The Right to Healthcare for the Most Vulnerable Migrant Groups and the Universal Implementation of the Right to Enjoy the Highest Attainable Standard of Physical and Mental Health

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Abstract

In this research paper I focus on the issue concerning the right to healthcare for the most vulnerable groups that is represented by undocumented migrant women and undocumented migrants with disabilities. I will highlight the relationship between human rights and the right to health clarifying the meaning of principles established in articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. With this regard, I consider important that states enhance the effectiveness of those authorities in charge of evaluating the respect of fundamental rights and the principle of human dignity. This would restore the legality as modern constitutions oblige authorities to undertake appropriate measures to fulfil all principles enshrined in international human rights covenants.

Keywords: Right to health; universality of fundamental rights; undocumented migrants; migrant women; migrants with disabilities

1. Introduction

As the universal right to health is still not ensured to everybody, my research demonstrates that the most vulnerable groups such as undocumented migrants, undocumented migrant women and undocumented migrants with disabilities face constraints in the full access to healthcare services in host countries (Lebano *et al*, 2020, 2-14; Van Ginneken, 2014, 11-14). My idea is that such exclusion can be considered as a breach of international law that obligates states to guarantee the full access to healthcare services and, in general, the enjoyment of the highest attainable standard of physical and

mental health. This objective has been reaffirmed by United Nations in the "*Sustainable Development Goals*" in which the international community commits to ensure the universal access to healthcare services (Stevenson *et al.*, 2024, 1; UN Committee for Development Policy, 2018, 3). In this context, I have also considered it important to clarify the relationship between the right to healthcare with other fundamental rights such as the rights to food and housing. That is because together they are functional to ensure the achievement of human dignity as these rights condition the status of physical and mental health (Evans, 2002, 212). Furthermore, even if we follow a utilitarian point of view, we can observe that the exclusion of the most vulnerable groups from the full access to healthcare would increase rather than decrease the public expenditure of states. Therefore, the objective of this research is to reaffirm the obligation of every state to ensure the full enjoyment of the right to health without discrimination. In this sense, the Supreme Courts would have the obligation to annul legislative measures that directly or indirectly contrast with the principle of universality of the enjoyment of the highest level of physical and mental well-being.

The first paragraph focuses on defining the concept of the right to health and its protection, as well as aiming to contextualize the obligation established in Article 12 of the aforementioned Covenant. In this regard, we can observe that the aforementioned right does not concern only the obligation by states to provide suitable healthcare services to everybody. Otherwise**,** this is also related to the fulfilment of all other social rights that determine psychological and physical well-being. This clarification helps us to understand the relationship between the right to health and the principle of equality, as well as the importance of guaranteeing the respect of all fundamental rights that, definitely, are interconnected. That is enshrined in Article 11 of the *International Covenant on Economic, Social and Cultural Rights*.

At the beginning of my study, the research focuses on describing the conceptual evolution of the right to health from a liberal democratic perspective toward an idea in which the state guarantees social welfare for all people without discrimination. In this context, it will clarify some concrete matters related to the principle of equality in the field of healthcare, such as the concepts of accessibility, acceptance and the socioeconomic integration of vulnerable groups. At the beginning of the third paragraph, this study focuses on the discussion concerning the relationship between the principles enshrined in the International Covenants and the restrictive normative measures established on domestic laws. This paragraph mentions some doctrinal terms of reference that would allow an assessment of the degree of

fulfilment of international obligations by states. In this context, the discussion focuses on the issue concerning the distribution of social rights and, in particular, the healthcare facilities and services.

At the end of the third paragraph, this study highlights the tight relationship between social justice and the right to health. In this context, this research mentions some practical examples showing that the level of socioeconomic inequality and political choices would have a considerable impact on the population's health conditions. Following this scheme, it will identify the issue concerning the justiciability of social rights in order to show that Supreme Courts should be obligated to withdraw legislative measures that directly or indirectly constrain the full implementation of the principle enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*.

In the second part of this study, the issue concerning access to healthcare in favour of the most vulnerable group of migrants, such as undocumented migrant women and migrants with disabilities will be analysed. I will provide some practical examples that would demonstrate that in many cases, states do not fulfil the obligations established on international treaties that they have signed and ratified. Because of this, discriminatory measures should be considered as a breach of international law, hence they should be declared invalid.

My methodological approach consists in analysing the issue concerning the right to health and the highest attainable standard of physical and mental health from both perspectives of international law and political philosophy. In my study, some practical cases have also been included to strengthen the idea that healthcare is still not considered as a universal right.

2. The right to health and the relationship with Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights

The right to health is enshrined by human rights covenants. Article 25 of the Universal Declaration of Human Rights, dated 1948, states that "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family…"*. This aforementioned article considers food, housing, clothing, healthcare, and social services as necessary rights that would ensure the achievement of human dignity. Article 11 of the International Convention on Economic, Social and Cultural Rights establishes

that rights to housing, water and sanitation, and food are necessary to ensure an adequate standard of living. These rights should be extended without discrimination (OHCHR, 2014, 60-80; Yaroshenko *et al.*, 2022, 244). Likewise, Article 12 of the International Convention on Economic, Social and Cultural Rights establishes that state parties recognize the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". Therefore, states are responsible for ensuring the fulfilment of the mentioned obligations. This obligation is the result of the evolution of the constitutional shape toward the welfare state model**.** The latter compels states to undertake measures that can satisfy social necessities. In fact, these specific normative interventions, mainly in the economic field, aim to reduce social inequalities caused by economic globalization (Asensi Sabater, 2014, 25; Lema Añón, 2009, 21-39; De Lucas, 1994, 57).

The main objective of the Welfare State should be the reduction of the negative effects of the market economy. This goal would be achieved through state legislative interventions that aim to ensure a suitable living condition for everybody (Klimczuk, 2017, 1). These normative measures would guarantee a minimum basic income and they would assure everybody welfare benefits in case of unemployment, a high quality of public services and, finally, healthcare services (Goul Andersen, 2014, 4). Therefore, from the approach of international covenants, we can identify three main features of the right to health: to have ensured a suitable living condition with a high standard of health and well-being for anyone; to obtain a high level of healthcare assistance with related social services; and, finally, the right to welfare services that prevent the negative impact of illness—for example, the economic treatment in case of a disease – (Lema Añón, 2009, 41; WHO, 1986, 1; Yaroshenko *et al.*, 2022, 242-243). The same WHO Constitution, in its preamble, states that "*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being*". In fact, the modern concept of health is not limited to a pathology-based perspective; otherwise, it encompasses all conditions that are tied to the wellbeing of people (Mann *et al.*, 1994, 8-9). The doctrine considers the right to health as a collective one that encompasses the principles of freedom and equality. That is because, on one side, beneficiaries have the freedom to choose if they want to receive healthcare assistance. On the other hand, they are entitled to enjoy a high standard of healthcare services and to receive all related information without discrimination (IOM, 2013, 18). States have the obligation to ensure and provide them.

The fulfilment of the obligation enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* means that institutions should guarantee the availability, the accessibility, quality and acceptance of healthcare services. These principles - known as AAAQ - have been defined by the Committee on Economic, Social and Cultural Rights through General Comment 14 (Montel *et al.*, 2022, 2). In this context, the aforementioned terms are interconnected thus, if we compare two of the many definitions of "quality" - the models of Avedi Donabedian and Drain Maxwell - we observe some common characteristics which are the level of skills of health workers, the efficiency and number of healthcare facilities and medical machines and the success rate of treatments (Ouzounakis *et al.*, 2023, 44; Nylenna *et al.*, 2015, 1-13). Hence, states should ensure a sufficient number of health facilities and healthcare centres in order to guarantee a high quality of assistance. In relation to the principle of accessibility, it means that healthcare services should be provided without any discrimination and this principle is tied to the concept of equality. It means that any healthcare facility should be distributed in a way that ensures the equality of opportunity. Therefore, all people are entitled to receive the same level of access to healthcare goods and services in accordance with the principle of human dignity. That is the main principle of modern legal systems (Da Silva, 2018, 343-384). Thus, institutions should ensure that nobody is excluded from enjoying all healthcare services, including primary and emergency healthcare.

Furthermore, any denial of access to healthcare should be considered not only as a breach of the principle of non-discrimination, but also an issue that would raise healthcare costs. That is because the treatment of diseases will have higher costs when they turn from generic to chronic and infective ones. When illness is not treated in time, its spread might cause serious health problems for the entire population (IOM, 2013, 19).

