

Christian Erk
Health, Rights and Dignity
Philosophical Reflections on an Alleged Human Right

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verlag

Frankfurt | Paris | Lancaster | New Brunswick

Bibliographic information published by Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie;
detailed bibliographic data is available in the Internet at <http://dnb.ddb.de>

This thesis was accepted as a doctoral dissertation by the Faculty of Arts of the University of Zurich
in the fall semester 2010 on the recommendation of Prof. Dr. Urs Marti and Prof. Dr. Georg Kohler.

Cover:

Loth, Johann Karl (1632-1698) - The Good Samaritan - ca. 1676



North and South America by
Transaction Books
Rutgers University
Piscataway, NJ 08854-8042
trans@transactionpub.com



United Kingdom, Eire, Iceland, Turkey, Malta, Portugal by
Gazelle Books Services Limited
White Cross Mills
Hightown
LANCASTER, LA1 4XS
sales@gazellebooks.co.uk



Livraison pour la France et la Belgique:
Librairie Philosophique J. Vrin
6, place de la Sorbonne; F-75005 PARIS
Tel. +33 (0)1 43 54 03 47; Fax +33 (0)1 43 54 48 18
www.vrin.fr

©2011 ontos verlag
P.O. Box 15 41, D-63133 Heusenstamm
www.ontosverlag.com

ISBN 978-3-86838-093-4

2011

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FSC-certified (Forest Stewardship Council)
This hardcover binding meets the International Library standard

Printed in Germany
by CPI buch bücher.de



Meinen lieben Eltern,
ohne die ich nicht wäre, was ich bin,
in tiefer Dankbarkeit.

“In toto corde tuo honora patrem tuum et gemitus matris tuae ne obliviscaris.
Memento quoniam, nisi per illos, natus non fuisses; et quid retribues illis, quomodo et illi tibi?”
(*Jesus Sirach/Ecclesiasticus 7, 27f (28f)*)



Meiner geliebten Frau Nadja,
ohne deren Geduld und Unterstützung
diese Arbeit nicht möglich gewesen wäre.

“Gratia enim verecundiae illius super aurum.”
(*Jesus Sirach/Ecclesiasticus 7, 19 (21)*)



Abstract

Christian Erk

“Health, Rights and Dignity: Philosophical Reflections on an Alleged Human Right”

Health is perhaps the most fundamental condition of human life. As such, it has been recognised as a human right by a variety of international and national documents since the World Health Organization (WHO) was established in 1946. These days, no one seems to doubt the stipulation that “health is a fundamental human right” (CESCR, General Comment No. 14). Yet, it is far from clear which normative background actually justifies this right: the philosophical underpinnings of the human right to health “remain largely a matter of guesswork” (Toebe, 1999b: 32). In order to remedy this unfortunate and intellectually dangerous insufficiency, this doctoral thesis aims at clarifying the idea of a ‘human right to health’ by reflecting on its philosophical underpinnings.

In doing so it shall offer an enquiry into the philosophical coherence of the concept which has come to be called the ‘human right to health’ and find an answer to the question whether health can be considered a human right from a philosophical perspective if one assumes that human rights are grounded in the inherent dignity of the human person. While offering a philosophical argument, this thesis shall not be philosophical-historical or doxographical in nature; it shall thus neither present and trace back the history as well as the development of the concept of the human right to health as it is used today nor outline or compare the prevalent opinions and arguments in this field. Rather, the purpose of this thesis is to analyse the concept of the human right to health systematically, to find out if such a right can exist, and if so, establish what it could entail from a philosophical perspective.

The answer to the research question of this thesis shall be developed by analysing the concepts underlying the idea of the human right to health as a right grounded in dignity, i.e. health, (human) rights and dignity. Once it is understood what the concepts contained in the proposition ‘health is a

human right grounded in dignity' signify, the answer to the question about the proposition's philosophical tenability should be rather self-evident.

The following discussion and argument shall show that health cannot be conceived of as a human right if we take human rights to be the rights of all human beings of all times which "derive from the inherent dignity of the human person" (ICESCR, Preamble). The catalogue of human rights has to consequently be adapted and reduced to what can be reasonably covered by the concept of a human right. It shall, however, also be argued that health – although not a human right in a strict sense – can still be thought of as a moral, passive negative claim-right either grounded in the human right to life or in a moral duty to health – even though such a moral right would be rather limited in scope.

Acknowledgements



Writing this doctoral thesis has been an important part of my pilgrimage through life – a journey of intellectual maturation, which has not only taught me crucial (although sometimes disillusioning) lessons about science, but also (and more importantly) forced me to reflect on and challenge the basic principles of my thinking. Now that the last sentence of this thesis has been written and my doctoral journey has ended, I do not want to leave unmentioned those, to whom this thesis and I are much obliged and whose support has made this journey possible in the first place. For, although writing a doctoral thesis can be lonely, one certainly cannot and does not do it alone.

Despite the fact that this thesis has been written in English, I am taking the liberty of expressing my gratitude in German, even though this might be considered unc customary. I have chosen to do this because matters, which are near to one's heart, are best expressed in one's mother tongue.

Zu Dank bin ich in erster Linie meinen Referenten Professor Dr. Urs Marti und Professor Dr. Georg Kohler verpflichtet, die sich zur Betreuung meines Dissertationsvorhabens an der Universität Zürich bereiterklärt haben. Ohne diese ihre Bereitschaft würde diese Arbeit wohl nur im Reich der Ideen existieren.

Professor Dr. Johannes Rüegg-Stürm möchte ich dafür danken, daß er es mir ermöglicht hat, mich durch die Arbeit als Unterrichtsassistent an seinem Lehrstuhl an der Universität St. Gallen für den Zeitraum der Dissertation zu finanzieren und mir dabei zudem ein hohes Maß an Freiheit für die Arbeit an meiner Dissertation eingeräumt hat. Er hat durch seine Beschäftigung mit dem Thema Krankenhausmanagement auch unbewußt dafür gesorgt, daß ich den Kontakt mit der praktischen Seite des Phänomens Gesundheit nicht verloren habe.

