and mothers "during maternity leave" are imprecise. Whether mothers who are not employed are excluded from that protection is not just a linguistic question; are women with stillborn children also excluded from exercising this right with this wording, i.e. women whose pregnancy resulted in the death of the child and who need health care even if they are unable to earn money for a long time after giving birth. Namely, the Constitution protects pregnant women, but their status after childbirth depends on whether the child is alive. Such a constitutional provision is not compatible with the provision that "the Republic of Serbia encourages parents to decide to have children and helps them do so" (Article 63, Paragraph 2). Furthermore, when categorizing specially protected citizens, the Constitution of our country did not take into account the economic conditions of the family and did not include the category of very poor citizens in the right to health care from public funds. The constitutional list of specially protected beneficiaries (children, pregnant women, mothers during maternity leave, single parents with children up to the age of seven and older) in Serbia only partially corresponds to the strategic goals of the European Union in this area. Criticism of the Constitution due to the aforementioned restrictive approach also extends to the coverage of certain types of health care. It was observed that, for example, the forms of dental care were significantly reduced, when it is compared to the period of socialist constitutionalism (Slavnić, p. 36).

Slavnić (p. 38) points out another controversial issue. Namely, "improving human health in Serbia is not anyone's concrete constitutional duty and responsibility. Systematic interpretation of the Constitution of Serbia leads to the conclusion that the state's constitutional obligations in the field of health care are not clearly aimed at improving health care and are not aligned with some key legal principles (and goals) of the European Union in this area. The Constitution of Serbia, even as a proclamation, does not contain the goal defined in the legal system of the European Union as "a high level of human health protection". The provisions guaranteeing the right to health protection do not mention the term "highest level" or "highest available standard". Those key categories from the highest legal and political documents of the European Union, with clearly defined strategic and operational goals in this area and elaborated methods of achieving them, are not recognized in the Constitution of Serbia".

5. Conclusion

Without doubts, the right to health is a fundamental part of our human rights and of our understanding of a life in dignity (World Health Organization, p. 1). In every modern state, the whole complex of functioning and realization of human rights is necessary for its proper functioning. It goes without saying that it is very difficult to value all these rights, and to give one of them the upper hand. Nevertheless, if we decide to take such a step, we can state that the right to health is one of the basic rights for the existence of a prosperous state. Namely, one of the elements of the state is sovereignty, and its bearers are citizens. This is precisely the reason that taking care of their health must be of special interest to any country that should be considered advanced. Of course, this fact is recognized both at the level of public international law and within national legal systems, including ours. However, it should always be borne in mind that a normative approach is necessary, but only the first step. Other said, the right to health has similarly broad demands that go well beyond legislating good health care. There are political, social, economic, scientific, and cultural actions that we can take for advancing the cause of good health for all. In seeing health as a right, we acknowledge the need for a strong social commitment to good health. There are few things as important as that in the contemporary world (Sen, p. 2010). Certainly, the right to health belongs to the group of economic and social rights, the purpose of which is to guarantee the economic and social security of a person within the concept of a social rule of law. According to the role of the state, this right belongs to the so-called rights of positive status. It is considered that the essence of the right to health lies precisely in the fact that it is a right for which the state has an obligation to enable individuals, the holders of that right, to enjoy and exercise that right.

The character of rights is determined by the fact "that they are applied depending on the real possibilities of the country and that they represent certain goals that the community should reach". With these rights, the value of constitutional guarantees does not depend so much on the institutional mechanism as on real social conditions. In other words, if the economy of the society does not enable the creation of a certain degree of material wealth, all the constitutional guarantees of social and economic rights remain without any effect. In addition to comparative constitutional practice, constitutional law science for critical analysis of constitutional solutions also takes into account the standards established in certain international documents and community law, as well as evaluations of competent international bodies, judicial practice and opinions of modern legal science. States must guarantee the right to health to the maximum of their available resources, even if these are limited. While the steps may depend on the specific context, all states must move towards fulfilling their obligations to respect, protect and realize the right to health (Sjeničić, p. 127). In any case, it is important, but it represents only an opportunity for the true realization of those rights. In fact, a necessary condition for their realization is the existence of a suitable material base of a concrete society. In the case of its non-existence, norms on the right to health are not unimportant, but they then represent a certain determination of the international community and the states themselves. When we look at comparative law, it is clear that the awareness of the need to foresee and protect the right to health is spreading irresistibly, and that every country that wants to positively legitimize itself within the community of sovereign states foresees the right to health as one of the supporting elements of its legal order. In this sense, our country, the Republic of Serbia, is also acting.

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