In defining the principle of accessibility, we can observe that any legislative measure that frustrates the access to healthcare services should be considered as a violation of the aforementioned principle. In relation to this issue applied to the field of migration policy, Joseph Carens commented on the importance of ensuring a "*firewall*" between medical workers and institutions in charge of enforcing immigration laws. That is because migrants without a residence permit might be frustrated by the access to healthcare facilities due to the fear of being reported to immigration authorities, jeopardizing their life in the host country (Crepeau *et al.*, 2015, 165-166). In relation to this latter issue, the OHCHR highlighted the importance of distinguishing the enforcement of the immigration law from activities that ensure the access to healthcare in favour

of migrants (OHCHR, 2016, 21). We also need to observe that the principle of accessibility encompasses the right to obtain information about healthcare services and the right to access them regardless of the economic condition of the beneficiary. This means that institutions should ensure access to people who do not have the economic capacity to pay for specific health services (IOM, 2013, 19-20). The condition of quality would be tied to the availability of health facilities and health staff in line with the specific necessity of the whole population (IOM, 2013, 19-20). Regarding the principle of the acceptance of the right to health, it means that institutions and caregivers should understand the cultural differences, including gender differences, of beneficiaries. On the other hand, they should behave in accordance with patients' necessities and they should take into account their point of view (Ouzounakis *et al.*, 2023, 44).

In relation to this issue, it would be interesting to understand that the right to health might be considered a collective right, rather than an individual one, because its achievement is tied to the implementation of economic policies. These public interventions aim to reduce the negative effects of the market economy insofar as the unregulated economic globalization would raise inequality among people and vulnerable groups, worsening their health conditions (Mason Meier *et al.*, 2005, 101-107). Therefore, as fundamental rights are interconnected and indivisible, the breach of other rights such as housing, food, clothing, and labour would raise the risk of physical and mental diseases (Beauchamp, 2003, 269-270; Ríos Ruiz *et al.*, 2019, 67). For this reason, the highest standard of physical and mental health can be achieved only when all fundamental rights are ensured to all people, including the most vulnerable groups—in this specific context, I refer to migrants -. For this reason, I consider that "*closed borders*" migration policies affect the level of well-being of the migrant population (Ikram *et al.*, 2015, 1-3).

In this context, it is useful to mention a study carried out in Denmark, France, and The Netherlands about the impact of different migration approaches on the migrant population and its health condition. The mentioned research took, as term of reference, regular migrants from Turkey and Morocco who lived in Denmark. The latter country used to implement a discriminatory migration policy; France carried out the policy of assimilation, while The Netherlands was considered the most inclusive country among the abovementioned ones (Ikram *et al.*, 2015, 1-3). The results showed a higher mortality and morbidity gap between citizens and migrants in Denmark—the most discriminative country -. It means that migrants did not enjoy the same wellness and health conditions as citizens in the aforementioned county. We need to observe that

this research considered some negative behaviours that conditioned the foreign population's health, such as smoking and malnutrition, but these misconducts often are related to poor economic and psychosocial conditions (Ikram *et al.*, 2015, 10). We note that sometimes the lack of information about harmful behaviours can be considered a breach of human rights (Mann *et al.*, 1994, 18).

For this reason, we can state that fundamental rights are interrelated, hence the rights to food and housing will have a considerable impact on the physical and mental health of people (OHCHR, 2014, 23-35). The former right mainly concerns the quality and nutritional value of the meal rather than its quantity. In relation to the right to housing, that is not fully ensured to everybody as, in many legal systems, migrants are excluded from any welfare benefit. This would cause damage to their physical and mental health condition (IOM, 2013, 23). Furthermore, we can observe that in host countries such as Spain and Italy, migration norms in the field of the right to housing are directly discriminatory. Spanish legislation on the right to decent housing for the migrant population appears rather chaotic.

This right appears to be constitutionally reserved to nationals — article 47 of the Spanish Constitution confirmed in Constitutional Court Decision 107/1984 of November 23, 1984, which admitted the difference in treatment between nationals and foreigners -. The same Constitutional Court Decision 107/1984 clarified that the rights of migrants would have a legal configuration, and these are not ensured by the Constitution. It means that they are defined by organic laws (González Beilfuss, 2010, 4-5). Following this idea, the Spanish migration law 02/2009 of December 11th confirms that only nationals and migrants with a long-term residence permit can apply for housing grants - Article 13 of Law 02/2009 – (López Ramon, 2020, 303). The same discriminative treatment against undocumented migrants and those with a short-term permit can be observed in Italian and Brazilian migration laws. Article 40 of the Italian migration law—Legislative Decree 286/1998—had already established the principle of non-discrimination between citizens and migrants with a long-term residence permit in the field of housing rights (Vuoto, 2022, 226-232). It means that undocumented migrants and those with a short-term permit cannot apply for housing subsidies. The aforementioned article stated that migrants have to hold at least a 2-year residence permit to apply for those grants (Bascherini, 2007, 305-307; Pallante, 2016, 148; Vuoto, 2022, 226-232). Similarly, in Brazil, the social program "*Minha casa, Minha Vida*" benefited only citizens and permanent visa holders; thus, all people living without a residence permit could not enjoy the aforementioned social program (De Almeida Mendes *et al.*, 2020, 65-80).

Consequently, we can observe that in these aforementioned migration laws, the right to housing is not ensured to everybody; hence, we observe a discriminatory treatment against the most vulnerable groups. Therefore, though Spain, Italy and Brazil ratified the *International Covenant on Economic, Social and Cultural Rights*, they do not guarantee the right to housing which is directly connected to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (United Nations General Assembly, 2013, 3-24; PICUM, 2022, 8-9). Moreover, there would be a legislative discrimination in the access to housing that can be considered a detriment to the migrant population that resides with a short-term permit. This legal discrimination might be evaluated as a violation of Recommendation Number 30 issued by the United Nations Committee on the Elimination of Racial Discrimination, which states that each state should have the obligation to ensure equality in the enjoyment of adequate housing between citizens and non-citizens, thus avoiding any type of segregation (OHCHR, 2004, 32).

Another element, related to Article 12 of the Convention and the right to health, concerns the right to safe and healthy working conditions. Article 7 of the *Convention on Economic, Social and Cultural Rights* states that working conditions must guarantee safety and hygiene, with the consequence that institutions will have the obligation to control their standards. In the field of migration, this issue has a significant impact when we talk about exploitation and abuse of irregular foreign labour (IOM, 2013, 25). In this field, the previously mentioned treaty makes no distinction between individuals "*regularly*" residing in a foreign state and those without a residence permit. Consequently, most of the destination countries declared several reservations in order to be able to undertake a discriminatory treatment against the most vulnerable groups of foreigners (Hausler, 2010, 4). Surely, in analysing migration laws of Spain, Italy and Brazil, we can observe some fundamental rights in labour matters that could be considered universal and, therefore, applicable to all migrants regardless of their administrative status. I am referring to the principle of safety in the workplace and the consequent right to be compensated in case of accident and, finally, the right to fair remuneration. This obligation has its normative basis in ILO Convention n. 19 of 1925, ratified by most European countries, which ensures that all workers, regardless of their status in their country of residence, are entitled to compensation in the event of labour accidents (Hausler, 2010, 5). ILO Convention n. 143 of 1975 has stated that all workers, without

distinction, would have the right to remuneration, as well as being entitled to social security and related benefits (Hausler, 2010, 5).

In this context, it seems important to note that poor economic conditions of certain groups of migrants and the lack of social integration — which would undermine the right to health — could be related to the implementation of neoliberal policies. This economic strategy sees public authorities much less committed to ensure the achievement of real equality and, consequently, human dignity. For this reason, the constraint of public policies in the field of the right to health has led to a higher incidence of diseases among the most vulnerable population. This is a consequence of the involvement of the private sector in the field of healthcare, as states have granted means and resources to private healthcare entities in order to increase the economic growth of multinational corporations (Mason Meier *et al.*, 2005, 111). Despite that, states are obliged to ensure the enjoyment of the highest standard of physical and mental health, hence public authorities have to undertake normative measures to guarantee the prevention, treatment, and control of diseases, thus creating the conditions to ensure universal access to public medical and health services - Articles 12.1 and 12.2 of the *International Convention on Economic, Social and Cultural Rights* - (Tasioulas, 2017, 3-28). The issue is that the previously stated international norm does not provide a practical framework for governments to fulfil their obligation to guarantee the right to universal health care. Therefore, states can freely implement economic policies aiming to reduce healthcare budgets and, at the same time, favouring private companies and entities. This can be considered a breach of international obligations. In fact, if health and social services do not avoid logistic, economic, and sociocultural obstacles, the non-discrimination principle may be considered unfulfilled (Fidler, 1999, 188; Mann *et al.*, 1994, 15; Mason Meier *et al.*, 2005, 114).

3. Public health, healthcare and their relationship with socioeconomic factors

It is important to define the concept of the highest standard of healthcare in order to understand whether states really comply with this international obligation. Although the aforementioned international convention is ambiguous and imprecise, it could be said that the right enshrined in Article 12 also encompasses the obligation to provide emergency care necessary to save the patient's life, as well as all treatments to cure illnesses. All of this also includes the implementation of measures to control possible threats to health (Toebes, 1999, 284). However, the ambiguity of the previously mentioned principle can be observed if we analyse Article 2 of the same

Convention on Economic, Social and Cultural Rights. This norm states that governments would only be obliged to invest the maximum of the economic resources available to "…*achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"* – doctrine of progressive realization -. This means that states might phase in the fulfilment of obligations established by the aforementioned treaty (Tasioulas, 2017, 4-10). Consequently, the fulfilment of this obligation would be less rigid and it would depend entirely on the economic capacity of the country.