Danken möchte ich zudem Frau Professor Dr. Ilona Kickbusch für die Möglichkeit, mit ihr als Forschungsassistent am 'Graduate Institute of International and Development Studies' (Genf) zusammenzuarbeiten und zu publizieren; die dieser Arbeit zugrundeliegende Forschungsfrage ist das Resultat des kritischen Hinterfragens der im Rahmen dieser Tätigkeit gewonnenen Einsichten in das Themenfeld 'Global Health Diplomacy' bzw. 'Global Public Health' und wäre ohne sie so wohl nicht entstanden.

Ich möchte mich vor allem aber auch bei all denjenigen Personen bedanken, die bereit waren, sich Zeit für meine Fragen zu nehmen, ihr Wissen mit mir zu teilen und mir in der ein oder anderen Form mit Rat, Hinweisen, durch kritische Diskussion meiner Ideen oder einfach durch kritische Rück- und Verständnisfragen zur Seite zu stehen. Ein paar Personen namentlich herauszuheben würde bedeuten, anderen Unrecht zu tun. Durch ihre Anregungen und Anmerkungen hat die vorliegende Arbeit viel an Qualität gewonnen; sie steht somit nicht nur mit einem Fuß auf ihren gedanklichen Schultern, sondern auch in ihrer Schuld. Allenfalls vorhandene Schwächen liegen vollkommen in meiner Verantwortung.

Nicht unerwähnt lassen möchte ich auch meinen ehemaligen Lehrer, Herrn Albert Regenfelder, der durch seine Begeisterung für die griechische Antike und altgriechische Sprache mein Interesse an der Philosophie (d.h. der Liebe zur Weisheit und damit dem Streben nach der Erkenntnis des höchsten Grundes der Dinge) geweckt und mich gefördert hat.

Meinen lieben Eltern und meiner geliebten Frau Nadja ist diese Arbeit gewidmet. Meinen Eltern kann ich im Grunde gar nicht ausreichend danken für ihre unerschöpfliche Liebe und für all die Opfer, die sie für mich und meinen Bruder dargebracht haben. Danke für eure Geduld, Gefühle, Zeit und sonstige Unterstützung, die ihr für uns aufgebracht habt. Sie waren auf meinem bisherigen Weg meine größten Förderer, aber auch strengsten und ehrlichsten Kritiker – vor allem aber haben sie mich als Mensch geformt. Ihnen verdanke ich alles. Auch die vorliegende Arbeit durfte jedoch mehr als einmal von ihrer Expertise als Ärzte sowie der lebendigen Diskussionen mit ihnen profitieren und ist nicht zuletzt auch durch die Werte inspiriert, die sie in mir eingepflanzt haben. Ich hoffe, daß ihr auf das Ergebnis Eurer Erziehung mit Stolz blicken könnt. Danke, daß Ihr für mich da seid!

Meiner Frau Nadja danke ich für das wundervolle Geschenk ihrer Liebe sowie für ihre Fürsorge und Unterstützung. Besonders bin ich jedoch zu Dank (aber im Grunde auch zu einer Entschuldigung) dafür verpflichtet, daß sie die Phasen, in denen ich zwar körperlich an-, aber mit dem Kopf abwesend und im Elfenbeinturm der Philosophie war, geduldig ertragen und es darüber hinaus geschafft hat, mich durch sanftes Klopfen an die Türe des Turmes jeweils wieder daran zu erinnern, daß Elfenbein auf die Dauer nicht wärmt. Ich liebe Dich und danke Dir für all das Gute und Schöne, das Du in mein Leben gebracht hast!

Christian Erk
September 2010

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I THE HUMAN RIGHT TO HEALTH: A PERVASIVE BUT OPAQUE IDEA

“Was jedermann für ausgemacht hält,
verdient oft am meisten untersucht zu werden.”
Georg Christoph Lichtenberg (1742–1799)

1 Human Rights: A Practice with Little Theory

Human rights¹ did not just happen nor did they have to be invented; they had to be discovered – a process which is ongoing.² Since their discovery, the idea of human rights has had an impressive trajectory, and these days the idea of rights and especially human rights is pervasive. As Tasioulas notes, the discourse of human rights has even acquired “in recent times [...] the status of an ethical lingua franca” (Tasioulas, 2007: 75; also cf. Knowles, 2001: 253). In addition, Thomasma states that “there are few mechanisms available other than human rights to function as a global ethical foundation” (Thomasma, 2008: 13). Manfred Nowak, the United Nations’ (UN) Special Rapporteur on torture, even holds that human rights constitute the only contemporary value system, which can claim universal

¹ As Cranston (1983: 1) mentions “‘Human rights’ is a fairly new name for what were formerly called ‘the rights of man’. It was Eleanor Roosevelt in the 1940s who promoted the use of the expression human rights when she discovered, through her work in the United Nations, that the rights of men were not understood in some parts of the world to include the rights of women. The rights of man at an earlier date had itself replaced the original term ‘natural rights’.”

² For an overview of the history of human rights in western political philosophy as well as in East-West and North-South relations cf. Vincent, 1986: 19ff, 61ff, 76ff; also cf. Cranston, 1983. In contrast to the common belief that individual rights did not exist before the seventeenth century and came into being with Hobbes, Locke and Paine, Mäkinen (2006a: 168) states that “recent scholarly research has shown that if we wish to find the beginning of the concept of individual rights we have to turn to the Middle Ages”. Tierney (cf. 1989: 625 as well as 1997: 58ff) adds that patterns of language which take ‘ius naturale’ not only as natural law or cosmic harmony, but also a faculty, ability, power or claim of individual humans qua humans can be traced back to the 12th century.

validity (Nowak, 2002: 13). The idea of human rights has become ‘in vogue’ and the “dominant morality of our time, [...] a truly global morality” (Perry, 2007: 4) – some, like Weissbrodt (1988: 1) even call it “the world’s first universal ideology”. The worldwide acceptance of the idea of human rights is also reflected by the fact that all of the almost 200 states in the world have acknowledged the existence of human rights – either in their constitutions and/or by means of ratification of one or more of the relevant treaties, declarations or covenants of international law. Today, hardly any state would dare – at least not publically – to question the very idea of human rights. Consequently, there is scarcely any statement with regard to social and political life that is not affirmed using the term ‘rights’: “these days it is usually not long before a problem is expressed as a human rights issue” (Clapham, 2007: 1). To cut a long story short, we live in an age of rights:

