

REVIEW ARTICLE

THE EVOLVING IDEA OF “HEALTH” IN THE LEGAL LANDSCAPE: AN ATTEMPT TO IDENTIFY CRITICAL ASPECTS

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ABSTRACT

The aim: The overall purpose of the research is to shed light on the evolving understanding of the concept of “health” in the legal field, attempting to identify its critical aspects.

Materials and methods: The study constitutes a comprehensive analysis of a large number of scholarly publications and international legal provisions through the prism of the principles of concreteness and objectivity, coupled with methodological pluralism, including both philosophical, general scientific, theoretical, general, and special legal research methods.

Conclusions: Considering the evolving idea of “health” in the legal landscape, it is noted that, in the current context, “health” should be perceived both as an individual and a collective feature, as well as the substance, legal right, and a state’s obligation.

KEY WORDS: coronavirus, health, public health, World Health Organization, international cooperation

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INTRODUCTION

Over the past decades, it has become abundantly clear that the events that had shattered the world and affected the lives of millions of people have profoundly changed the research agenda. Epidemic and pandemic illnesses have contributed immensely to the developments in perspective that go far beyond traditional approaches to widespread and entrenched problems, shifting the focus towards a formidable array of new challenges. The present-day realities of the massive and rapid spread of COVID-19 coronavirus infection [1] and devastating Ebola virus disease outbreaks [2] have certainly brought to the fore the tremendous number of various health-related extraordinarily complex issues, encompassing both purely medical aspects and the relevant area of public management and administration. Such an ambivalent mixture of all those matters is inextricably bound to the subtleties of moral and ethical considerations, along with the legal niceties of their normative regulation.

This kind of situation is compounded by the fact that all of them nowadays conditionally constitute relatively separate stand-alone frontiers of knowledge with rather autonomous directions of activities that may exist either simultaneously, parallel to each other, in different dimensional planes, – international, regional, national, and local levels or even interfere with one another, overlapping, intersecting and penetrating their domains both on a global scale and a specific case-by-case basis.

At the current point, the “health” itself might serve as a vivid example. Regarded as a systemically important central

category of medicine, solely in biological form and perception, it fell within the purview of governmental bodies, and evokes a whole different meaning, while implementing the state health policy. A similar phenomenon occurs within the operation of the entire healthcare system and the functionality of a health service in general. The same trend is likewise valid for the health research ethics and the “health law” in a generic way, involving the “right to health”, its promotion and protection not only domestically but also regionally and globally.

Under these circumstances, all the complexities presently seem to necessitate a critical conceptual redeeming of the concept of “health” in the legal sphere, clarifying the contours and normative content of the “right to health”, reimagining and clearly outlining the extent and depth of the commitments undertaken by the states to that end.

THE AIM

The research objective is to contrast differences in the perception of the concept of “health” in the legal field and identify potential points of challenge and difficulty, as well as to seek to recognize and highlight the common pitfalls.

MATERIALS AND METHODS

The present study is based on the extensive review of the most pertinent scholarly writings, namely over 35 scientific articles, contained in the PubMed database, and a

large variety of other publications, including monograph series, encyclopedias, and books, along with many international regulations, in particular, the major human rights conventions adopted under the auspices of the United Nations, and the basic official documents, fact sheets and summary reports of the World Health Organization, as well as the results of the activities of other organizations like the Committee on Economic, Social and Cultural Rights, Committee on Assuring the Health of the Public in the 21st Century and Committee for the Study of the Future of Public Health, and many more.

The foundation of the methodology of the research is represented by analytical, phenomenological, hermeneutic, and dialectical methods of cognition with the use of linguistic and systemic-functional methods, as well as the abstract logical thinking, comprehensive and critical analysis, synthesis, inductive and deductive reasoning, and several others.

REVIEW AND DISCUSSION

It is quite telling that "health" and "law" have a fairly long-standing history of their mutual relations. At an earlier stage of the development, legal norms and provisions that were designed to regulate the relationship between medical personnel and patients arising predominantly in connection with medical treatment and clinical practice were referred to as "medical law" [3, p. 241].

However, with the passage of time and increase in the number of health problems associated with "medical errors" [4, p. 1043], the scientific parlance has gradually been replenished with a couple of alternatives, among which the most commonly used were and still are "medical negligence law" [5, p. 37] or much less frequently "clinical negligence law" [6, p. 120-121], and "medical malpractice law" [7, p. 339].

