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CONCEPT OF THE RIGHT TO HEALTH CARE

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Abstract. *On the grounds of the fundamental value of the human rights, which is the human dignity, this article describes a basis of the right to health care in terms of quality, discloses its concept, reviews the spheres of health system in which this right is exercised: health care and public health. The right to health care is stressed as one of the fundamental rights, without which the person will not able to enjoy other rights: economic, political and social rights. It comprises the right to enjoy the best physical and mental health. The right to health care is not absolute in itself: efficiency of its implementation depends upon both ability of administrative and institutional systems, which were created by the state, to properly implement the assigned functions and upon the individual, its state of health and lifestyle.*

Keywords: *human dignity, right to health care, health system, health care, public health.*

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Introduction

The Universal Declaration of Human Rights reads: "All human beings are born free and equal in dignity and rights"[1]. Fight for human dignity is old as the society itself, still a mechanism of human rights as a measure of their implementation originated only in the 20th century, after adoption of the aforementioned document. It is not enough for a human being to be equal *in abstracto*: human dignity must be entrenched in its human identity.[2] First of all, through the human rights of the first generation one consolidates a civic human identity, in other words – one secures equality of dignity as politically equal with others. Second generation of the human rights (economic, social cultural) means a radical step forward: a citizen is not satisfied with the right to life and political rights. He wants more. He strives for dignified conditions of life with the right to health care[3] as one of its guarantees. It is distinguished as one of the basic human rights and having not ensured its proper implementation it becomes difficult to exercise other rights as well. L.O.Gostin notes that health is important as joy, creativity, productivity – the gift of life to the person. Without minimum state of health the person is not able to fully participate in social life of the community, political administration of the state, creation of welfare and guarantee of economic stability, as well as development of common defence and security – thus he may not secure his own economic, political and social rights. [4] Professor A. Vaišvila stresses that "in case of violation of the human right to health [...] one reduces alongside his biological [...] ability to enjoy the rights while carrying out certain duties, it means – to enjoy a full-fledged life in the society".[5] Attention should be drawn to the fact that the fundamental right to health care is actually perceived only in interaction with other fundamental rights that fall into the categories of both social rights, for example the right to healthy environment, right to social security, and classic rights – the right of human equality and autonomy. [6] Thus implementation of this right is important to the individual and society and formulates the objectives that are linked to definition and implementation of the content of this right. Role of the state in the course of ensuring the implementation of the right becomes important also. When construing provisions of Paragraph 1 of Article 53 of the Constitution, namely the provision that "the State shall take care of people's health and shall guarantee medical aid and services for the human being in the event of sickness"[7] the Constitutional Court of the Republic

1 UN Universal Declaration of Human Rights, GA Res. 217A(III), U.N. Doc.A/810 at 71 (1948).

2 Finnis, J. *Natural Law and Natural Rights*. Oxford: Oxford University Press, 1986, p. 272.

3 The definition „right to health care", which is used in the article, is considered to reflect the very essence of the aforementioned right, which discloses, in view of the arguments presented in the article, a type of the right. This type of the right is not absolute and is similar to the right to health, which may not be fully guaranteed by the state due to circumstances that are caused by state of health of a person, hereditary diseases, lifestyle and other factors.

4 Gostin, L. O. *Public health law. Power, Duty, Restraint*. Berkeley and Los Angeles, California: University of California Press, 2000, p. 7−13.

5 Vaišvila, A. *Teisės teorija* [Theory of Law]. Vilnius: Justitia, 2009, p. 171.

6 Molinari, P. A. The right to health: from the solemnity of declarations to the challenges of practice. *International Digest of Heatlth Legislation*. 1998, 49(1): 41−60.

7 Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.

of Lithuania has held more than once that the health of a human being and of society is one of the most important values of society[8], that protection of people's health is a constitutionally important objective, a public interest, while looking after people's health is to be treated as a state function[9].

Scientific literature examines separate issues related to the person's right to health care, for example public health, the right to health care, patient's rights and their implementation, etc.[10] However, due to threats of new threats related to public health that are faced by the society, such as pandemic diseases, climate changes, modern scientific technologies, environment pollution[11], one must first of all present the concept of the public health as a measure of implementation of the person's right to health care and this concept should comprise all important problems at issue.

The object of the present research is the basis of the right to health care, as well as concept of this right.