“A new idea has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developed world and the liberals of Hampstead and Manhattan. Human rights started their life as the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political program of revolutionaries and dissidents. But their appeal is not confined to the wretched of the earth. Alternative lifestyles, greedy consumers of goods and culture, the pleasure-seekers and playboys of the Western world, the owner of Harrods, a former managing director of Guinness plc, as well as a former king of Greece, have all glossed their claims in the language of human rights.”
(Douzinas, 2000: 445)³

Far from being a modern idea, the concept of human rights has been constantly evolving throughout the history of mankind. One could even say that – despite different ways of addressing it throughout history – the question of man and his rights is as old as mankind itself. The complex intellectual history of the idea of human rights has its roots in Christian

³ Also cf. *Fayed v United Kingdom* (1994) 294 Eur Court HR (ser A) 23; *Saunders v United Kingdom* (1996) VI Eur Court HR 2044; *The Former King of Greece v Greece* (2000) 33 EHRR 516.

religion (Old Testament: Genesis 20, 1-5; New Testament: Matthew 20, 12; Acts 10, 34; Galatians 2, 6; Romans 2, 11), ancient legal codes of conduct (Hammurabi, Draco, Solon) as well as ancient Western (Plato, Aristotle, Thucydides, Cicero, Seneca, Epictetus) and ancient Asian (Confucius, Kautilya, Asoka) thinking and philosophy (cf. Ishay, 2007; Punt, 1987). Precursors of our modern human rights can also be found on the American continent where Inca and Aztec codes of conduct and justice as well as an Iroquois Constitution (cf. Johansen, 1995) existed well before the ‘Universal Declaration of Human Rights’ (UDHR) was issued by the United Nations (UN) in 1948. Despite these widespread roots, we owe it to modernity and particularly the 20th century that human rights have been explicitly formulated as well as catalogued and that it has codified “die geistliche, die ideelle Würde des Menschen in eine Rechtsinstitution innerhalb des Gemeinwesens” (Huber & Tödt, 1978: 123), which obliges the whole international community.

But the mere existence and continuous ratification of international human rights instruments does not allow for the conclusion that there is a universal concept of human rights. Upon closer look, a regrettable lack of theory becomes obvious. Although the idea of universal human rights is being increasingly accepted, explicated and refined in the realm of international law on practical grounds, there is no universally shared theoretical foundation of such rights: “the morality of human rights is not well understood” (Perry, 2007: 4). While it is undoubtedly true that there is something “deeply attractive” (Sen, 2004: 315) about the idea of human rights, attractiveness alone cannot be a sustainable foundation for the ever-growing catalogue of alleged human rights. The craft and art of philosophy is quite similar to the construction of a building in that both require a solid basis; otherwise, they become unstable as work progresses and ultimately collapse. Even if all the walls and ceilings have been erected perfectly, this cannot make up for a weak base. If one looks at the foundation of the concept of human rights one soon has to realise that – as Griffin puts it – the term ‘human right’ has become “seriously debased” (2001a: 306), “nearly criterionless” (2008: 14) and “less determinate and more disputed than most common nouns” (2001a: 307). This might be due to the fact that

“there are few criteria for determining when the term is used correctly and when incorrectly” (Griffin, 2008: 14).

“When during the seventeenth and eighteenth centuries the theological content of the idea was abandoned, nothing was put in its place. The term was left with so few criteria for determining when it is used correctly, and when incorrectly, that we often have only a tenuous, and sometimes plainly inadequate, grasp on what is at issue. Its indeterminateness of sense is not something characteristic of ethical terms in general; it is a problem specifically [...] with the term ‘human right’.” (Griffin, 2008: 2)

The reason for this grievance is the fact that human rights are “the rights of lawyers, not the rights of philosophers” (Nickel, 2007: 7).⁴ Hence, it is not surprising that the major human rights documents signed by the international community during the past fifty years do not address underlying philosophical issues and are not concerned with identifying the normative foundation of human rights. In fact, “there is very little moral philosophy written into the documents that constitute the framework for the United Nations human rights regime” (Puchala, 1995). In consequence of this unfortunate lack the realm of human rights seems to be rather theory-free. That this description is not a cynical phantasm, but indeed a true description of reality, can be gathered from the actual experiences of Jacques Maritain, a French theologian and philosopher who headed the French delegation at the UNESCO meetings in Mexico City during November and December 1947:

“During one of the meetings of the French National Commission of UNESCO at which the Rights of Man were being discussed, someone was astonished that certain proponents of violently opposed ideologies had agreed on the draft of a list of rights. Yes, they replied, we agree on these rights, providing we are not asked why. With the ‘why’, the dispute begins. The subject of the Rights of Man provides us with an eminent example of the situation that I tried to describe in an address to the

⁴ And, even if philosophers attend to the concept of human rights, they “in the manner of magicians, pull rights out of nowhere” (Griffin, 2001a: 306).

second international conference of UNESCO⁵, from which I take the liberty of quoting a few passages. ‘How,’ I asked, ‘is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and opposing schools of thought? Since the aim of the UNESCO is a practical aim, agreement among its members can be spontaneously achieved by virtue not of common speculative notions, but of common practical notions; not on the affirmation of the same conception of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action.’” (Maritain, 1998: 77)

The Universal Declaration of Human Rights was and is not a declaration about common intellectual and philosophical conceptions and ideas, but a pragmatic achievement. The drafting parties agreed on a common and – given the differing views – necessarily theory-free denominator of practical principles. The philosophical underpinnings were sketched only vaguely by putting down on paper that people are born free and equal in dignity and concluding that they have equal and inalienable rights. Why this is so, why human beings are only born, but not conceived free and equal in dignity, and how dignity is the source of rights, nobody really knows. Men, mutually opposed in their theoretical views, came to a purely practical agreement of what constituted a list of human rights. Maritain’s experience that international human rights documents in some sense bypass philosophical debate by simply and pragmatically establishing a set of positive legal norms is corroborated by Weston who states that “to say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope – which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers.” (1984: 262) Freeman adds that “there is no adequate theory of human rights, and there is a need for greater theoretical

⁵ This conference took place in Mexico City on November 6th, 1947.

rigor” (1994: 494). One cannot help but call this lack of theory a serious deficit – one, which has not been overcome to date.