However, the Minimum Core Doctrine suggests that the lack of food, essential healthcare services and an adequate standard of housing as well as basic education can be considered as an unfulfilment of obligations enshrined in the Covenant (Müller, 2017, 55-87). The breach of the obligation enshrined in Article12 of the abovementioned convention would occur when the state fails to implement a policy capable of ensuring access to the right to health for everybody, as well as when the budget is insufficient to achieve the universality of the right. Following this idea, the violation of the aforementioned duty would be clear when public institutions do not ensure the fair and equal distribution of healthcare facilities and services (CESCR, 2000, par. 52). Through this clarification, we can distinguish between medical care and public health in order to affirm that the right to health is related to a joint analysis of other fundamental rights. The term medical care refers to the mere activity of healthcare to cure illnesses, while the latter has a broader connotation and is related to the social and economic variables that influence the state of individuals' health. Public health focuses on the implementation of measures to prevent diseases, disability, and premature health. Therefore, it aims to ensure the well-being of the entire population (Institute of Medicine, 1988, 31).

In fact, considering that the term "*healthcare*" means the complete physical, psychological, and mental wellness, "*public health*" refers to public policies and programs that aim to ensure an equal distribution of health for the entire population. Therefore, this latter idea is broader and it is not limited solely to the guarantee of the absence of illnesses but is related also to the control of their spread, the prevention of injuries, and the study of the distribution of risk factors in a given community (Binns, 2015, 5-6). Consequently, it is acceptable to state that the concept of public health is related to the implementation of public policies that ensure respect for fundamental rights, since their violation is the main cause of the spread of disease, illness, armed conflicts, crime, and poverty. Thus, we can confirm that healthcare is a

necessary right, but it is not sufficient to ensure the well-being of the population (The International Bank for Reconstruction and Development, 1993, 17-36). For this reason, the achievement of public health should be related to an in-depth analysis of the socioeconomic context (Meyer *et al*., 2000).

In this context, Carlos Lema Añón proposes a conceptual distinction between "*minimum expenditure*" and "*minimum health*". That would help to define the concept of public health and the objectives that public authorities would be obliged to meet. The idea of minimum health means that authorities should guarantee a minimum level of health for everybody, whereas the concept of minimum expenditure is the right to expect that states allocate a minimum amount of resources for health protection (Lema Añón, 2009, 165-167). According to the aforementioned author, opting for the minimum expenditure approach would mean only ensuring medical assistance, whereas if we follow the idea that states have the obligation to ensure the achievement of minimum health — I agree with this approach—we would have a broader vision that is related to the concept of right to health. That would include the analysis of the socio-economic conditions that would determine the level of health of individuals. In relation to this approach, this study mentions, among others, the essay *Health and Human Rights* dated 1994. In which, authors describe three kinds of relationships between health and human rights. In the first framework, they highlight the impact of health policies and programs on human rights. Regarding the second relation, that is based on the awareness that human rights breaches have a considerable impact on fundamental rights, while the latter concerns the important connection between protection and their promotion (Mann *at al.*, 1994, 13-22).

In this regard, General Comment 14 of the Committee on Economic, Social and Cultural Rights, concerning Article12 of the Convention, specifies that the right to health is not only about providing a healthcare service, but it is also about ensuring an analysis of the elements that determine the level of health. Therefore, the latter is tied to the right of access to drinking water, sanitation, food, and housing, as well as to a healthy environment. The implementation of these rights should be considered when we assess the healthcare level (Lema Añón, 2009, 169). Similarly, in order to comply with the obligation enshrined in the aforementioned Article12, states must ensure access to education and information, including matters relating to reproductive and sexual health (CESCR General Comment No. 14).

In this context, this research cannot refrain from mentioning the issue concerning inclusion and scarcity. The first term refers to the entitlement to the right to health while the second one regards the distribution of resources when these are scarce (Lema Añón, 2009, 170). In relation to the concept of scarcity, it is important to observe that, as social rights are inalienable, they are not "goods", hence they should not be conditioned by the economic stability of the state. In fact, authorities should define strategies that aim to decommercialize the production of social rights (Lema Añón, 2009, 199-200). In relation to the right to health, the problem of scarcity can manifest itself in concrete cases such as when a health system has a limited number of certain biomedical devices necessary for specific treatments or in cases where there are limited resources for numerous patients. Following these scholarly cases, the issue could create some distribution problems when a particular technology is not available to all patients who need it, thus forcing health workers to establish terms of reference to prioritize some beneficiaries. For this reason, author Jon Elster identifies some useful criteria to solve the problem of the distribution of limited health treatments. He establishes, as terms of reference, the principles of equality, time and position, and need (Elster, 2000, 13). In case of incompatibility with the application of the principle of equality, the adoption of a term of reference that ensures equal opportunities for beneficiaries would have to be justified. Following the second criteria, the waiting time for a specific treatment should be chosen, taking into account the state of health of the patient concerned. The last term of reference – position - would be based on an evaluation of the social condition of the beneficiary, which would involve an evaluation of needs and levels of vulnerability (Lema Añón, 2009, 200-206).

In relation to the issue concerning the scarcity and distribution, I wonder whether social rights, and specifically the right to health, should be extended to everybody or just to the most vulnerable groups. According to Luigi Ferrajoli, all human beings are entitled to fundamental rights and they represent the "*moral minimum*" generally accepted. Specifically, Ferrajoli considers fundamental rights as the *law of the weakest* (Ferrajoli, 1999, 37; Contreras, 2012, 121-145). The problem of the ownership of fundamental rights is related to the theory of specification of human rights theorized by Norberto Bobbio and Gregorio Peces-Barba, so that both authors consider it important to identify all vulnerable individuals and groups' needs in order to implement specific measures that can reduce their vulnerabilities. Through these measures, human dignity should be achieved (Bobbio, 1991, 97-112). Following the idea that human rights are considered as the *law of the weakest*, the author Peces-Barba claims that social rights should be ensured only to

vulnerable groups and individuals who cannot cover their basic needs (Peces-Barba *et al.*, 1995, 319). He argues that in an unequal political system focused on the market economy—economic globalization—that allows wealthy groups to become even wealthier, the latter would gain even more advantage if we extended social rights to everybody. Peces-Barba mentions, as an example, the Minimum Living Income measure, stating that, if it were extended to everybody, this would convince wealthier people to drop their working activities. This would give some advantage to the "*Free Rider*" a person who takes advantage of the community's efforts (Peces-Barba *et al.*, 1995, 319; Lema Añón, 2009, 191-192).

The analysed arguments urge a reflection on the relationship between social justice and the right to health, in order to understand the importance of this connection. In particular, this approach reinforces the idea that distributive justice and its policy is related to the level of health of individuals and the community. In particular, it is interesting to observe that the individuals' status of health will be conditioned by their social condition and the level of inequality in a given society, despite the commitment of states to fulfil the universal principle of health care. In this context, I mention a study carried out by the authors Norman Daniels, Bruce Kennedy, and Ichiro Kawachi on the social determining factors — related to distributive justice and inequality—that influence the level of health of individuals. Their approach is based on the fact that the population's health will be conditioned by certain political choices and consequently by socioeconomic conditions (Daniels *et al.*, 1999, 215-218). It means that the economic inequality will have a huge impact on the people's health. The mentioned authors analyse some statistics, dated 1998, concerning human development and the relationship between gross domestic product and life expectancy of the population. We can observe that these two elements are not always strictly associated; thus, a country like Costa Rica will have a life expectancy level equal to that of the United States, although the latter has a much higher GDP than the former. Furthermore, some countries, such as Sweden and Japan, with more equal income distribution have higher life expectancies than others, such as the United States, with a higher GDP level (Daniels *et al.*, 1999, 222). These examples, together with other research, show us the huge impact of social and economic factors on the population's health (Alanazi *et al.*, 2023, 1072-1077).

The issue relates to the implementation of appropriate policies for the redistribution of wealth; thus, these mentioned measures should be addressed to reduce the level of "*relative deprivation*" in a given society. This latter concept indicates the lack of individual resources and the unequal distribution

of them, rather than the lack of basic goods needed for full participation in society (Daniels *et al.*, 1999, 221). Besides, there are other factors that influence the achievement of the highest attainable standard of physical and mental health. I refer to the investments for the improvement of "*human capital*" that coincides with the education degree and gender equality. To this end, through research carried out in the United States, Ichiro Kawachi found that the socioeconomic differences between men and women—harming this latter group—would be related to the female mortality level. The terms of reference for this study were the participation of women in politics, their level of employment and relative salaries, their economic autonomy, and, finally, access to reproductive rights (Kawachi, 1999, 21-32; Whitehead, 1992, 429-445).