The purpose is to submit arguments of the person's right to health care in terms of value, to disclose its content according to the spheres of health system: health care and public health. In view of the trans-disciplinal character of the subject various *scientific methods* are applied, these are: systematic analysis, historical, synthesis, comparative, philosophical.

1. Values on which the Right to Health Care is Based

Having named the humanistic view of life as universally recognised grounds of the doctrine of law, legal protection of interests of a human being becomes the most important objective. Irrespective of challenges of its practical application, the concept of

8 Constitutional Court Ruling of 11 July 2002. *Official Gazette*. 2002, No. 72-3080.

9 Constitutional Court Ruling of 29 September 2005. *Official Gazette*. 2005, No. 117-4239; Constitutional Court Ruling of 26 January, 2004. *Official Gazette*. 2004, No 15-465.

10 Abbing Roscam, H. D. C. The Right to Care for Health: The Contribution of the European Social Charter. *European Journal of Health Law*. 2005, 12: 183; Birmontienė, T. The Influence of the Rulings of the Constitutional Court on the Development of Health Law in Lithuania. *European Journal of Health Law*. 2007; Čelkis, P. Visuomenės teisės į sveikatą būklė Lietuvoje [Status of the Right of Society to Health in Lithuania]. *Visuomenės sveikata*, 2007, 3(38); Gevers, S. The Right to Health Care. *European Journal of Health Law*. 2004, 11; Gostin, L. O. *Public health law. Power, Duty, Restraint*. Berkeley and Los Angeles, California: University of California Press, 2000; Juškevičius, J.; Balsienė, J. Human rights in health care: some remerks on the limits of the right to healthcare. *Jurisprudencija*. 2010, 4(122): 95−110; Lapinskas, K. Asmens socialinių teisių apsaugos klausimai Lietuvos Respublikos Konstitucinio teismo jurisprudencijoje [Issues of Protection of Social Rights of a Person in the Jurisprudence of the Constitutional Court of the Republic of Lithuania] [interactive]. [accessed 01-12-2010]. <www.lrkt.lt/PKonferencijose/08.pdf>; Molinari, P., *supra* note 6; Nys, H.; Van Wijmen, F. Mastricht 2002: Health law in the Era of Globalization. *European Journal of Health Law*. 2002; Jamar, S. D. The international human right to health. *Southern University Law Review*. 1994, 22: 13; Šimonis, M. Legal relations of doctors and patients. *Justitia.* 2005, 2(56): 58−64.

11 The Future of Public Health in the 21st Century [interactive]. [accessed 30-10-2009]. <http://www.nap.edu/catalog/10548. html>; Davis, D.; Dewailly, E.; McMichael, A. *Health and the Environment: The Scientist's Responsibilities*. 2000 [interactive]. [accessed 30-10-2009]. <http://www.hsph.harvard.edu/foph/cdrom/FINAL_82203/ pdf/chapter3.pdf>.

dignity in democratic societies is always recognised to be the platform of values, which unites people with different attitudes, of different races and cultures, in toleration of each other and which enables solidarity and consensus in the course of solving problems related to a person and his interests. According to A. Pumputis, it is desire of a person and society to improve that the major needs – wishes implied by social preconditions, originate from and entirety of such needs influences the system of human rights and level of their implementation.[12] Necessity to protect a human being as an integral physical and spiritual creature is both an interest of a democratic state and the purpose of the law of the state under the rule of law. Protection of value/dignity of a person means that the right is created on the grounds of human dignity as the value and this places an obligation on the state to take positive actions: to ensure quality of existence by recognising every person as a subject of law and guaranteeing the minimum standard of living. The international law recognises a physical person as an undisputable value and protection of his rights – one of the objects of modern intern international law. Beginning of these processes, as properly indicated in majority of sources dealing with human rights, is establishment of international organisations and adoption of universal international documents on the need to protect a human existence and his interests by legal instruments. Modern international community recognises that every member of people's community enjoys a natural dignity, which constitutes the most important source of all rights. Natural human rights – natural possibilities of an individual, which ensure human dignity in spheres of social life. They constitute the minimum level, a milestone of development and expansion of the other rights, and which constitute values that are beyond debate recognised by international community.[13] Explanations relating to the Charter of Fundamental Rights read: "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights".[14] We may state that it means synthesis of various values of a human being while he strives for self-expression. Thus human dignity stands above human rights, in other words human rights are concrete legal expression of human dignity. As a core of all human rights and freedoms, the human dignity serves as an argument in their interpretation and concretisation. It also has the principal importance to any activity of the state: indicates a trend for law-making, interpretation of fundamental rights and all legal order. Attention should also be drawn to the fact that recognition of value of a person means recognition of actual natural-social creature as the subject of law both at the international and national levels. However, it is not a single act and society must put forth continuous moral efforts to protect rights of

12 Pumputis, A. *Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija ir jos įgyvendinimo mechanizmas* [European Convention for the Protection of Human Rights and Fundamental Freedoms and Mechanism of its Implementation]. Vilnius: Lietuvos teisės universiteto Leidybos centras, 2000, p. 9.