It could be replied that the preamble of the Universal Declaration of Human Rights actually mentions the ‘inherent dignity’ and the consequential ‘equal and inalienable rights of all members of the human family’. Given this wording, one would be tempted to conclude that all the signatories have at least some common philosophical conception of the source of human rights. But, does it actually suffice to postulate the natural evidence of the inalienable dignity of man without explicitly grounding it in and giving it a commonly accepted anthropology? As experience and intuition tells us, it does not. This position is substantiated by Konrad Löw’s comparative studies of the understanding and reality of basic rights in the former German Democratic Republic (GDR) and the Federal Republic of Germany. As Löw (1977: 22ff, 127ff, 156ff) convincingly shows, although both sides used terms such as ‘dignity’, ‘equality’ and ‘freedom’, both had a very different understanding of the actual content of these terms. The well-read reader might notice that such differences in understanding are not a thing of the past, but a problem that has outlived the Cold War.

Therefore, as honourable as pragmatism for the sake of the common goal of bettering the life of people and peoples may be⁶, it can only be a short-term solution. Whenever actions have to be suited to the word and concrete

⁶ cf. Maritain (1998: 78): “I am fully convinced that my particular way of justifying the belief in the rights of man and the ideal of freedom, equality, and fraternity is the only one which is solidly based on truth. That does not prevent me from agreeing on these practical tenets with those who are convinced that their way of justifying them, entirely different from mine or even opposed to mine in its theoretical dynamism, is likewise the only one that is based on truth. Assuming they both believe in the democratic charter, a Christian and a rationalist will, nevertheless, give justifications that are incompatible with each other, to which their souls, their minds, and their hearts are committed, and about these justifications they will fight. God forbid that I should say it is not important to know which of the two is right! It is vitally important. There remains, however, an agreement on the practical affirmation of that charter, and they can formulate together common principles of actions.”

human rights instruments have to be implemented, having a clear theoretical foundation of human rights becomes unavoidable. Moreover, as the human rights theorist Freeman notes, “rights without reasons are vulnerable to denial and abuse. The human rights struggle is certainly motivated by passion, but it is also influenced by argument.” (Freeman, 1994: 493) The theoretical foundation of human rights is not something that everyone can have his own opinion about as long as one aims for the same rights. In the end, it is the justification and specification, which determines a specific human right’s actual meaning and content. It is very likely that the almost insurmountable difficulties in bringing the human rights talk and declarations to life are due to their deficiencies and differences in justification and specification.

Furthermore and as the most detrimental consequence, without a sound philosophical foundation of human rights there is no end to the catalogue of human rights. The result being, “an unruly proliferation of incompatible or often just incredible rights claims” (Tasioulas, 2007: 75). Given the fact that such a foundation is missing, all kinds of human rights have mushroomed up “uncontrollably” (Griffin, 2001b: 2) over the last decades: from peace, help in the event of a natural disaster and comprehensive sexual education to euthanasia, globalisation and killing an unborn child based on a woman’s right to choose virtually everything is conceptualised as a human right – the result being an indiscriminate, dubious and quite possibly an irresponsible inflation or hypertrophy of human rights. But: Do we indeed have all these rights? If so, why do we have them? If not, why not? These questions cannot be answered without reference to a theory of human rights, which explicates their foundation.

This thesis takes up the just posed questions and is devoted to scrutinising the philosophical soundness of one right of this long list of human rights which is “characterized by particular vagueness” (Toebe, 1999a: 661), but which is nevertheless asserted by philosophers, political scientists, physicians and economists alike (cf. Clapham & Robinson, 2009): the so-called ‘human right to health’ or – as it is also referred to – the ‘human right to the highest attainable standard of health’.

2 The Human Right to Health

“It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for.”

Kofi Annan, Former UN Secretary General

“Wer nichts weiß, muss alles glauben.”

Marie v. Ebner-Eschenbach

The idea that there is such a thing as a human right to health, i.e. that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” (Preamble of the Constitution of the World Health Organization (WHO); also cf. CESCR, General Comment No. 14), has become pervasive. Every country in the world is now party to at least one human rights treaty that addresses health-related rights. Because of this, Navanethem Pillay, UN High Commissioner for Human Rights, seems to state the obvious when he writes that “the right to health is a fundamental part of our human rights” (Pillay, 2008: 2005). This right has, however, not only entered the realm of politics and policies, but is also defended in academic circles: Gostin considers it “perhaps the most important social and economic entitlement” (Gostin, 2001: 29) and Amartya Sen thinks of this right as an “extraordinarily important subject that does not get as much attention as it deserves” (Sen, 2008: 2010).

2.1 The Human Right to Health in International Law

As has been adumbrated, the human right to health has become acknowledged by and firmly embedded in a significant number of international and regional human rights instruments governing the conduct of states, organisations and individuals. These instruments give the individual some sort of health-related human right vis-à-vis the state or international community, which in turn has the responsibility to respect, protect and fulfil it, i.e. not to violate it, to prevent its violation and to create policies, structures and resources that promote and enforce that right (cf. Eide, 1995). The most prominent examples of these instruments are found in:

1. United Nations' Texts on the Right to Health:

- The third paragraph of the preamble of the Constitution of the World Health Organization (1946)
- Article 25.1 of the Universal Declaration of Human Rights (1948)
- Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Article 12 of the International Covenant on Economics, Social and Cultural Rights (ICESCR) (1966)
- Articles 11.1 (f) and 12 of the UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (1979)
- Article 24 of the UN Convention on the Rights of the Child (1989)
- General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) (2000)