In this context, it is important to highlight which elements condition the implementation of Article 12 of the *Convention on Economic, Social and Cultural Rights*. Definitely, we distinguish between inevitable inequality and avoidable inequality. The former concept refers to physical, ethnical, and biological differences that cannot be modified, whereas through the latter term we refer to the scarcity that could be avoided through the implementation of normative measures that solve issues such as the lack of water and sanitation, adequate housing, basic education and, finally, maternal and prenatal healthcare. For these reasons, authors Norman Daniels, Bruce Kennedy, and Ichiro Kawachi claim that in a society where wealth is not fairly distributed, inequality in the field of the right to health would continue to exist. Therefore, the achievement of the principle of universality in the field of the right to health would be ensured mainly through the implementation of policies that aim to reduce socioeconomic inequality (Daniels *et al.*, 1999, 226).

4. The application and justiciability of article 12 of *International Covenant on Economic, Social and Cultural Rights* for undocumented migrants, migrant women and undocumented people with disabilities

As this research aims to study the concrete implementation of the right to health and to the highest standard of healthcare for the most vulnerable groups, my attention would be addressed to the rights of migrants living without a residence permit, undocumented migrant women and migrants with disabilities. In fact, the most problematic issue concerns the right to health for those undocumented migrants, despite the existence of the principle of non-discrimination. The latter should be extended to social rights, including the

aforementioned right to health (Pace, 2009, 11-12). However, this principle could be considered ambiguous, as it would not totally prevent states from implementing different and exclusive measures to the detriment of certain groups. For this reason, in several legislations, we can observe many attempts to limit the access to healthcare services to migrants who do not meet the requirements for residence (Pace, 2009, 12). However, this restrictive interpretation of the principle of non-discrimination could be overcome if we analyse General Observation number 14 of the Committee on Economic, Social and Cultural Rights, which, in paragraph 26, affirms that for the implementation of the right to health, any discrimination would not be admitted if it "*…has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health*" (Pace, 2009, 13). It means that any discriminative measure that would have the effect of limiting access to health care and, in general, to physical and psychological care is not allowed. Therefore, the principle of non-discrimination would be extended also to people living in a foreign territory without a residence visa (Cholewinski, 1997, 44-49). This idea has an important impact if we consider that most of the South Asian countries have not signed or ratified the 1951 Refugee Convention and its 1967 Protocol yet. In fact, among ASEAN countries, only the Philippines and Cambodia have accepted this aforementioned international framework; thus, they commit to implementing a legal framework for refugees' protection. On the other hand, those countries that did not ratify the refugees' legal frameworks do not make the distinction between economic migrants and people who need international protection (Moretti, 2023, 3). However, the right to health is considered as an essential human right that should be ensured to everybody without discrimination. It is because principles such as non-refoulment, non-discrimination and the access to healthcare are considered Ius Cogens that are part of the customary international law (Ramadani *et al.*, 2024, 1-2). Furthermore, the rights enshrined in the 1951 Refugee Convention are reflected in other International Conventions such as the aforementioned International Covenant on Economic, Social and Cultural Rights. This confirms that all rights are interconnected and that the right to healthcare should be ensured to everybody without discrimination (Ramadani *et al.*, 2024, 4).

Following this approach, Article 5 of the International *Convention on the Elimination of Racial Discrimination* prohibits states from any form of discrimination in access to public health, while General *Recommendation XXX on discrimination against non-citizens,* establishes the obligation to ensure an adequate standard of physical and mental health for non-nationals. At the same time, this recommendation forbids the implementation of rules

and policies that deny or limit access to preventive, curative, and palliative care (General recommendation XXX on discrimination against non-citizens, 2004 par. 36). Similarly, Article 28 of the International *Convention on the Rights of Migrant Workers and Their Families* recognizes the right of foreign workers residing in a foreign country to access health and social services under the same conditions as citizens. On the other hand, the following paragraph recognizes the right of all foreign subjects, including those in an irregular administrative situation, to emergency healthcare (Pace, 2009, 27-28).

The most controversial issue regards the exclusion of undocumented migrants from preventive care such as diagnostic activities and palliative services (Pace, 2009, 27-28). At the European level, the Council of Europe had previously accepted this restriction. However, the European *Committee of Social Rights*, through the Additional Protocol of the European Social Charter, affirmed that these restrictions could not be valid when dealing with children of irregular migrants. Consequently, the obligation of the States would be to ensure them access to health services (Cholewinski, 2005, 47-49).

However, in order to confirm the principle of universality of the right to health, this research claims that the denial of full healthcare services for migrants without residence permits could be considered a breach of Article 3 of the European *Charter of Human Rights* concerning the prohibition of torture and inhuman or degrading treatment or punishment. In fact, the author Ryszard Cholewinski compares that denial with a violation of the right to be free from inhuman treatments (Cholewinski, 2005, 49). This approach has been followed by the European Court of Human Rights in several cases, such as *D. v. United Kingdom* in 1997 and *Arcila Henao v. The Netherlands*. On those occasions, the Court established that Article 3 might be invoked to prevent the measure of expulsion to the county of origin in case this latter cannot provide an adequate degree of healthcare for a specific disease (Cholewinski, 2005, 49). Although the European Court of Human Rights remarked that this principle can be invoked exceptionally, we can observe that several migration laws, such as the Spanish one, formally provide residence permits and healthcare for migrants who suffer a sudden illness that cannot be treated in the country of origin. This legislative provision is known as "residence permit for humanitarian reasons" (Fernández Burgueño, 2016, 34-35). Therefore, we can consider the universal access to emergency healthcare as the minimum standard for ensuring the right to health (Schoukens *et al.*, 2003, 20).

In relation to this matter, concerning the residence permit for humanitarian reasons, it would be interesting to understand what kind of assistance could be labelled as "*emergency*". The strictest interpretation is that in this category, we could only include treatments that are necessary for the migrant's life until the patient returns to the country of origin. A more flexible approach would involve an evaluation by medical personnel and the implementation of some preventive medicine measures that would have an impact on public health (Schoukens *et al.*, 2003, 21-22). However, on several occasions, access to public healthcare services for migrants depends on the approach of the governing administration and its migration policy. For example, through Decree 16/2012, the Spanish government, led by a conservative coalition, tried to limit the access to healthcare to undocumented migrants. They were excluded from any assistance other than emergency care. In other words, the full right to healthcare was only granted to migrants residing with a valid residence permit (De Benito, 2018). According to this government, this mentioned measure would have aimed to reduce the budget of the National Health System. However, this approach would be a violation of the principle of human dignity and, at the same time, a breach of the obligation of each state to implement policies based on public solidarity (Celkis *et al.*, 2014, 168). Furthermore, even if we follow a utilitarian approach – that is not my proposal -, we can observe that the restriction of social rights and, in this specific case, health rights would not necessarily reduce the public expenditure. In fact, the exclusion of undocumented migrants from full access to healthcare services would not cut the public budget but rather would increase it. That is because the emergency units would be overcharged, taking into account that preventive cares aim to reduce cost for healthcare assistance (Boso *et.al.*, 2016, 238).

Throughout this research, it has been stated that the right to health aims to ensure the achievement of human dignity, which is the main principle of the democratic legal systems. Likewise, it was observed that the market economy system hampers the aforementioned achievement, conditioning the principle of universality of human rights. It was also highlighted the need to focus on specific vulnerable groups, and thus states should undertake specific measures to reduce the vulnerabilities caused by socioeconomic and structural factors. For this reason, this study cannot refrain from focusing on the access to healthcare services for migrant women living without residence permits. This issue is connected to a broader analysis that encompasses the study of the women's condition within a patriarchal society and their constraint to enjoy in both a relative and absolute sense all rights enshrined in international law

(Richards *et al.*, 2007, 855-856). The legislative adjustments provided by international regulations through the Universal *Declaration of Human Rights* and the specific *Convention on the Elimination of All Forms of Discrimination against Women* have been absolutely necessary insofar as gender discrimination still represents a plague that limits the development of more than half of the population (Carretero Palacios, 2015, 6; Barrére Unzueta *et al.*, 2002, 24; Frazer, Elizabeth *et al.*, 1993, 82).

In some countries, women do not have total control over their lives and their bodies. They suffer humiliating and damaging sociocultural practices that harm their physical and mental health. The most obvious examples are the female genital mutilation, forced marriage, child marriage, and exclusion from formal education. In some cases, they suffer strategic mass rapes during armed conflicts (Mlambo-Ngcuka, 2017, 48; Brashear, 2017, 2-61). In this regard, it is interesting to highlight the approach of the *Convention on the Elimination of All Forms of Discrimination against Women*, which is the result of an awareness of the existence of a hierarchical relationship between women and men that needs to be eradicated. In this regard, I mention the general objective enshrined in Article 5 of the mentioned treaty that sets, as its main goal, the implementation of policies aiming at eradicating the patriarchal structure of society (Pezzullo Gaeta, 2019, 306). In particular, the same concept is emphasized by some United Nations recommendations relating to articles 5 and 12 of the *Convention on the Elimination of Discrimination Against Women* and *International Covenant on Economic, Social and Cultural Rights* respectively, which would oblige States to approve appropriate legislative measures to eliminate any form of discrimination that prevents women from accessing healthcare and family planning. This obligation is fully described in General Recommendation 26 on Migrant Women Workers of the Committee on the Elimination of Discrimination against Women, which observes that although the migratory phenomenon is of interest to both men and women, it does not affect them in the same way insofar as the patriarchal structure would cause a discriminatory treatment that would affect more migrant women (OHCHR, 2015, 36-37). This issue has the consequence that female migrant workers are employed in lower-paid jobs than men; thus, the inequality would threaten their health condition (OHCHR, 2015, 37). For these reasons, in providing healthcare services, public authorities will have to consider the needs and interests of women, including an analysis of the socioeconomic and structural factors that, *de facto*, hamper equality with men (CEDAW General recommendation No. 24, 1999).