13 Spruogis, E. *Šiuolaikinės demokratinės valstybės socialinė paskirtis ir funkcijos*. Daktaro disertacija. Socialiniai mokslai, teisė [Social Purpose and Functions of Modern Democracy. Doctoral dissertation. Social Sciences, Law]. Vilnius, 2002, p. 52−53.

14 Declaration on the Charter of Fundamental Rights of the explanations relating to [interactive]. [accessed 03-12-2010]. <http://eur-lex.europa.eu/lt/treaties/dat/32007X1214/htm/C2007303LT.01001701.html>.

all its members and solve an issue of their implementation.[15] Analysis of implementation of the human right to dignity discloses the fact that in order to ensure a full-fledged life of the person the negative human rights and freedoms are not enough. Therefore in a modern democratic state the fundamental human right comprises not only the rights of the first generation (civic and political), but the rights of the second generation (social and economic) and the third generation (solidarity) as well. The Universal Declaration of the Human Rights states that "Everyone [...] is entitled to realization [...] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[16] In this legal norm the concept of dignity is combined with other concept – value, which links human dignity with the existence that he is worth of. In theory, a question what life is worth of human dignity is open. If we agree with a precondition that human being is an integral creature, it should be concluded that existence that is worth of the dignity must enable self-realisation of a person. On a programme level this norm expresses a common purpose of the legal order, because dignified life is not possible without effective enjoyment of fundamental rights. Human rights and freedoms ensured by the Constitution are people's tools of cultural cooperation, creation of material and spiritual values and exchange in them. The state has the duty to ensure the quality of existence. Essence of personal and political rights is restriction of power of the state, which is implemented by clearly defining what space is allocated for the minimum personal freedom, meanwhile the social rights have contrary effect – they expand the sphere of actions of the state.[17] In order to implement the right to human dignity the state should render assistance. The principle of justice demand priority to be given to the interests of weaker party, therefore there are cases (unemployment, illness, other problems) where in the name of solidarity and stability of social life some modern democracies violate the principle of equality. Today human rights of the second generation are of the most importance. Their importance to societies is increasing... The 1990 UNDP Report on Human Social Development stressed that human being of any level of development must be granted a possibility of choosing among three major things: long and healthy life, gaining knowledge and resources that are necessary in order to attain a normal standard of existence... [18] This relates to improvement of the status of public health. Concept of health as a state of comprehensive welfare is universally recognised at the international and national level. Therefore it has impact upon world-view, system of values and hierarchy, which influence, in their turn, the law. Constitution of the World Health Organization[19] defines the "Concept of health" and indicates that health is a state of complete physical, mental and social well-being and not merely the absence of dise-

15 Šlapkauskas, V. Pasitikėjimas – teisės socialinio veiksmingumo veiksnys [Confidence – Factor of Social Efficiency of Law]. *Jurisprudencij*a. 2002, 24(16): 192.

16 UN Universal Declaration of Human Rights, *supra* note 1.

17 Spruogis, E., *supra* note 14, p. 55.

18 1990 m. Jungtinių Tautų vystymo programos pranešimas apie žmogaus socialinę raidą [1990 UNDP Report on Human Social Development] [interactive]. [accessed 25-11-2006]. <http://hdr.undp.org/2006>.

19 Constitution of the World Health Organization [interactive]. [accessed 01-12-2010]. <http://www.who.int/governance/eb/who_constitution_en.pdf>.

ase or infirmity, therefore by the sphere of health one intends to cover all spheres of life of a person. Resolution 2002/31 „The right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[20] of the UN Commission on Human Rights of 2002 proves that "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is a human right and that such a right derives from the inherent dignity of the human person." Moreover, the Commission "urges States to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources for this purpose, with a view to achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health by all appropriate means, including particularly the adoption of legislative measures".