2. Regional Texts on the Right to Health:

- Article 11 of the European Social Charter of 1961 as revised in 1996 (1996)
- Article 16 of the African Charter on Human and People's Rights ('Banjul Charter') (1981)
- Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988)
- Article 11 of the American Declaration of the Rights and Duties of Man (1948)
- Article 39 of the Arab Charter of Human Rights (2008)

3. Other General Texts on Health and Human Rights:

- The Declaration of Alma Ata (1978)

- People's Charter for Health (2000)
- The Leaders Statement on the Right to Health (2005)

There is also a variety of further international documents, which relate to health and human rights and/or touch upon one of its aspects as e.g. bioethics (professional ethics, research and experimentation, bioethics and biotechnology), protection of life and physical integrity, health aspects of the right to an adequate standard of living (right to adequate food, right to adequate housing, right to education), protection of vulnerable populations (women, children, disabled, elderly persons, refugees and displaced persons), protection of the environment and the human rights aspects of public health (infectious diseases, business, trade, intellectual property, occupational health and safety, tobacco control) (cf. Marks, 2006; also cf. Leary, 1994: 32ff and Alfredsson & Tomaševski, 1998: 127ff).

2.2 The Lacking Theoretical Foundation of the Human Right to Health

Despite its prominence and pervasiveness, libraries full of writings on its enforcement as well as the fact that every country in the world is party to one of the above-mentioned instruments, the human right to health as stipulated in the legal codifications mentioned previously is something of a mystery and “characterized by particular vagueness” (Toebe, 1999a: 661). Ten years later but still in the same fashion, Ruger (2009: 119) observes that “one would be hard pressed to find a more controversial or nebulous human right than the ‘right to health’”. This vagueness and nebulosity is twofold in nature: it is a mystery both, with respect to its legal ramifications, as well as its philosophical underpinnings.

As far as the legal ramifications are concerned, it is by no means clear “precisely what individuals are entitled to under the right to health, nor is it clear what the resulting obligations are on the part of states” (Toebe, 1999a: 661f). In spite of the wide range of international human rights instruments asserting a human right to health, it does not seem to be clear what the human right to health actually implies from a legal standpoint.

Although Toebes (1999a: 675ff) tries to remedy this vagueness by exploring the scope and core content of the human right to health as explicated in contemporary legal instruments and rulings, this does not solve the second – philosophical – mystery and problem of the human right to health. Most of the literature simply holds that health is a human right because it has been codified; the underlying assumption is that human rights and, by extension, the human right to health are mere legal and therefore positive rights, i.e. rights which are justified with reference to national constitutions and laws or international treaties and documents.⁷ But as Fagan rightly points out and as will be shown later on, equating human rights with legal rights is “philosophically naïve” (Fagan, 2006). I would even dare to say that it would not only be naïve, but also negligent to deal with the human right to health from solely a legal and not also as well as primarily from a philosophical perspective. For, everything can be codified and enacted as a legal right; any parliament could agree upon a law that forbids any movement other than two steps forward followed by one step back. However, adding the word ‘human’ to ‘right’ seems to give the latter a kind of importance that goes beyond the law; it adds moral importance: “human rights are a form of moral rights” (Cranston, 1973: 21; also cf. Nickel, 2007: 46 as well as Orend, 2002: 67) – and as such they have to be validated with reference to a moral theory and not a mere act of legislation. As long as such a foundation is missing, the first mystery and problem – the vagueness of the legal human right to health – cannot be satisfactorily solved. In the end, it is the philosophical justification and specification, which determines a specific human right’s meaning, as well as its legal content. Unfortunately, the philosophical underpinnings of the

⁷ Examples of this position are e.g. Tomaševski (1995) or Riedel (2009). Tomaševski (1995: 126) identifies international health law as the normative framework for a human right to health; this would mean that positive norms are the ultimate foundation for the human right to health. In his essay, which serves as the first chapter of a book devoted to the realisation of the human right to health and which is entitled ‘The Human Right to Health: Conceptual Foundations’, Riedel only addresses legal sources of the human right to health. His conceptual foundation is confined to a positivist account of human rights, but forgets or avoids going one step further to see what lies beyond the realm of legal positivism.

human right to health “remain largely a matter of guesswork” (Toebe, 1999b: 32)⁸ – which is partly due to the fact that we do not have a record of the reasoning and reasons of the creators of the human right to health.

Again, it could be replied that the international instruments enshrining the right to health in law usually refer to the ‘inherent dignity’ of all members of the human family, thereby positioning the human right to health as a right grounded in the dignity of man. This is how the authors of the ICESCR have envisioned the foundation of human rights; they explicitly state that the rights asserted in the ICESCR “derive from the inherent dignity of the human person” (ICESCR, Preamble).⁹ But, without further explication of the exact understanding of the concept of ‘dignity’, i.e. what it is and why it is had (and such explication is unfortunately missing), this is not a foundation of the human right to health but a stipulation that needs to be questioned.

⁸ Also cf. Ruger (2009: 119): “The question of a philosophical and conceptual foundation – a theory – for the right to health has fallen through the cracks at the interdisciplinary intersection of medical ethics, international relations, international human rights law, health policy, health law, and public health law. [...] And while General Comment No. 14, issued by the UN Committee on Economic, Social, and Cultural Rights (UNCESCR), provides the most reliable report on the right to health – defining the goal of this right as ‘the highest attainable standard of mental and physical health’ – it too, by necessity and purpose, lacks a systematic philosophical grounding for the right to health.” Unfortunately, despite her correct analysis of the problem, Ruger (2009) fails to offer such a systematic philosophical grounding of health as human right. She merely refers us to the Aristotelian idea of human flourishing as well as the capability approach and stipulates that the “capability paradigm offers a philosophical justification for a right to health” (Ruger, 2009: 118) – a position, which cannot be upheld if scrutinised closely. The best it can do is to establish health as a moral duty. Any other conclusion would be a misinterpretation of the natural law theory upon which the capability approach is based (cf. chapter I. 3.2.1). In the end, Ruger’s grounding of health as (human) right is a mere stipulation and still highly nebulous.