In order to fulfil the aforementioned obligations, the international community has considered it important to draw up some guidelines to focus migrant reception policies towards a gender perspective. These efforts aim to ensure that migrant women have all their rights guaranteed, including the right to health. Therefore, in 2016, the 71st Session of the United Nations General Assembly approved the *Global Compact for Migration*, which establishes common standards of reception conditions for migrants as well as ensures that the public authorities of destination countries respect fundamental rights (Pezzullo Gaeta, 2019, 307-309). In fact, in relation to the aforementioned objectives established in Article 5 of the *Convention on the Elimination of Discrimination Against Women,* the *Global Compact Agreement* enshrines the general commitment to ensure that each host state would have to strengthen its migration policy by adjusting aid measures to the needs of migrant women. The general goal is to ensure the achievement of gender equality and respect for fundamental rights (Pezzullo Gaeta, 2019, 307-309). After these premises, the issue would focus on the right to the enjoyment of the highest attainable standard of physical and mental health for migrant women, since the impact of their displacement requires a specific analysis of gender inequality, their role in patriarchal societies and in the labour market. All these aspects are relevant to the state of women's health, which is related to biological, economic, and social aspects (WHO Europe, 2016, 18). Therefore, the patriarchal structure forces migrant women to be employed in the informal sector without any kind of protection and with the danger of suffering psycho-physical damage. This issue has a huge impact on undocumented migrant women, as the aforementioned psychological harm is not treated by the health system of the country of destination for the reason that the status of irregularity would hamper the full access to healthcare services (Sanz Caballero, 2018, 98-99). In fact, certain types of care, such as preventive imaging diagnostics, reproductive health services, or prenatal care, would be delayed due to the reluctance of the National Health Services to provide specialized assistance to undocumented subjects (Lebano *et al*., 2020, 2-9).

Furthermore, the institutional discrimination, as mentioned, would jeopardize women's rights because they would avoid access to healthcare services due to the fear of being persecuted by migration authorities. In this context, we can mention a case dated 2016 in which an undocumented woman residing in Cyprus, arrived at the emergency unit of the capital's main hospital in critical condition after suffering a miscarriage. Her reluctance to go to the maternity health unit was caused by the fear of being reported as an irregular migrant and, consequently, being expelled. Her fear was concrete, as Cyprian

migration law does not ensure the right to health for undocumented migrants (Lebano *et al.*, 2020, 2-9; UN Committee on Economic, Social and Cultural Rights, 2016). This problem has been confirmed by recent research carried out in the Spanish Basque Country in which the author found barriers in the access to healthcare services for undocumented women. The study also proved the lack of a multicultural approach that would frustrate undocumented migrants' access to healthcare services (Pérez-Urdiales, 2021, 1-11).

In this regard, the limitation of maternal healthcare services for migrant women without residence permits would directly violate the obligation enshrined in the *Convention on the Rights of the Child* and the *Convention on the Elimination of Discrimination Against Women*, which obliges states to guarantee all health services inherent to pre- and post-natal health, including all nutritional services for newborns and mothers. Therefore, motherhood is considered a universal fundamental right that cannot be limited for any reason. On the contrary, authorities should be responsible for providing healthcare services in accordance with the vulnerability of the subjects involved (Feldman, 2016, 28-30). This analysis is necessary as migrant women may have been victims of violence, or genital mutilation, and they may not have enjoyed an adequate level of health in their countries of origin due to the lack of healthcare services. However, as observed, even in states in which the universal right to health is formally guaranteed, some limitations still exist and prevent the real fulfilment of the obligation enshrined in Article 12 of the *Convention on Economic, Social and Cultural Rights*. I am referring to some European Union countries where undocumented migrant women—and in general all those people living without a residence permit— are obliged to pay fees to enjoy healthcare assistance. Author Rayah Feldman highlighted that in Germany, undocumented migrants are entitled to healthcare services for serious illness—emergency care—if they obtain a medical insurance card. However, public officers are obliged to report undocumented migrants to migration authorities (Feldman, 2016, 28-30).

Another issue that is related to the principle enshrined in Article 12 of the *Convention on Economic, Social and Cultural Rights* is the relationship between healthcare and cultural rights. In this context, it is interesting to analyse this issue, focusing on women's right to healthcare. As the Committee on Economic, Social and Cultural Rights observed, states have the obligation to adopt preventive, promotional, and corrective measures to eradicate degrading cultural practices against women and those that encourage gender inequality, violating their right to health (Comité de Derechos Economicos,

Sociales y Culturales de Naciones Unidas, 2000, 8-9). In particular, the main issue is to achieve a balance between the protection of cultural rights and the principle of real equality and non-discrimination to the detriment of women. In relation to this latter point, the important issue is to avoid those cultural practices that restrict and deny their rights (Facio *et al.*, 2017, 48). This approach is based on the fact that cultural practices, being the mirror of the power relations in society and in daily life, would reflect the androcentric patriarchal and discriminatory values that would be the cause of gender inequality (Facio *et al.*, 2017, 49-50). In this context, one of the most problematic issues would be related to the concept of cultural relativism. This approach considers fundamental rights as a reflection of Western culture and they are considered a means to impose this. However, this idea might frustrate the achievement of the principles of equality, freedom, and human dignity for women (Facio *et al.*, 2017, 56-57). In fact, on many occasions, cultural relativism would relegate women to the role of custodian and guardian of the culture, having an impact on their level of physical and mental health. I am referring to some cultural factors that are detrimental to the health of women, such as the inadequate information about female healthcare, illiteracy, malnutrition, the imposition of dress codes, the practice of clandestine abortions—in many countries the termination of pregnancy is considered a crime —, the practice of forced marriages and female genital mutilation (Sharma, 2018, 359-360).

In relation to female genital mutilation, this practice, that most endangers women's health, consists of nonmedical injury to the female genital organs by way of clitoridectomy—total or partial removal of the clitoris, partial or total excision of the labia minora -. This would represent 85% of the practices. Finally, we mention the practice of infibulation, which would be the narrowing of the vaginal opening (Pérez Vaquero, 2005, 1-2). According to UNICEF data, the victims of this degrading and dangerous practice are roughly 200 million women in 30 countries, mainly in the Middle East, North Africa, and Southeast Asia. Despite the growing rejection by the international community, many women are still submitted to these rituals. Besides the healthcare damage, the female genital mutilation would be considered as a violation of the obligation established by Article 5 of the *Convention on the Elimination of Discrimination Against Women*, which establishes that States would have the obligation to take all appropriate measures to '*...modify the sociocultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women"* (Pérez Vaquero, 2005, 1-2).

In order to demonstrate the supremacy of the principles enshrined in Article 5 of the *Convention on the Elimination of Discrimination Against Women* and in Article 12 of the *Convention on the Economic, Social and Cultural Rights* over some accepted cultural practices, it **is** interesting to mention the case of a gynaecologist of Somali origin, working in Florence, who proposed to legalize a protocol that would make possible to carry out the "*type one*" of the female genital mutilation in healthcare centres without risk to the woman's health. He used to call this practice '*sweet infibulation*' or '*sunna rituale*' (Di Pietro, 2007, 13). The proposal was rejected through Resolution 3/2/2004 on the grounds that it would form part of a system of patriarchal values that would represent a direct violation of fundamental rights and, therefore, of Article 5 of the *Convention on the Elimination of Discrimination against Women* (Di Pietro, 2007, 13; Ministerio de Igualdad de España, 2020, 6-106). This concrete case helps us to ponder over the relationship between cultural rights and the right to enjoy the highest attainable standard of physical and mental health. In fact, this latter principle not only ensures an adequate level of healthcare assistance for everybody but also it has an impact on the implementation of all fundamental rights as interrelated norms that would concern the physical and mental health of people (Mann *et al.*, 1994, 6-23).

The research's approach on the right to health encourages us to analyse the condition of undocumented migrants with disabilities. We identify this latter group as people who have physical, mental, intellectual, and sensory disability that makes it difficult for them to participate in social life in the same way as other subjects (UNHCR, 2019, 5). The World Health Organization observes that this vulnerable sector of the population, which includes the group of forced and undocumented migrants, would suffer most from their condition of disability as the denial of rights would cause a higher incidence of disease (UNHCR, 2019, 5). In fact, an undocumented migrant with a disability would be more likely to be excluded from education services and from access to healthcare. That is because, as we observed, the main approach of governments is to guarantee the full access to healthcare only to '*regular*' migrants. In fact, one point of concern remains the right to healthcare for undocumented migrants with disabilities, as many migration laws ensure them just emergency assistance, though this group needs continuous and specialized healthcare (Solanes Corella, 2001; Bonneau, 2024, 43).