2. Concept of the Right to Health Care in International Documents

In the current doctrine of law trend dominates that human rights may not be treated in narrow national aspect. They are universal not only in the process of their declaration but in course of their implementation as well.[21] For this reason it is expedient to start examining the person's right to health care from the international documents, because it is provisions of these documents that ensure the present status of the human right to health care and its content. It is the provisions of international law that created preconditions for development of the human right to health care on a national level and transfer of its provisions into the national legal acts. The international legal regulation today makes great impact upon the doctrine of human rights and provisions of the constitutional law of different states[22]. In the course of analysis of the international legal documents the following major provisions related to consolidation of the right to health care should be stressed:

– Constitution of the world health organization (1946)[23] (preamble): health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity; 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; Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures;

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20 Commission on Human Rights resolution 2002/31 „The right of everyone to the enjoyment of the highest attainable standard of physical and mental health" [interactive]. [accessed 30-10-2009]. <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/5f07e25ce34edd01c1256ba60056deff?Opendocument>.

21 Birmontienė, T., *et al*. *Lietuvos konstitucinė teisė: Vadovėlis* [Constitutional Law of Lithuania: Textbook]. Vilnius: Lietuvos teisės universiteto Leidybos centras, 2001, p. 274.

22 *Ibid.,* p. 278.

23 Constitution of the world health organization, *supra* note 20.

- UN Universal Declaration of Human Rights (1948)[24] (article 25 part 1): everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control;
- European Social Charter (1961, 1996 revised)[25] (part I article 11): everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable;
- International Covenant on Economic, Social and Cultural Rights (1966)[26] (article 12 part 1): 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;
- Convention on the Elimination of All Forms of Discrimination against Women (1979)[27] (article 11 part 1 paragraph f): the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction;
- Convention on the Rights of the Child (1989)[28] (article 24 part 1s): 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. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services;
- European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997)[29] (article 3): parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality;
- Treaty on the functioning of the European Union (1957, 2010)[30] (article 168): A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public he-

24 UN Universal Declaration of Human Rights, *supra* note 1.

25 European Social Charter, 18 October 1961 (1965) ETS No 035, (revised) 5 May 1996 ETS No 163.

26 International Covenant on Economic, Social and Cultural Rights. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

27 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, 19 I.L.M. 33 (entered into force 3 September 1981) [CEDAW].

28 Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [CRC].

29 European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 4 May 1997 (ETS No. 164), entered into force Dec. 1, 1999.

30 Treaty on the functioning of the European Union [interactive]. [accessed 01-12-2010]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

> alth, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health. The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

Provisions of the aforementioned legal acts prove that the right of a person to health care evolved in the treaties and declarations from a conservative consolidation of health as the major human value (1946 Constitution of the World Health Organization) and refusal to specify it as an individual right (1948 Universal Declaration of Human Rights) to the independent right, which is implemented by constantly increasing number of various specific measures of broader that comprise more factors of significant importance to the state of health. On the European level, the European Social Charter (1961, revised in 1996) and the International Covenant on Social, Economic and Cultural Rights (1966) entrench the right to health care as an independent universal human right, which is implemented by particular actions. Moreover, discussion about individual responsibility of a person for the health (by establishing his obligations) is still cautious and the right concentrates on the duty of the state to ensure health care services, goods and resources, alongside by stressing that the state is not able to guarantee the full coverage of healthcare. In view of special status of various social groups – role of a woman in society and still existing discrimination (1979 Convention on the Elimination of all Forms of Discrimination against Women), special status of a child (1989 UN Convention on the Rights of the Child) – in respect of the latter the right to health care is included in the group of other civic, personal, social and economic rights. In the course of development of the right to health care, scientific progress and implementation and concretization of provisions of the aforementioned international legal documents, one does not strive to consolidate the very right. Contrary – one strives to ensure its implementation, equal opportunities for people to get a service of health care and to define rights and status of patients (1997 Convention on Human Rights and Biomedicine). In order to disclose the content of the human right to health care it is useful to revise provisions of two major documents, which are International Charter on Economic, Social and Cultural and the European Social Charter.