⁹ Also cf. Pillay (2008: 2005): “The right to health is a fundamental part of our human rights and of our understanding of a life in dignity.”

Consequently and regrettably, this means that – as the concept of human rights in general – the human right to health is theory-free and lacks philosophical foundation. This diagnosis is alarming and positively calls for a treatment and cure! In worst case scenario, the human right to health might just be an arbitrary legal fiction, which does not exist in the realm of morality. However, if it cannot be upheld from a philosophical perspective, what would be the point in talking about its implementation and application as a moral right? In the end and prior to any concerns about or allocation of resources for its implementation, the human right to health is a philosophical problem – and has to be dealt with consistently by means of philosophy first. It may be studied as a problem of law, some other social science or even a natural science for that matter, but these disciplines can only shed light on one part of the picture, whereas only philosophy can provide a unified account of a human and therefore special class of moral right to health.

3 Purpose and Structure of this Thesis

The lack of a philosophical foundation of the alleged human right to health should not be taken lightly. The mere observation that the concept of human rights as presented in today's world – though contested and indeterminate – is already being applied and implemented, however, does not exempt it from the need to be defined. Rather, I agree with Freeman's statement that "evading the task of finding the best grounding for human rights [...] demonstrates a lack of intellectual responsibility" (Freeman, 1994: 493). When it comes to human rights, "conceptual doubts must [...] be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing" (Sen, 2004: 317). And since the human right to health – despite its worldwide and apparently unquestioned acceptance – lacks conceptual clarity, it is a worthy object of enquiry.

This thesis is therefore devoted to overcoming the lack of intellectual responsibility prevalent in the discussion of health as a human right. In

doing so it shall offer a philosophical reflection on the human right to health – although this might involve “deciding some fairly hefty ethical matters” (Griffin, 2001a: 307) and is likely to be a stumbling block causing controversy (but at least there would be debate, which is the necessary catalyst for truth). As should have become clear by now, this thesis shall not be about what is actually covered by international declarations but shall rather present an enquiry into the philosophical foundation of the human right to health and thus attempt to find an answer to the question, whether health can be considered a human right from a philosophical perspective – a discussion that has not been addressed in detail by any international body. The aim of this thesis is to critically assess the stipulation that “health is a fundamental human right” (CESCR, General Comment No. 14) which “derive(s) from the inherent dignity of the human person” (ICESCR, Preamble). The research question of this thesis can therefore be posed as follows:

Assuming that human rights are grounded in the inherent dignity of the human person, can health be conceptualised as a human right from a philosophical perspective?

What follows constitutes a philosophical assessment of the hypothesis that health can be conceptualised as a human right if we assume that human rights are grounded in the inherent dignity of the human person. This thesis takes the metaphysical premise implied by international law (namely that there is such a thing as inherent human dignity) seriously and asks whether the conclusion drawn from this premise (namely that the human right to health is grounded in this premise) is tenable or not.¹⁰ The

¹⁰ As any work in the realm of (moral) philosophy, this thesis and especially the development of its accounts of health and human rights cannot do without certain assumptions and premises, which also serve as its foundation: “In what a great philosopher says there is a pattern. It all flows from one source, a few fundamental ontological ideas. In the light of this source and only in this light, it can all be understood.” (Bergmann, 1969: 82) Unfortunately, the validity of these assumptions and premises – though decisive for the validity of the whole argument (because only true premises produce true conclusions) – cannot be exhaustively defended within the necessarily confined limits of a doctoral thesis.

reader should note that while offering a philosophical argument, this thesis shall not be philosophical-historical or doxographical in nature; it shall thus neither present and trace back the history as well as the development of the concept of the human right to health as it is used today nor outline or compare the prevalent opinions and arguments in this field. Rather, the purpose of this thesis is to analyse the concept of the human right to health systematically and determine whether the hypothesis that such a right exists can be upheld or not. Although it will eventually conclude that health cannot be conceptualised as a human right based on the inherent

“All argument begins with an assumption; that is, with something that you do not doubt. You can, of course, if you like, doubt the assumption at the beginning of your argument, but in that case you are beginning a different argument with another assumption at the beginning of it. Every argument begins with an infallible dogma, and that infallible dogma can only be disputed by falling back on some other infallible dogma; you can never prove your first statement or it would not be your first. All this is the alphabet of thinking.” (Chesterton, 1907)

Strictly speaking, this thesis is built on only one ontological or metaphysical assumption, namely that everything that lives, lives because it has a soul. Although, as I mentioned before, this premise (or the first philosophical principles informing it) cannot be proven in an empirical fashion, I shall nevertheless attempt to demonstrate its reasonableness (cf. chapter I. 1.1), that is, why it is reasonable and rational to explain the phenomenon of life through the concept of soul, i.e. an entelechial principle of life (as far as I am concerned, I do not see how it could be explained differently). Furthermore, the reader will find that the argument posed by this thesis most prominently draws on Aristotelian-Thomistic reasoning. This school of thought has not been chosen, however, because this thesis is meant to be an exercise in Aristotelian-Thomistic philosophy (if this had been the case, a different approach to the topic and structure of the thesis would have been in order). Rather, it has been chosen because it is the paradigmatic case of a philosophy, which takes the concept of soul seriously.

Regardless of whether the reader likes or agrees with the answer to this thesis' research question, I ask him to benevolently engage in this thesis' line of reasoning. By that I mean, to accept its underlying premise, see where it takes him and judge the quality of the argument of this thesis not by its philosophical-historical and doxographical breadth or its premises, but rather by its analytical rigour and consistency of thought.

dignity of the human person, this thesis, however, should not be misunderstood as an offer of an ex-post rationalisation of a preconceived opinion with respect to the possibility of the existence of a human right to health. Rather, it is a quest for truth and reason which is meant to uncover what we can reasonably demand from each other when it comes to health. Its conclusion is the result of an impartial and open-minded assessment of the above-mentioned hypothesis based on what I consider to be the best and most stringent philosophical accounts of health as well as human rights grounded in dignity.