In relation to this issue, we can observe different approaches among some EU member states. In Belgium, undocumented migrants have access to healthcare

services only if they proof that the disability is due to a labour accident. Therefore, in order to enjoy welfare services – including the right to healthcare – they need to demonstrate the employment relationship and that the disability has been caused by a labour accident (Bonneau, 2024, 19; Keith *et al.*, 2022, 24-25). In France, undocumented migrants with disabilities have access to healthcare services and their status can be recognized by a specialized team - MPDH - . This office cannot reject applications due to the irregular residence status of applicants, thus migrants have the right to file a legal compliant (Jusot *et al.*, 2019, 1-8; Fédération des acteurs de la solidarité Ile de France, 2023, 2). In Germany, migration authorities can temporarily suspend the deportation decree against undocumented migrants with disabilities. However, this measure – "*Duldung*" - is not considered as a residence permit but a temporary toleration. In this case, they have access to essential healthcare services and some assistance in accordance with their disability. Point of concern is the officers' discretionary treatment in granting healthcare assistance to undocumented migrants with disabilities (Bonneau, 2024, 23). A deep concern is the poor legal framework in other EU countries such as Greece, Spain and Italy. In the first country, undocumented people with disabilities are marginalized and they do not have full access to healthcare services. In Italy basic healthcare services are ensured but other essential social rights are not guaranteed (Bonneau, 2024, 25-27). In Spain, authors have highlighted some normative constraints to have the disability status recognized, though the Spanish law formally ensure the access to primary and emergency healthcare services (Díaz Velázquez *et al*., 2009, 122-123). In fact, the main requirement is the registration of residency - "*empadronamiento*" – that would allow undocumented migrants access to healthcare services. However, often undocumented migrants face constraints in finding a safe place to live due to the rise of house rents in cities such as Madrid or Barcelona (Beilfuss, 2010, 367-388). Actually, in Madrid many NGOs are claiming that undocumented migrants *de facto* are excluded to any social rights due to the administrative requirements for the registration of residency (Pérez, 2024). Therefore, these constraints have a deeper impact on undocumented migrants with disabilities who need periodical healthcare treatment.

If we consider that states have signed and ratified the main human rights conventions that enshrine the universality of the right to healthcare and the highest attainable standard of physical and mental health, we need to support the idea that any legislative measure that breach this principle could be repealed by Supreme Courts. In this regard, it seems useful to mention the Alexy and Ferrajoli approaches on the influence of fundamental rights on

legal systems. The former considers that any legislative measure should be a reflection of human rights principles – Radiation Theory – while the latter distinguishes between "*valid law*" and "*law in force*". Through the first term, Ferrajoli indicates legislative norms in line with human rights principles whereas, with the second one, those that respect only formal rules for their approval. These latter norms are invalid (Ferrajoli, 1995, 354-355; Alexy, 1993, 507-510).

Conclusion

In conclusion, we can see that the principle enshrined in Article 12 of the *Convention on Economic, Social and Cultural Rights* is closely related to other fundamental rights such as the right to food, housing, decent working conditions, and universal healthcare. All together they ensure the achievement of human dignity, which is the main objective of modern legal systems. Consequently, we have reached the conclusion that the level of health depends on the socio-economic conditions of the subjects, so that the right to health, which would include not only healthcare but all the elements that indirectly influence psychophysical well-being, would have a value impact on human dignity. For this reason, the right to health should be assured to all individuals without discrimination. All these mentioned rights should be ensured to everybody, including those migrants who reside in a foreign country without a residence permit. That is because fundamental rights can be considered necessary norms that eradicate the obstacles that *de facto* prevent the real equality among people. For this reason, my research focused on the right to health for the most vulnerable groups, such as undocumented migrant women and migrants with disabilities. That is because the aforementioned article 12 can be achieved only if socioeconomic rights are guaranteed.

We have also observed that the breach of fundamental rights and the limitation of access to health services, would not result in budget savings for states. On the contrary, this would increase costs as people excluded from primary care would be forced to resort to emergency care, which has much higher costs. Likewise, the breach of the right to health and the enjoyment of the highest attainable standard of physical and mental health would be violated when authorities instruct health workers to report the administrative irregular status of migrants who attend health centres. For this reason, I mentioned the Carens' theory of the "*Firewall".* Furthermore, the limitation of the full access to healthcare services in detriment to undocumented migrants has been considered as a direct breach of international law. My idea is that the right to healthcare should be fully ensured to anybody, as well as the enjoyment of all fundamental rights. I consider the universality of human

rights as a necessary principle to guarantee the fulfilment of all obligations established in international conventions that are mandatory for all states.

The examples provided throughout this research such as the discriminatory migration norms concerning the right to housing in Brazil, Italy and Spain and the former Spanish Decree 16/2012, that was not abrogated by the Constitutional Court but by another law, suggest to me that the role and effectiveness of the Ombudsman and the Supreme Courts should be enhanced. That would ensure the respect of international obligations concerning human rights by states. Following this approach, in 2019, the European Commission for Democracy through Law endorsed some guidelines that aim to enhance the role and effectiveness of the European Ombudsman – *The Venice Principles* -. The expected result is the promotion of "good administration" through the protection of fundamental rights (Avtonomov, 2021, 1-16).

References

Alanazi, Anfal Marzouq; Alhudaithi, Muath H; A. Asiri, Meshari Hassan; Saad Alamri, Raghad; S. Alqarni, Saeed Ali; Alotaibi, Raghad Ahmed; Salhawiti, Nada Saleem; Salem F Alqahtani, Mansour; S Asiri, Hamad Mohammed; Mofareh M. Asiri, Mohammed; Alruwaili, Janab Mirzan "Social and Economic Factors that Influence Health Outcomes in Family Medicine" in *Journal of Advanced Zoology,* vol. 4, issue 5, 2023 https://www.researchgate.net/publication/377381521_Social_and_Economic_Factors_that_Influence_Health_Outcomes_in_Family_Medicine

Alexy, Robert, *Teoría de los derechos fundamentales*, ed. Centro Estudios Constitucionales, Madrid, 1993

Asensi Sabater; José "Origen e Historia del Estado Social" in A. Noguera Fernández y A. Guamán Hernández, *Lecciones sobre Estado Social y Derechos Sociales,* ed. Tirant Lo Blanch, Valencia, 2014

Avtonomov, Alexei "Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance" in *Laws*, 10, 51, 2021

Barrére Unzueta, María Ángeles "Igualdad y discriminación positiva: un esbozo de análisis teórico conceptual" in *Género y Derechos Humanos,* ed. Mira, Zaragoza, 2002

Bascherini, Gianluca, *Immigrazione e diritti fondamentali*, ed. Jovene Editore, Naples, 2007

Beauchamp, Dan "Public Health as Social Justice" in *Health and Social Justice,* ed. Richard Hofrichter, New York, 2003

Binns, Colin; Low, Wah-Yun "What Is Public Health?" in *Asia-Pacific Journal of Public Health*, vol. 27, 2015 https://www.researchgate.net/profile/Wah-Yun-Low/publication/270657006_What_Is_Public_Health/links/5b6d3729a6fdcc87df706228/What-Is-Public-Health.pdf

Bobbio, Norberto, *El tiempo de los derechos,* ed. Sistema, Madrid, 1991

Bonneau, Louise *Navigating disability and irregular status in Europe*, ed. PICUM, Brussels, 2024 https://picum.org/wp-content/uploads/2024/12/Navigating-disability-and-irregular-status-in-Europe.pdf

Boso, Alex; Vancea, Mihaela "Should irregular migrants have the rights to healthcare? Lessons learnt from the Spanish case" in *Critical Social Policy*, Vol. 36, n°2, 2016 https://www.researchgate.net/publication/290220371_Should_irregular_migrants_have_the_right_to_healthcare_Lessons_learnt_from_the_Spanish_case

Brashear, Madeline "Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia" in *Voces Novae*, vol.9, art. 5, 2017 https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1108&context=vocesnovae

Carretero Palacios, Amparo "Migraciones y género. La feminización de la migración transnacional" in *Material informativo en interculturalidad y migración de la Junta de Andalucía*, 2015

CEDAW, 1999 General recommendation No. 24: Article 12 of the Convention (women and health par. 12) https://www.refworld.org/legal/general/cedaw/1999/en/11953

Celkis, Paulius; Venckiene, Egle "Relationship between the right to dignity and the right to healthcare" in *International Journal of Arts and Commerce*, Vol. 3, n. 5, 2014 https://www.researchgate.net/publication/278025927_RELATIONSHIP_BETWEEN_THE_RIGHT_TO_DIGNITY_AND_THE_RIGHT_TO_HEALTHCARE