The further rapid evolution of the situation that has taken place in the medical field since then has led to substantial expansion of the range of relations that extended beyond a mere doctor-patient relationship [8, p. 26]. Apart from it, growing attention was given to the issues of administration of health services and the role of law in maintaining public health care [9, p. 3-4], as well as ethical issues relating to the human body [10], as a result of which the new terms "health care law" [11] and/or "healthcare law" [12] were coined.

In that respect, it has been commonly argued that despite the difference in the spelling, these two categories are equivalent, whereas the contrary view is that they are identical neither in wording nor in their meaning. The possibility of such ambiguities in interpretation is of crucial importance, as it mainly leads to the unduly broadening or narrowing of the content and scope of the term. In turn, such a change in discourse largely affects the spectrum of public and social relations that are subject to legal regulation.

In the light of the foregoing observations, it was suggested considering the use of another different category, thereby the term "health law" [13] came into being in order to

deal with old and new problems. As it became apparent that a narrow approach was no longer appropriate, such novelty marked a further conceptual shift in the process of expanding the extent of the substantive sphere of its application [9, p. 4].

Despite the growing popularity and frequent resort to this term over others, issues regarding the peculiarities of their reciprocal relations remain highly relevant today [14]. Even more, the dilemma deepens, becomes more complex and sophisticated, which entails a number of additional problems.

Foremost among these are issues related to the definition of the term "health" [15, p. 735], concerned with the attempt to explain the meaning of the "right to health" [16], as well as to establish its place in the field of international law [17, p. 189], identify the bearers of this right, as well as to clarify the nature of the state's obligation [18, p. 371], and the limits of the competence of state bodies to protect it [19].

Concerning "health", in most cases, the starting point for determining its content remains the comprehensive analysis of the definition, outlined in the Constitution of the World Health Organization, signed at the International Health Conference [20], dated back to 1946, which stipulates that "... health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity ..." [21]. In addition, it has also been traditionally associated with an attempt to further refine the legal understanding of the notion during the 1st International Conference on Health Promotion [22] in 1986, resulting in the adoption of the Ottawa Charter for Health Promotion [23], containing the provision that "... health is, therefore, seen as a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities ..." [22].

Such significance usually stems from the fact that "health" was initially and up until that moment perceived, to a large extent, exclusively as the absence of any disease or impairment [24, p. 662]. However, since then it has no longer been defined simply in "physical terms", as the "absence of illness or disability", but also includes "mental and social dimensions" [25].

This idea, in turn, received a rather mixed reception. On the one hand, it contributed to a very useful broadening of the lens through which the health has to be considered [26, p. 127], whereas its attractiveness as an ideal was vitiated by the impossibility of its practical realization, on the other [27, p. 87], thus giving rise to a substantial amount of criticism.

In particular, it has been argued that health is not a "state of complete physical, mental, and social well-being", and nor is it "merely the absence of disease or infirmity" [28, p. 781]. And what is more, that state need not be "complete", but it must be at least adequate, i.e., without significant impairment of function. It also need not encompass "mental" well-being; one can be healthy yet anxious, well yet depressed. And it surely ought not to encompass "social well-being", except insofar as that well-being will be

impaired by the presence of large-scale, serious physical infirmities [27, p. 87].

It is also alleged that the definition of “health”, formulated and developed by the World Health Organization 75 years ago [26, p. 127], as a “complete wellbeing” [29, p. 1, 3] is no longer adequate for dealing with the new challenges in health care systems [15, p. 735], no longer fit for purpose given the rise of chronic disease [29, p. 1, 3] and the nuanced needs of an aging population, especially in the emerging era of value-based care, nor can it provide clear and useful goals for the value-based care movement [26, p. 127].

Accordingly, there had been calls for the amendment of the current definition [30] and over the years various proposals have been presented as an alternative. One of the views expressed was that the term “health” should be defined as a “state of physical well-being” [27, p. 87], that serves as a certain reference to its “classical sense”. Other suggestions made were to include the idea that something more practical is required and a new improved definition of “health”, as the “experience of physical and psychological well-being” [26, p. 127] was introduced. However, that definition likewise was not entirely flawless.

Also worthy of attention were several other more specific innovative approaches. Considering the fact that disease and disability can and often do co-exist with wellness, the new conception has been created based on the point that “health” should be transformed from a “state that requires the absence of disease” to a “state where the central theme is the fullness of life” so that it becomes not a “static state of being”, but a “dynamic quality of living where body, mind, and spirit are fully employed to make the most of each day” [31, p. 204].