2.1. Content of the Right to Health Care

One of the major documents of the international law, which defines the right of the person to health care, is the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations. Paragraph 1 of Article 12 of this Covenant reads: „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"[31]. Thus, first is the time when the international document established that every person is recog-

31 International Covenant on Economic, Social and Cultural Rights, *supra* note 27.

nised as enjoying the right to the highest standard of health. Having recognised by the Covenant the right to health care as the universal human right an obligation was placed on the states to take necessary measures aimed at ensuring for their citizens the highest attainable level of physical and mental health. According to the professor S.Gevers, the preconditions are, on one hand, protection from external threats, such as unsafe drinking water or diet, measures ensuring healthy working environment and living conditions, as well as learning of healthy life. On the other hand, it means that the members must ensure available of services of health care of sufficient quality to all citizens according to the needs and status of the most vulnerable groups.[32] The UN Economic and Social Council states that the concept "highest standard of health" takes account of biological and social as well as economic prerequisites of an individual, and the resources of the state. There are many issues that may not solved only in respect of relations of the state and private persons: first of all – good health may not be ensured by the state, and the state is not able to guarantee the protection in all known cases of threat to human health. Such aspects as genetic factors, individual health disorders and unhealthy or risky lifestyle may be important and make impact upon the health of a person. For this reason the right to health care must be understood as the right to resources, goods, services and conditions that are necessary in order to ensure the best attainable health standard. It means that the right to health care may not be understood as the right to be healthy. The right to health care comprises both freedoms and rights. The freedoms are also the right to control person's own health and body, including sexual and reproductive freedom, and the right to be free from disturbance, for example the right to freedom from torture, prohibition of treatment and experiments without a consent of the person.[33] These are the steps to be taken by the states that strive for implementation of the right to health care, as defined in Paragraph 2 of Article 12: provision for the reduction of the still-birth-rate and of infant mortality and for the healthy development of the child (item a); improvement of all aspects of environment and industrial hygiene (item b); prevention, treatment and control of epidemic, endemic, occupational and other diseases (item c); creation of conditions which would assure to all medical service and medical attention in the event of sickness (item d). In this case, in our opinion, the main spheres are defined, the ensuring/implementation of which would guarantee the highest attainable standard of person's health as described in the first paragraph of this article. Prof. Steven D. Jamar indicates that the second paragraph of Article 12 is unusual, but not necessarily unique, because treaties on human rights to the extent covered therein indicate that they strive to establishment of relatively specific areas which need to be improvement while striving for health rather than indicate the general content of the right, the main purpose of the right and training steps of what should be done. Attention should be drawn to the fact that despite a difference between the right and measures (action list), the list helps to establish obligations of executor of the duty, who is the state, and holder of the rights,

32 Gevers, S., *supra* note 11, p. 29.

33 General comment No. 14 (2000) Substantive issues arising in the implementation of the international Convenant on Economic, Social and Cultural Rights: The right to the highest standart of health. United Nations Economic and Social council [interactive]. [accessed 21-07-2010]. <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

who is the individual. An individual cannot properly claim, "I have a right to health so make me healthy;" but that person can assert: "I have a right to health so do the things necessary to enable me to have health".[34]

On the European level it is also the European Social Charter that grants to the people the right to health care as well.[35] As noted by professor Roscam Abbing, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter – the most important instruments of human rights adopted by the European Council – relate to each other in respect of health. Other documents that are important to particular sector include the Convention on Human Rights and Biomedicine adopted the Council of Europe (1997) and European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997). However the European Social Charter is usually considered to be a core measure related to the right of every person "to enjoy the highest standard of physical and mental health"[36]. Paragraph 11 of Part I of the European Social Charter establishes: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable". According to professor S. Fluss Article 11 of the European Social Charter provides a more precise definition of the right to health, which states that everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable, that anyone without adequate resources has the right to social and medical assistance, and that every contracting party must remove as far as possible the causes of ill-health; provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health, as well as prevent as far as possible epidemic, endemic and other diseases.[37] Still, according to professor Steven D. Jamar, the European Social Charter provides for a narrow attitude not to the protection of the right to health. It only calls for "respective measures" "for the protection of health". Despite the fact that, as indicated by the professor, the European Social Charter strengthens an opinion that the right to health care is more than a right to medical treatment, including the spheres related to numerous causes of poor state of health. This Charter also consolidates measures of prevention and training rather than solely a reaction to medicinal or other health problems[38]. These provisions of the Charter are specified in more details in Article 11 of the latter, which provides that with a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

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;

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34 Jamar, S. D., *supra* note 11, p. 13.