Cholewinski, Ryszard "Borders and Discrimination in the European Union*"* in Cholewinski, Ryszard, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, ed. Clarendon Press, Oxford, 1997

Cholewinski, Ryszard "Study on obstacles to effective access of irregular migrants to minimum social rights" in *Council of Europe Publishing*, 2005 https://www.coe.int/t/dg3/migration/archives/documentation/Legal_texts/5879-7-Effective%20access%20of%20irregular%20migrants%20to%20minimum%20social%20rights_en.pdf

Comité de Derechos Economicos, Sociales y Culturales de Naciones Unidas "El derecho al disfrute del más alto nivel posible de salud: 11/08/2000. E/C.12/2000/4, CESCR OBSERVACION GENERAL 14. General Comments" in *Informe del Consejo Economico y Social de Naciones Unidas*, 2000 https://www.refworld.org/es/leg/coment/cescr/2000/es/36991

Contreras, Sebastián "Ferrajoli y los derechos fundamentales" in *Revista de la Inquisición (Intolerancia y Derechos Humanos)*, v. 16, 2012

Crepeau, Francois; Hastie, Bethany "The Case of Firewall protection for Irregular Migrants" in *European Journal of Migration and Law"* n. 17, 2015 https://www.researchgate.net/publication/282552407_The_Case_for_%27Firewall%27_Protections_for_Irregular_Migrants

Daniels, Norman; Kennedy, Bruce; Kawachi, Ichiro "Why Justice is Good for Our Health: The social Determinants of Health Inequalities" in *Daedalus. Bioethics and Beyond*, vol. 128, n. 4, 1999 https://docenti.luiss.it/protected-uploads/175/2015/05/20150521152802-Daniels-Kennedy-Kawachi_Justice-is-Good-for-our-health-copy.pdf

De Almeida Mendes, Aylle; Ribeiro Brasil, Deilton "A Nova Lei de Migração Brasileira e sua Regulamentação da Concessão de Vistos aos Migrantes" in *Seqüência (Florianópolis),* n. 84, 2020 https://www.scielo.br/j/seq/a/m857phqNWZFzQDZ8vqhLDLM/

De los Ángeles Ríos Ruíz, Alma; Fuente del Campo, Antonio "Public medical services and the human right to health" in *Perfiles de las Ciencias Sociales,* year 6, n. 12, 2019

De Lucas, Javier, *El Desafío de las Fronteras*, ed. Temas de Hoy, Madrid, 1994

Di Pietro, Francesco "Le norme sul divieto delle pratiche di mutilazione genitale femminile" in *Diritto e diritti*, 2007

Díaz Velázquez, Eduardo; Huete García, Agustín; Huete García, María de los Ángeles; Jiménez Lara, Antonio, *Las personas inmigrantes con discapacidad en España*, ed. Ministerio de Trabajo e Inmigración, Madrid, 2009 https://consaludmental.org/publicaciones/Personasinmigrantesdiscapacidad.pdf

E. De Benito "Undocumented migrants in Spain will have universal healthcare from day one" in *El Pais*, 17 July 2018 https://english.elpais.com/elpais/2018/07/17/inenglish/1531816315_449712.html

Elster, Jon "La ética de las decisiones medicas" in Elster, Jon; Herpin, Nicolas *La ética de las decisiones médicas,* ed. Gedisa, Barcelona, 2000

Evans, Tony "A human Rights to health" in *Third World Quarterly,* n. 2, vol. 23, 2002 https://library.fes.de/libalt/journals/swetsfulltext/13092691.pdf

Facio, Alda; Victoria, Anya "Los derechos culturales y los derechos de las mujeres son derechos humanos y como tales, deben ser gozados en igualdad" in *Revista Europea de Derechos Fundamentales,* 2017 https://dialnet.unirioja.es/servlet/articulo?codigo=6143999

Fédération des acteurs de la solidarité Ile de France "Note sur l'accès aux droits des personnes étrangères en situation de hándicap" 2023

Feldman, Rayah "Migrant women battle for access to maternity care" in *Socialist Lawyer. Women Fighting Back: International and Legal,* vol. 72, 2016 https://www.scienceopen.com/hosted-document?doi=10.13169/socialistlawyer.72.0028

Fernández Burgueño, Borja, *Boletín de jurisprudencia de protección internacional segundo semestre de 2016,* ed. CEAR, Madrid, 2016 https://www.cear.es/wp-content/uploads/2017/05/BOLETIN-JURIDICO-CEAR-SEGUNDO-SEMESTRE-2016.pdf

Fernando López, Ramón "El reconocimiento legal del derecho a disfrutar de una vivienda" in *Revista de Administración Pública,* 212, 2020

Ferrajoli, Luigi "Derechos Fundamentales" in *Derechos y Garantías. La ley del más débil,* ed. Trotta, Madrid, 1999

Ferrajoli, Luigi, *Derecho y Razón,* ed. Trotta, Madrid, 1995

Frazer, Elizabeth; Lacey, Nicola, *The Politics of Community. A feminist critique of the liberal-communitarian debate,* ed. Harvester, London, 1993

General recommendation XXX on discrimination against non-citizens, 2004 https://www.refworld.org/legal/general/cerd/2004/en/39027

González Beilfuss, Markus "El papel de la jurisprudencia constitucional en el desarrollo del derecho público de la migración" in *Revista catalana de dret public,* n°40, 2010 https://dialnet.unirioja.es/servlet/articulo?codigo=3213554

González Beilfuss, Markus "Inmigración y padrón municipal de habitantes" in *Anuario del Gobierno Local*, 2010

Goul Andersen, Jørgen "Welfare States and Welfare State Theory" in *Centre for Comparative Welfare Studies. Working Paper,* 2012 https://www.researchgate.net/publication/271217758_Welfare_States_and_Welfare_State_Theory

Hausler, Katharina Anna "Defenceless workers? The protection of irregular migrant workers in Europe with a focus on the situation in Europe and Spain" in *Working paper. Institut de dret public,* n. 1, 2010

Ikram, Umar; Malmusi, Davide; Juel, Knud; Rey, Grégoire; Kunst, Anton "Association between integration policies and immigrants' mortality: an explorative study across three European countries" in *Plos One*, Vol. 10. n°6, 2015 https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0129916

IOM, *Migración internacional, salud y derechos humanos*, ed. IOM, Genève, 2013 https://publications.iom.int/system/files/pdf/iom_unhchr_sp_0.pdf

Jusot, Florence; Dourgnon, Paul; Wittwer, Jérôme; Sarhiri, Jawhar "Access to State Medical Aid by Undocumented Immigrants in France: First Findings of the "Premiers Pas" Survey" in *Institute for Research and Information in Health Economics*, n. 245, 2019 https://www.irdes.fr/english/issues-in-health-economics/245-access-to-state-medical-aid-by-undocumented-immigrants-in-france-first-findings-of-the-premiers-pas-survey.pdf

Kawachi, Ichiro "Women's Status and the Health of Women: a view from the States" in *Social Science and Medicine*, n. 48, 1999 https://www.sciencedirect.com/science/article/abs/pii/S027795369800286X

Keith, Liliana; Web, Alex, *A snapshot of social protection measures for undocumented migrants by national and local governments*, ed. PICUM, Brussels, 2022 https://picum.org/wp-content/uploads/2022/08/A-snapshot-of-social-protection-measures-for-undocumented-migrants-by-national-and-local-governments_EN.pdf

Klimczuk, Andrzej "Welfare State" in Bryan, Turner; Kivisto, Peter; Outhwaite, William; Kyung-Sup, Chang; Epstein, Cynthia; Ryan, Michael, *The Wiley-Blackwell Encyclopedia of Social Theory*, ed. Wiley-Blackwell, London, 2017

Lebano, Adele; Hamed, Sarah; Bradby, Hannah; Gil-Salmerón, Alejandro; Durá-Ferrandis, Estrella; Garcés-Ferrer, Jorge; Azzedine, Fabienne; Riza, Elena; Karnaki, Pania; Zota, Dina; Lino, Athena "Migrants' and refugees' health status and healthcare in Europe: a scoping literature review" in *BMC Public Health*, n. 20, 2020 https://www.researchgate.net/publication/342584247_Migrants%27_and

_refugees%27_health_status_and_healthcare_in_Europe_A_scoping_literature_review

Lema Añón, Carlos, *Salud, Justicia y Derechos. El derecho a la salud como derecho social,* ed. Dykinson, Madrid, 2009

Link, Bruce; Phelan, Jo "Social Conditions on Fundamental Couses of Diseases" in *Journal of Health and Social Behavior,* vol. 80, 1995 https://www.jstor.org/stable/2626958

Mann, Jonathan; Gostin, Lawrence; Gruskin, Sofia; Brennan Troyen; Lazzarini, Zita; Fineberg, Harvey "Health and Human Rights" in *Health and Human Rights,* n. 1, vol. 1, 1994 https://www.jstor.org/stable/4065260