Almost the same thinking lies at the core of the pretty similar definition of “health”, indicating that it is a “state of balance, an equilibrium that an individual has established within himself and between himself and his social and physical environment” [24, p. 662], together with the formulation of “health” as the “ability of an individual to adapt to the unique prevailing conditions” [28, p. 781] and to “self manage” [29, p. 1, 3].

Notwithstanding the numerous appeals concerning the need to redefine the concept, all of these efforts have been made so far seem futile to date. Complicating the situation, however, is the fact that the definition of “health” is not just a theoretical issue, because it has many implications for practice, policy, health services [15, p. 735], and, arguably equally important, for the “right to health”.

And remarkably, just as the “health” itself, the “right to health” has also trod a long and thorny path of its evolution. Originally, the concept of “the right to the enjoyment of the highest attainable standard of health” [21] was used with regard to “health” in the texts of the international instruments. Shortly after, “the right to the enjoyment of the highest attainable standard of physical and mental health” [32] was developed and applied as well. Side by side with that, therefore, “the right of access to health care services” [33], “the right to receive medical care” [34] and “the right to access to health service” [35] may well also be found in

the international legal documents.

Though typically synonymous [36, p. 603], such diversity of terms, made the concept of the “right to health” to be the subject of much debate, whilst defining its content, – a formidable challenge [37, p. 1457]. Torn between being both “human” [17] and “international” [19] right, it is frequently associated with the “access to health care and the building of hospitals”, but, in fact, the “right to health” extends much further, including a wide range of factors that can help to lead a healthy life [38, p. 3]. It is also commonly identified as an “inclusive right extending not only to timely and appropriate health care” but also to the “underlying determinants of health”, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health [39, p. 3]. Apparently, these definitions can hardly ever be considered reasonably accurate, precise, conclusive, and exhaustive that, to some degree, opens up the whole idea of the need to develop a coherent universal one [40].

The problem becomes even more complex owing to the existing paradigm of the so-called “individual health”, where the “right to health” is seen mostly as the “right to individual medical care”, which is so far slowly coming to be treated as the collective right [41, p. 102]. Thus, the emphasis is gradually shifting from individual-private to public-global issues.

Apart from “individual health”, “public health” [42] or yet occasionally the “health of the public” [43] is becoming both common and essential, facing almost similar difficulties in its definition, continuing uncertainty about what counts as “health”, and introducing additional complexities concerning the meaning of “public” [44, p. 7] in “public health” [45, p. 13]. And indeed, it is still not sufficiently clear whether this is intended to refer to the “health of nations” [46], “health of a nation” [47], “population health” [48], “community health” [49] or all of it at once, especially considering that each of these concepts has at least its own formal definition, as well as a large number of own problems. Given that, “public health” is quite often understood as an “... organized community effort to address public concerns about health by applying scientific and technical knowledge ...” that is distinguished from health care by its focus on communitywide concerns – the public interest – rather than the health interests of particular individuals or groups [50, p. 140], in its broadest sense.

The same pattern can also be observed in relation to the “right to public health” [51]. For example, there is a view that the “public health right” has to be distinct from the “right to health” because it does not aim to ensure an affirmative right to access health-care services, health protection, or aspirational standards of health for individuals and is grounded in the “old” public health, which aims at collective action problems, not the “new” public health, which aims broadly to ensure the “underlying determinants” for people to be healthy [52].

As a result of such a wide variety of controversial issues and events recently, there has emerged an increased interest in the need for the development of the relevant direction in the legal environment, which also was presented with a number of terms, including “public health law” [53], “global public health” [54], or even broader scaled “world health law” [55] and “global health law” [56], which, in turn, also address questions of policy and international relations.

It is in this sense that the “health” and “public health” are starting to be seen as a “governmental duty” and “an obligation of a state” [19], rather than a “right of individuals, nations, nation, population, and community” [57].

CONCLUSIONS

Contemporary highly complex emergencies that are indissolubly linked with the outbreaks of contagious diseases have mainstreamed a wide range of issues, relating to “health”. Through all appropriate means to confront them nowadays, the pivotal role has been given to the law, establishing a framework to manage successfully threats, regulating the relations, ensuring and protecting the rights, freedoms, and legal interests. With the multidimensional nature of “health”, it is crucial to create the definition that will not only possess the more realistic and practical interdisciplinary character, comprising medicine, policy, and law but also correspond to the needs of the demands of the times, treating it both from individual and collective perspectives. In contrast, further refinements of the legal understanding of the concept of “health” should be accompanied by the “three ones” model, including “health” – “right to health” – “obligation of a state”.

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