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Editorial

Editorial on Human Rights and Health

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Health promotion is a movement that allows people to actively participate in improving their health. The goal of health promotion is to enable individuals and communities to have greater control over the factors that condition health (determinants of health). This concept of health emphasizes the positive potentials and abilities of both the individual and the community. The active participation of all important social sectors (inside and outside the health care system), the creators of health policy and the citizens themselves, for whom the right to health is guaranteed by the Constitution as a basic human right, is necessary in the promotion of health.

Human rights as they are enshrined in public international law concern primarily the relationship between the individuals as right holders and the state as the primary duty bearer [1]. The underlying idea behind such a human right to health is that the state refrains from compromising the health of the people, protects them against interference, and undertakes measures to ensure that healthy living and working conditions are available to the people and above all that they have access to appropriate healthcare.

The World Health Organization (WHO) set out already in the preamble to its 1946 constitution that each individual person has a fundamental right to the "enjoyment of the highest attainable standard of health". In doing so the WHO defined health in a comprehensive and ambitious way as a "state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity". The WHO thereby detached itself from a purely biomedical understanding (and most everyday notions) of health as being the freedom from physical and mental illnesses and impairments and ignited a lively expert debate, and not only among medical professionals. On the one hand, the concept of health as complete wellbeing was often criticised as utopian, on the other hand it remained heavily disputed what exactly such wellbeing consisted of.

Human rights, including the right to health, constitute a set of norms governing the treatment by States and non-State actors of individuals and groups on the basis of ethical principles incorporated into national and international legal systems [2]. Thus, the source of human rights is to be found in the norm-creating process of national and international legal systems, which provides the formal validation of normative positions. The positions emerge from ethical reasoning in moral philosophy or religious faith-what we might term the deeper origins of human rights-or from political claims, which emerge from social mobilization. In plain language, this means that the right to health has emerged from a process of people successfully advocating and eventually obtaining formal recognition in law and policy that they are entitled to-and the State must ensure that they have-an opportunity to lead a healthy life.

Although morality is universal, it allows for some significant variations because of cultural differences [3]. Bioethics is morality applied to medicine and medical research, so a global bioethics should be thought of as an application of the common moral system to medicine and medical research that allows for significant variations in different cultures or societies. Common morality has rules that prohibit killing, causing pain or disability, and deceiving and breaking promises, but there is some variation in the interpretation of these rules as well as in what counts as an adequate justification for violating them. Different societies also have some significant differences in their laws and in the duties that they regard physicians as having. There are also differences in whom they hold to be fully protected by the moral rules. These societal variations have significant effects on what morality encourages, prohibits, and requires physicians to do.

Different cultures give different answers to some of the questions with which bioethics is concerned. This much seems obvious, and it has led many to conclude that there is no universal morality while leading others to conclude that where there is disagreement one of the disagreeing cultures must be mistaken.

Skepticism

The human right to the highest attainable standard of health frequently evokes skeptical reactions [4]. After all, human rights differ from moral postulates in that they impose binding obligations on the state, which under international law figures as the formal guarantor

of the rights of those living under its jurisdiction. If that is true, however, how can a certain standard of health become a legally binding entitlement? Obviously, efficient and comprehensive healthcare presupposes an expensive infrastructure, which not every state can afford. Even affluent states face the problem of increasing healthcare expenses, which they may feel unable fully to shoulder in the long run. For economically impoverished states in the global south, the situation is much more dramatic; scarcity of resources may even hamper the development of a minimum healthcare infrastructure. In the light of such obvious contingencies, how can the state »guarantee« a right to health for everyone? If the state promises what is beyond its control, such a promise does not seem to be fully reliable. Do we have to conclude that the proclaimed human right to health is illusionary? Is it but an empty promise?

Radical critics of the right to health go a step farther by contending that the semantics of a right to health might in the long run weaken the validity claims of international human rights in general. Human rights are a particularly strong category of norms. Based on due respect for "the inherent dignity […] of all members of the human family", they have the elevated status of "inalienable rights". Accordingly, human rights claim priority over other legal norms. Now, by inserting an entitlement that in practice depends on the availability of adequate resources and other socio-economic contingencies, the framework of human rights may eventually lose much of its stability and reliability. This at least is what skeptical commentators have objected.

Medical law

Medical law is unusual amongst legal subjects as there is considerable academic debate over whether it is a distinct subject at all [5]. The growth in healthcare during the 20th century, both in terms of technological advances and social expectations, means that we are all likely to encounter doctors, nurses and other healthcare workers on a professional basis at some point in our lives. As with any human relationship,the law seeks to regulate it but the discipline of medicine brings with it specific emotive and moral complications. Our encounter with healthcare may involve one of our most intimate interests: mortality; reproduction; a life free of pain and suffering. In a democratic society governed by the rule of law, the law must step in to regulate these issues but it does not, and should not, do so in a moral vacuum. Abortion, euthanasia, transplants, assisted conception, and so on, are ethical, as well as legal, issues and an entire philosophical subject of medical ethics has developed to study them. The question remains, however, whether there is a distinct legal subject which focuses on the law regulating healthcare.

Doubt has arisen because medical law is an academic version of the cuckoo. When a medico-legal problem arises, medical law utilises the principles and remedies of other branches of law. So, traditionally, if you wanted to know about the legal duties imposed upon your doctor - his legal standard of care in providing treatment - you would need to refer to the law of torts; if you wanted to know whether you would face legal liability for helping a terminally ill loved one to die, you would need to consult the criminal law; if you wanted to know whether an underage child could obtain contraceptives or an abortion without parental consent or knowledge, you would need to refer to the principles of family law. A medical lawyer needed to be a jack of all trades but, as the issues specific to healthcare increased (for example because the terminally ill could be kept alive for longer or because new technology enabled new uses of the human body), the traditional rules of these other branches of law had to be adapted. A tentative new and distinct branch of law emerged.

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