Mason Meier, Benjamin; Mori, Larisa "The highest attainable standard: advancing a collective human right to public health" in *Columbia Human Rights Law Review,* Vol. 37, 2005

Meyer, Ilan; Schwartz, Sharon "Social Issues as Public Health: Promise and Peril" in *American Journal of Public Health,* 1189, 2000 https://www.researchgate.net/publication/12383675_Social_Issues_as_Public_Health_Promise_and_Peril

Ministerio de Igualdad de España, *La mutilación genital femenina en España,* ed. Ministerio de España, Madrid, 2020 https://violenciagenero.igualdad.gob.es/wp-content/uploads/Estudio_MGF.pdf

Mlambo-Ngcuka, Phumzile "Sexual Health and Women's Rights" in *Harvard International Review,* vol. 38, n. 3, 2017

Montel, Lisa; Ssenyonga, Naomi; Coleman, Michel; Allemani, Claudia "How should implementation of the human right to health be assessed? A scoping review of the public health literature from 2000 to 2021" in *International Journal for Equity in Health,* n. 21, 2022 https://www.researchgate.net/publication/363764754_How_should_implementation_of_the_human_right_to_health_be_assessed_A_scoping_review_of_the_public_health_literature_from_2000_to_2021

Moretti, Sebastien "Refugee protection in Southeast Asia" in *Migration weltweit: Daten - Geschichte – Politik,* 2023 https://www.researchgate.net/publication/375073049_Refugee_Protection_in_Southeast_Asia

Müller, Amrei "The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges" in Sabine Klotz, Heiner Bielefeldt, Martina Schmidhuber, Andreas Frewer *Healthcare as a Human Rights Issue. Normative Profile, Conflicts and Implementation,* ed. Transcript, Bielefeld, 2017 https://www.researchgate.net/publication/355865635_The_Minimum_Core_Approach_to_the_Right_to_Health_Progress_and_Remaining_Challenges

Nylenna, Magne; Bjertnaes, Oyvind; Sperre Saunes, Ingrid; Karin Lindahl, Anne "What is Good Quality of Health Care?" in *Professions and Professionalism,* vol. 5, n. 1, 2015 https://www.researchgate.net/publication/277181203_What_is_Good_Quality_of_Health_Care

OHCHR "CERD Recomendación general Nº 30 (General Comments)", sesión 65, 2004 (par. 32)

OHCHR, *Migraciòn, Derechos y Gobernanza,* ed. UN, Genève, 2015 https://www.ohchr.org/sites/default/files/Documents/Publications/MigrationHR_and_Governance_HR_PUB_15_3_SP.pdf

OHCHR, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situation,* ed. OHCHR, Genève, 2016 https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf

OHCHR, *The economic, social and cultural rights of migrants in an irregular situation,* ed. Genève and New York 2014 https://www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-1_en.pdf

Ouzounakis, Petros; Sialakis, Christos; Iliadis, Christos; Adamakidou, Theodoula; Kourkouta, Lambrini "The Meaning of Quality in Health Services" in *Progress in Health Sciences,* vol. 13, n. 1, 2023

https://www.researchgate.net/publication/371970624_The_Meaning_of_Quality_in_Health_Services

Pace, Paola "Migration and the Right to Health" in *IOM. A review of International Law*, n. 19, 2009 https://publications.iom.int/system/files/pdf/iml_19.pdf

Pallante, Francesco "Gli stranieri e il diritto all'abitazione" in *Costituzionalismo.it*, fascicolo 3, 2016 https://www.costituzionalismo.it/download/Costituzionalismo_201603_600.pdf

Peces-Barba, Gregorio; De Asís Roig, Rafael; Llamas Cascón, Ángel *Cursos de Derechos Fundamentales*, ed. Universidad Carlos III, Madrid, 1995

Pérez Vaquero, Carlos "Las Mutilaciones Genitales Femeninas en la Unión Europea" in *Derecho y Cambio Social*, n. 5822, 2005

Pérez, Antonio "Dieciséis colectivos sociales denuncian las trabas municipales al derecho a empadronarse" in *XLavapiés*, published on October 22nd 2024 https://xlavapies.com/campana-derecho-empadronarse-colectivos-sociales/

Pérez-Urdiales, Iratxe "Undocumented immigrants' and immigrant women's access to healthcare services in the Basque Country (Spain)" in *Global Health Action*, vol. 14, 2021 https://www.researchgate.net/publication/351535579_Undocumented_immigrants%27_and_immigrant_women%27s_access_to_healthcare_services_in_the_Basque_Country_Spain

Pezzullo Gaeta, Matteo "The Global Compact for Migration Agreement and the principle of Universality of Human Rights: a gender perspective" in *Current Issues on Human Rights*, ed. Dykinson, Madrid, 2019

PICUM, *The right to health for undocumented migrants*, ed. PICUM, Brussels, 2022

Ramadani, Yahdi;Tjitrawati Aktieva, Tri; Romadhona, Mochamad, Kevin "Humanitarian commitment: Indonesia's policy on refugees' rights to health" in *Healthcare in low-resources settings*, vol. 12, n. 2, 2024

Richards, David; Gellenty, Ronald "Women's status and economic globalization" in *International Studies Quarterly,* n. 51, 2007 https://www.researchgate.net/publication/227511998_Women%27s_Status_and_Economic_Globalization

Sanz Caballero, Susana "La mujer migrante como grupo especialmente vulnerable en el Derecho Internacional y Europeo: ¿resulta suficiente el actual marco de protección?" in *Derecho de la Economía y de la Integración,* n.6, 2018

Schoukens, Paul; Pieters, Danny, *Exploratory report on the access to social protection for illegal labour migrants,* ed. Council of Europe, Louvain, 2003 https://www.coe.int/t/dg3/sscssr/Source/IllLabMigrReport.PDF

Sharma, Arti "Gender Inequality and Health for Women: some socio-cultural issues" in *International Journal of Research in Humanities, Arts and Literature,* vol. 6, issue 6, 2018

Solanes Corella, Angeles "Sujeto al margen del ordenamiento jurídico: Inmigrantes sin papeles" in *Inmigrantes: una aproximación jurídica a sus derechos,* ed. PUV, Valencia, 2001

Stevenson, Kerrie; Antia, Khatia; Burns Rachel; Mosca, Davide; Gencianos, Genevieve; Rechel, Bernd; Norredam, Marie; LeVoy, Michele; Blanchet, Karl "Universal health coverage for undocumented migrants" in *the WHO European region: a long way to go"* in *The Lancet Regional Health – Europe* -, vol. 41, 2024 https://pubmed.ncbi.nlm.nih.gov/39119095/

Tasioulas, John "The Minimum Core of the Human Right to Health" in *The World Bank Research Paper,* 2017

The International Bank for Reconstruction and Development, *World Development Report 1993: Investing in Health,* ed. Oxford University Press, New York, 1993 https://documents1.worldbank.org/curated/en/468831468340807129/pdf/121830REPLACEMENT0WDR01993.pdf

Toebes, Brigit, *The right to health as a human right,* ed. Bioethic research library, Washington, 1999

UN Committee for Development Policy, *Leaving no one behind, 2*018 https://sustainabledevelopment.un.org/content/documents/2754713_July_PM_2._Leaving_no_one_behind_Summary_from_UN_Committee_for_Development_Policy.pdf

UN Committee on Economic, Social and Cultural Rights *Concluding observations on the sixth periodic report of Cyprus*, 26 October 2016 https://www.refworld.org/policy/polrec/cescr/2016/en/115211

UN General Assembly "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik" in *Human Rights Council Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development,* 25th edition, 30 December 2013 https://digitallibrary.un.org/record/766905?ln=en&v=pdf

UNHCR, *Working with persons with disabilities in forced displacement*, ed. Genève, 2019

Van Ginneken, Ewout "Health care access for undocumented migrants in Europe leaves much to be desired" in *Eurohealth Observer*, n. 4, vol. 20, 2014 https://www.researchgate.net/publication/270450242_Health_care_access_for_undocumented_migrants_in_Europe_leaves_much_to_be_desired

Vuoto, Stefano "Il diritto all'abitazione degli stranieri. Profili problematici della normativa italiana" in *Forum Quaderni Costituzionali*, 1, 2022

Whitehead, Margaret "The Concepts and Principles of Equity and Health" in *International Journal of Health Services"*, n. 22, 1992

WHO Europe "Migrant women's health issues: addressing barriers to access to health care for migrant women with irregular status" in *WHO reports,* n. 6, 2016

World Health Organization "Constitution of the World Health Organization" in *Basic Documents,* ed. Geneva, 1986 https://www.who.int/docs/default-source/documents/publications/basic-documents-constitution-of-who.pdf

Yaroshenko, Oleg; Steshenko, Volodymyr; Tarasov, Oleh; Nurullaiev, Ilkin; Shvartseva, Mariia “Right to health care: the practice of the ECtHR and the case of Ukraine” in *The Age of Human Rights Journal*, n. 18, June, 2022 https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/6496