35 European Social Charter, *supra* note 26.

36 Abbing Roscam, H. D. C., *supra* note 11, p. 183.

37 Fluss, S. S. The development of national health legislation in Europe: the contribution of international organizations. *European journal of health law*. 1995, 2: 193.

38 Jamar, S. D., *supra* note 11, p. 16.

3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

2.2. Implementation of the Right to Health Care

Upon review of the international legal instruments, measures implementation of the right to health care that are entrenched therein may be divided into two major groups according to the sphere of health system, namely:

– measures such as attempt to ensure the necessary medical aid and health care to all children, first of all by developing the first aid, supply with necessary drugs, treatment of epidemic, endemic, vocational and other diseases, as well as vaccination against main infections, creation of conditions to all of them to receive medical services and medical supervision in case of illness, by paying special attention to the service rendered to women during their pregnancy, childbirth and postnatal period and, if necessary, providing free-of-charge services of related health care;
– measures such as reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child first of all by developing sanitary; improvement of all aspects of environment and industrial hygiene thus encouraging safe and sufficient supply of food, proper diet, sufficient supply of safe water and main sanitation; prevention, treatment and control of epidemic, endemic, occupational and other diseases, including vaccination against major infections by implementing preventive measures and control over local endemic diseases, executing proper supervision over the popular diseases and injuries, as well as preventing as far as possible the accidents; education related to the most popular problems of health and means of their prevention and control, consultancy and supply with education material propagating healthy lifestyle and encouraging individual liability for the own health; information to all groups of society, especially parents and children, about health and nutrition of a child, advantages of breast-feeding, hygiene, sanitary of child environment and prevention of accidents; as well as creation of opportunity to them to be trained and use the gained knowledge; develop education and services in the sphere of health care, parents' consultancy and family planning - all these are to the attributed to the public health.

Despite the fact that the right to health care is entrenched in numerous international instruments, professor S. Gevers declares that the most important decisions on a system of health care are still made on the national level. International legal acts may indicate core provisions, clearly identify measures that ought to be implemented, however, it is the national decision of particular country as to the scale and method of their execution and allocation of available resources of healthcare.

Attention should be drawn to the fact that the right to health may be implemented only as the right to health care, rather than the absolute right to good health. State may create all necessary conditions to the person to take care of health and treatment in case of illness, but it may not force a person to choose a healthy lifestyle. Besides, as already

mentioned, on the other hand, irrespective of healthy lifestyle an ill person has no right to demand from the state to ensure a full-fledged health, return it to the former status. However, the right to health care as a social right has a positive aspect under which it places an obligation on the state to take necessary measures for prevention and treatment of illness and alongside obligates the state to create necessary structures and services which would ensure the health care and rehabilitation to the people enjoying respective right[39]. Therefore it is natural that the state is first of all liable for creation of a system which would both help the person in case of illness and create conditions for healthy lifestyle. When effective measures and system are created, the person will become able to efficiently enjoy the right to health care that he is entitled to.

The right to health care (also called the right to health, the right to health care, the right to take care of health, the right to be a patient[40]) is a universal human right, therefore, as already mentioned, the state is demanded to take measures to ensure that its citizens can enjoy the highest attainable standards of physical and mental health. On one hand, it demands protection against external threats such as unsafe drinking water or diet, measures ensuring safe working environment and healthy living conditions, development of health. On the other hand – the state must ensure availability of health care services of respective quality to people by creating conditions for meeting the needs of the most vulnerable groups[41]. Many people expect active participation and assistance of the state in the sphere of health care, they treat the right to health care as fundamental. Social research of status of human rights in Lithuania in 2001-2002 proved that 32.1 % of respondents identified the right to health care as one of the major rights of a person[42]. Thus implementation of the right to health care also depends upon attempts of the individual himself, and upon the state, ability of administrative and institutional systems created by the latter to properly execute the assignment.