A right is a conclusion which calls for an explanation of its premises; without knowing them, the right assertion is of no actual use, since it would be a mere stipulation. As a result, the following chapters will contain a great deal of groundwork and – by breaking down the research question into its logical components and analyse them systematically – try to construct the concepts needed to answer the question whether health is a human right grounded in the inherent dignity of the human person. The question whether health can be conceived of as a human right grounded in the inherent dignity of the human person can be easily answered once we know what it is we are actually talking about:

“Quaedam vero propositiones sunt per se notae solis sapientibus, qui terminos propositionum intelligunt quid significant, sicut intelligenti quod Angelus non est corpus, per se notum est quod non est circumscriptive in loco, quod non est manifestum rudibus, qui hoc non capiunt.” (I^a-IIae q. 94 a. 2 co.)¹¹

So, the search for an answer to the research question of this thesis has to start with a clarification of the concepts underlying the idea of a human right to health grounded in dignity, namely health, (human) rights and dignity. Once we understand what the terms contained in the proposition

¹¹ This translates as: Some propositions are self-evident only to the wise, who understand what the terms of the propositions signify: for example, to one who understands that an angel is not a body, it is self-evident that an angel is not in a place in a circumscribed fashion; that is not evident to the unformed, who cannot grasp it.

‘health is a human right grounded in dignity’ signify, the answer to the question about the proposition’s philosophical tenability should be rather self-evident. This line of argumentation demands a rather straightforward structure of the thesis at hand, namely one, which orientates by a philosophical discussion of the concepts ‘health’ and ‘human rights’ (which necessarily includes ‘dignity’). It is my firm opinion that any complete attempt – whether successful or not – to justify the idea of health as a human right has to comprise the following components:

1. A theory of health

This theory has to answer the following questions (amongst others): What is this phenomenon we call health, i.e. what is the object of an alleged right to health? Is it only the Lerichean ‘silence of the organs’? Is it subjective, objective or a mere social construct? How do we measure health? Is it static or dynamic?

2. A theory of human rights

It is not possible to convincingly compile and stipulate any list of human rights without an “inquiry on the foundations and cogency of human rights” (Sen, 2004: 318), i.e. without first gaining a substantial understanding of what human rights are and where they come from. Before asking, ‘What human rights are there?’, we have to answer the question, ‘What are human rights?’. Although the second question can be answered without knowledge about the first, it is not possible to answer the first without having dealt with the second one first. As the ‘Λόγος’ (Logos) was in the beginning of the world, a clear, coherent and sustainable conception of human rights, i.e. a theory of human rights, has to exist at the beginning of our discussion of human rights. But in order to find out what human rights are, we first have to immerse ourselves in its constituent concepts and understand what is meant by ‘rights’ and ‘duties’, the distinction between positive, conventional, moral and human rights as well as the notion of dignity, which is usually advanced as the justification for the existence of human rights. Therefore, a theory of human rights has to be explained with reference to what we mean by ‘human *rights*’ and what we mean by ‘*human* rights’ (i.e. what is so

special about the human being and his dignity that warrants granting him such rights).

These components also serve as the main building blocks of this thesis. Following this introduction, the second chapter (Chapter II) shall be devoted to a thorough discussion of the concept of health. In an attempt to approximate the nature of health, this chapter shall first outline the foremost condition for health: life. Health is inextricably linked with life, since without it there can be no health (although there can be life without health). Therefore, in order to understand the phenomenon of health, one has to have an understanding of the underlying phenomenon which is life. Having chiselled out the essence of life and its counterpart, death, the chapter then goes on to discuss and criticise the main contemporary notions of health and highlight their defective and tenable aspects. This critical discussion shall then form the basis and open out into the development of a complete philosophical theory of health. The third chapter (Chapter III) shall be devoted to the explication of a theory of human rights. It shall address both the question of (a) what is meant by 'rights' (including 'duties') and (b) what is so special about the human being that we grant him human, i.e. special moral, rights. Whereas the answer to (a) mainly draws on (but also amends) the Hohfeldian instances of rights (claim-rights, liberty-rights, power-rights, immunity-rights), discusses the notion of 'duty' and finally distinguishes between positive, conventional as well as moral rights, (b) shall be answered with reference to what I consider the most comprehensive and integrative concept of human dignity. The last chapter (Chapter IV) shall interweave the ideas developed in the previous chapters and answer the research question of this thesis, namely whether health can be conceptualised as a human right grounded in dignity from a philosophical perspective. Despite the fact that health cannot be conceptualised as a human right – which is the conclusion of the philosophical reflections put forth in this thesis – it shall, however, also be argued that health can still be thought of as a moral, passive negative claim-right either grounded in the human right to life or in a moral duty to health – even though such a moral right would be rather limited in scope.

II UNVEILING THE ENIGMA OF HEALTH

Die Krankheiten befallen uns nicht aus heiterem Himmel,
sondern entwickeln sich aus täglichen Sünden wider die Natur.
Wenn diese sich gehäuft haben, brechen sie scheinbar auf einmal hervor.
Hippocrates of Cos (ca. 460 B.C. – ca. 370 B.C.)

Gesundheit kauft man nicht im Handel, denn sie liegt im Lebenswandel.
Karl Kötschau (1892-1984), Professor of Medicine

Gesundheit ist ein Geschenk, das man sich selber machen muss.
(Swedish) Proverb

At the core of many disputes in the realm of individual, public and/or global health as well as in regard to the human right to health are differing views of what it means to be healthy and unhealthy. If we do not ask ourselves what sets health apart from unhealth and which criteria have to be fulfilled to apply these terms, it becomes impossible to have an argument about the status of individual instances of unhealth. Health and unhealth are critical and crucial concepts, and without an understanding of them, talking about any health-related topic would be futile. Without a theory of health and its opposite, it would be rather useless to ask whether the common cold or homosexuality is an instance of health or unhealth, as we would not know what criteria and conceptions such judgement would be based on. But an account of health is also needed for the purposes of this thesis: if we are to make up our minds about and do some philosophical groundwork with respect to the problem of health as a human right, we should know what it is that this alleged human right is actually securing. So, let's start by answering the question: What is health?