3. Concept of the Right to Health Care in National Documents

Implementation of the right to health care at least in future will basically depend upon the national authorities. It is important that in the course of adoption of political decisions that are important to availability of health care services (for example funding of health care, scope of systems getting the public finance, types of services rendered under such systems, distribution of internal resources, including decisions of priorities, administration of sequence, etc.) the state follows the right to get health care services despite of huge economic and political powers which impede major principles of solidarity and equality[43]. Paragraph 1 of Article 53 of the Constitution of the Republic of Lithuania reads: "the State shall take care of people's health and shall guarantee me-

39 Molinari, P. A., *supra* note 6, p. 41−60.

40 Nys, H.; Van Wijmen, F., *supra* note 11, p. 1−4.

41 Gevers, S., *supra* note 11, p. 29−34.

42 Constitution of the world health organization, *supra* note 20.

43 Gevers, S., *supra* note 11, p. 32.

dical aid and services for the human being in the event of sickness. The procedure for providing medical aid to citizens free of charge at State medical establishments shall be established by law." Professor T. Birmontienė states that the official doctrine formulated by the Constitutional Court has major impact upon the legal system of Lithuania and the law on health as well[44]. According to the professor, the right to health care which is protected by the Constitution, is included as a right in the catalogue of the constitutional rights and is basically one of the most important ones. The right to health care, both as the duty of the state to take care of public health and as an individual right, is entrenched in Paragraph 1 of Article 53 of the Constitution. The fact that the right to health care is included in the catalogue of constitutional rights as a social right and is defined first of all as social rather than individual rights – and this aspects is subject to dispute by the petitioners – results in a situation where, in view of the acts of the Constitutional Court, this right is perceived as a constitutional obligation of the state to take care of health of the entire society – as the social right instead of the individual (patient's) right[45]. Meanwhile K. Lapinskas, the President of the Constitutional Court of Lithuania, states that in the Constitution of Lithuania the right to health care is protected not only as an individual rights of a person to health care, but as a collective right, i.e. public interest, which justifies limitation of some other rights and/or freedoms, for example freedom of speech, freedom of information or ownership rights.[46]

In the course of analysis of the jurisprudence of the Constitutional Court of the Republic of Lithuania, it becomes obvious that the right to health care as entrenched in the Constitution of the Republic of Lithuania is a function of the state. The Constitutional Court of the Republic of Lithuania has held more than once that taking care of people's health and guaranteeing medical aid and services in the event of sickness are to be treated as a state function. The administering and supervisions of health activities are one of the elements of the aforementioned function.[47] When construing these provisions of the Constitution, the Constitutional Court has held that the health of human being and of society is *one of the most important values of society*. In the context of the constitutional justice case at issue the Constitutional Court noted that the state has the duty to protect human beings from threats to health (to reduce dangers to health and in certain cases, as far as possible, to prevent them), to improve ability of a person and society to overcome dangers to health, and to ensure availability of medical services in case of illness. Moreover, it has been noted that the right to healthy environment is a necessary condition of dignified life and enjoyment of many other constitutional rights.[48] The Constitutional Court has also held that the provision of Paragraph 1 of Article 53 of the Constitution reading that the state takes care of public health results in the statement that protection of people's health is a *constitutionally important objective, a public interest*.[49]

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44 Birmontienė, T., *supra* note 11, p. 323.

45 *Ibid.*, p. 324.

46 Lapinskas, K., *supra* note 11.

47 Constitutional Court Ruling of 14 January, 2002. *Official Gazette*. 2002, No. 5-186.

48 Constitutional Court Ruling of 2 September, 2009. *Official Gazette*. 2009, No. 106-4888.

49 Constitutional Court Ruling of 14 March, 2002. *Official Gazette*. 2002, No. 28-1003.

While implementing the provision of Paragraph 1 of Article 53 of the Constitution and "recognising that the health of the population is the greatest social and economic value of society and <...> seeking to ensure the inborn human right to enjoy the best possible health, as well as the right to have healthy environment, acceptable, accessible and adequate health care" [preamble part 2], the Seimas of the Republic of Lithuania adopted the Law on Health System.[50] Pursuant to the provisions of Articles 11 and 14 of the law on Health System, the health system comprises: health care, public health and pharmaceutical activity[51]. These spheres of health system are intended for implementation of the objective which is set for the state – take care of people's health and respectively implement the right of a person to health care. Health care is basically aimed at treatment of persons (patients), their rehabilitation and nursing (Chapter II of the Law on Health System), pharmaceutical activity comprises production and distribution of drugs (Paragraph 14 of Article 2 of the Law on Pharmacy of the Republic of Lithuania[52]), and public health concentrates on preventive activity aimed at strengthening health of community, disease prevention and control, and creation of safe environment.

As already mentioned, is should anyway be stated that health system is basically divided into two types: health care and public health, as pharmaceutical activity in its essence is a constituent part of health care, as treatment could be hardy effected without medicines, and the latter is aimed at ensuring effective health care.

Therefore, in the Republic of Lithuania, in view of the right to health care as entrenched in the international legal acts and the Constitution of the Republic of Lithuania, the national health system must be developed so that it comprises the measures necessary for execution of the right to health care and creates conditions to the people to enjoy the highest attainable standard of physical and mental health.

Conclusions

1. The right to human dignity is implemented through the entire system of human rights. The second generation of human rights (economic, social, cultural) ensures the dignified conditions of life and the right to health care is one their guarantees.
2. The right to health care is not absolute: efficiency of its implementation depends upon both the state, ability of its established administrative and institutional systems to properly implement the assigned functions, and the lifestyle of the person.
3. The right to health care is implemented by the state by means of organisation of measures of health care and public health.
4. When implementing the health care and public health and organizing activity of the authorities, the state must ensure that tasks and objectives that are set in every sphere are attained in order to guarantee the general and integral efficiency of every sphere of health system.

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50 Law on the Health System. *Official Gazette*. 1994, No. 63-1231.

51 Čelkis, P., *supra* note 11, p. 12.

52 Law on Pharmacy. *Official Gazette*. 2006, No. 78-3056.

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TEISĖS Į SVEIKATOS APSAUGĄ SAMPRATA

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Santrauka. *Visuotinėje žmogaus teisių deklaracijoje tvirtinama, kad „kiekvienas* […] *turi teisę realizuoti* […] *ekonomines, socialines ir kultūrines teises, reikalingas, nepakeičiamas savo orumui* [...]; *šios teisės užtikrina egzistenciją, vertą žmogaus orumo*."[53] *Iš prigimtinio orumo kyla kiekvieno žmogaus teisė į aukščiausio pasiekiamo lygio fizinę ir psichinę sveikatą*[54]. *Antra žmogaus teisių karta (ekonominių, socialinių, kultūrinių) priima radikalius sprendimus: įtvirtinama teisė į sveikatos apsaugą, motyvuojant, jog asmeniui svarbios ne tik pilietinės, politinės teisės, bet būtinos ir orios gyvenimo sąlygos, o teisė į sveikatos apsaugą yra viena jų. Tarptautinės teisės aktų nuostatų analizė rodo, kad teisė į sveikatos apsaugą tarptautinėse sutartyse, deklaracijose evoliucionavo nuo sveikatos, kaip pagrindinės žmogaus vertybės, iki savarankiškos teisės, kuriai įgyvendinti skiriama vis konkretesnių ir daugiau sveikatai lemiamą įtaką apimančių veiksnių įgyvendinimo priemonių. Teisės į sveikatos apsaugą įgyvendinimas priklauso ir nuo paties individo pastangų, ir nuo valstybės, jos sukurtų administracinių bei institucinių sistemų gebėjimo tinkamai atlikti pavestą funkciją. Nors tarptautinės teisės aktuose nurodytos pagrindinės nuostatos, aiškiai apibrėžtos siekiamos įgyvendinti priemonės, tačiau nuo nacionalinės šalių dispozicijos priklauso, kokiu mastu ir kaip jos bus įgyvendintos. Teisė į sveikatos apsaugą yra įtvirtinta Lietuvos Respublikos Konstitucijos 53 straipsnio 1 dalyje. Lietuvos Respublikos Konstitucinis Teismas savo jurisprudencijoje nurodo, kad žmogaus ir visuomenės sveikata yra viena svarbiausių visuomenės vertybių, konstituciškai svarbus tikslas, viešasis interesas ir valstybės funkcija – ją įgyvendinti. Apžvelgus tarptautinės teisės dokumentuose įtvirtintas teisės į sveikatos apsaugą įgyvendinimo priemones ir nacionalinį teisinį reglamentavimą, matyti, kad iš esmės nustatytos dvi sveikatos priežiūros rūšys: asmens sveikatos priežiūra ir visuomenės sveikatos priežiūra. Valstybėje nacionalinė sveikatos apsaugos sistema turi būti plėtojama, apimant teisei į sveikatos apsaugą įgyvendinti reikiamas priemones ir sudarant sąlygas asmenims džiaugtis aukščiausio lygio fizine bei psichine sveikata.*

Reikšminiai žodžiai: *žmogaus orumas, teisė į sveikatos apsaugą, sveikatos sistema, asmens sveikatos priežiūra, visuomenės sveikatos priežiūra.*

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