In answering this question, it might be helpful, at least as an initial step, to engage in some comparative etymology and find out about the linguistic roots of the term 'health' across different languages. De Almeida Filho (2000) has compiled an overview, whose main points I take the liberty of summarising below:

- Etymologically speaking, 'saúde' (Portuguese) and 'salud' (Spanish) both come from the Latin root 'salus'. In turn, 'salus'

stems from the Greek term ‘holos’ (meaning whole) and designates the main attribute of whole intact individuals. ‘Salus’ is also the root for the Latin ‘salvus’, which implies having overcome threats to or maintained one’s physical integrity.

- ‘Santé’ (French), ‘sanidad’ (Spanish), ‘sandidade’ (Portuguese), ‘sanity’ (English), ‘sanitario’ (Portuguese), ‘sanitary’ (English), ‘sanatório’ (Portuguese), ‘sanitarium’ (English), ‘Sanatorium’ (German) and the adjective ‘são’ (Portuguese) stem from the medieval Latin word ‘sanus’, meaning ‘pure’ and ‘immaculate’, but also ‘correct’ and ‘true’. The Latin ‘sanitas’ designates ‘sanus’ as a condition.
- The German word ‘Gesundheit’ implies integrity or wholeness. The word is composed of the prefix ‘ge-’ (designating a totality or accumulation of something), the radical ‘-sund-’ (meaning solid or firm, as in the Anglo-Saxon ‘sound’) and the suffix ‘-heit’ (indicating a quality or faculty).
- The archaic form of the English term ‘health’ – derived from the medieval English ‘hal’ and related to the German ‘heil’ – is ‘healeth’. This form is equivalent to the past participle ‘healed’, meaning treated or cured. The medieval ‘hal’ defines the semantic area of health as akin to that of ‘fullness’.
- All of the words of the Scandinavian semantic family, which designate health, such as e.g. ‘hälsa’ (Swedish), derive from ‘höl’, an old German word, which implies wholeness and refers to the Greek radical ‘holos’.

In conclusion, the etymology of the term ‘health’ denotes “a quality of intact, unharmed, uninjured beings, with the meaning linked to properties of wholeness or totality” (de Almeida Filho, 2000: 301). Health, therefore, can be seen as the ordered and proper functioning of the organism as a whole. However, while such etymological inquiry can give us an initial understanding of what the word ‘health’ means, it cannot supersede a thorough philosophical inquiry into the concept of health. But before shedding light on the enigma of health, I want to devote some pages to a

topic, which is closely related to the phenomenon of health and also establishes its temporal limits.

1 Preconditions of Health: Life and Death

Health is not an isolated phenomenon; it is embedded in the most basic phenomenon there is: life. We are not only healthy, but we also lead healthy lives. Without life, there is no health. Dead matter cannot be said to be healthy or unhealthy. There is no such thing as a healthy chair or an unhealthy chair; a chair can be more or less purposeful, but speaking of a chair's (or any dead matter's) health would be nonsensical. Health, therefore, is an attribute or quality of something, which is alive. But since being alive is not necessarily contingent on being healthy, health cannot be the essence of life. Of course, it is sometimes said that life without health is no life at all; strictly speaking, however, life without health is still life – it is just life experienced in a more or less undesired fashion. But lack of health can also end life and cause death; while some unhealth might merely diminish the quality of life, too much unhealth might lead to losing one's life and to death. Health and unhealth only happen within to an individual's lifetime (i.e. the time between the beginning¹² and end¹³ of his life). Life, death and health seem to be inextricably linked. In light of these thoughts, the first step in looking for the nature of health is to gain an understanding of the phenomena we call life and death – which is “die Grundfrage, die allen Fragen zugrunde liegt” (Brenner, 2007: 8).

¹² It is undeniable that individual human life begins at conception, i.e. the completion of the fertilisation of the ovum and the formation of the zygote. At that moment in time, “a new life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth” (Pope John Paul II., 1995: paragraph 60). Also cf. this thesis' chapter on personhood.

¹³ As we shall see, the determination of the exact moment of death is much more disputed than the unquestionable beginning of human life.

1.1 Human Life

It is a peculiarity of man that he is the only living being amazed by his own existence and that, which keeps him in existence. It was Socrates who said that “ὁ δὲ ἀνεξέταστος βίος οὐ βιωτὸς ἀνθρώπῳ” (Apology, 38a), i.e. that the unexamined life is not worth living for man. In order to examine one’s life it is reasonable to first ask what this life actually is. So, what is life?

The dictionary definition tells us that life is the abstract noun of the verb ‘to live’, whose meaning – etymologically speaking – is equivalent to such verbs as ‘to remain’, ‘to persevere’ and ‘to continue’. Life, therefore, is not only the period from birth to death, but what makes us persevere during this period. It is the principle or force that is considered to underlie the distinctive quality of animate beings; it is “that irreducible power and actuality of which we comprehend that it must lie at the root of all the activities and marks of living organisms” (Seifert, 1997: 34)¹⁴. This means then that life is some form of force, power, actuality or principle. But this account is merely a step out of the frying pan into the fire as it substitutes one abstract for another.

According to Seifert (1997) we have to acknowledge our limitedness in trying to define exactly what life is. Life is irreducible, i.e. not definable through any other known entities, and therefore cannot be reduced to other notions or properties: “Life is an ultimate and irreducible datum” (Seifert, 1997: 16). As George Edward Moore has shown for ‘good’ in the first chapter of his ‘Principia Ethica’, any attempt to define such a datum in terms of other entities is doomed to failure.¹⁵ In a sense, life only allows us

¹⁴ The reader might find that this chapter draws heavily on Seifert (1997). While this might be ominous from a scientific perspective, which is keen to support an argument by means of a canon of references, which are as broad as possible, I nevertheless think that this can be excused for a simple reason: there is virtually no other philosophical treatise on the phenomenon which is life (I, at least, have not found one).

¹⁵ Also cf. Seifert (1997: 17): “Any attempt to define everything in terms of something else or of another element is just as circular as any effort to prove everything. For as