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## Introduction. Health and law after the pandemic: Socio-legal observations

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### Abstract

Today claims relating to health are so common that distinguishing between *rights* and *interests* is harder and harder: definitions of health as the one provided by the World Health Organization legitimise the expectation of a continuous improvement in standards of care, access to treatment and measures of prevention. Moreover, with COVID-19 pandemic, health seems to gain the status of a supreme and unquestionable value. Here the hypotheses of a “Healthization of Law” is presented: it indicates both a kind of supremacy of Law on other spheres of society when health (public or individual) is at stake, and also the fact the Law is strongly conditioned by the emergence of health as the highest value to which all spheres of society must orient themselves. Then analysing the relationship between the structural conditions of world society and the semantics of health it is urgent than ever, in order to understand which kind of expectations and claims pandemic legitimised, and how the semantics of health (and wellbeing) describes social structure and its changes.

### Key words

Right to health; COVID-19 pandemic; health claims

### Resumen

Hoy en día, las reivindicaciones relacionadas con la salud son tan comunes que distinguir entre *derechos* e *intereses* es cada vez más difícil: definiciones de salud como la proporcionada por la Organización Mundial de la Salud legitiman la expectativa de una mejora continua de niveles de curas, acceso al tratamiento y medidas de prevención.

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Además, con la pandemia COVID-19, la salud parece adquirir el estatus de valor supremo e incuestionable. Aquí se presenta la hipótesis de una “sanitarización del Derecho”: tanto una especie de supremacía del Derecho sobre otras esferas de la sociedad cuando está en juego la salud (pública o individual), como también el hecho de que el Derecho está fuertemente condicionado por la emergencia de la salud como valor supremo al que todas las esferas de la sociedad deben orientarse. Analizar entonces la relación entre las condiciones estructurales de la sociedad mundial y la semántica de la salud es más urgente que nunca, para entender qué tipo de expectativas y reivindicaciones la pandemia legitima, y cómo la semántica de la salud (y del bienestar) describe la estructura social y sus cambios.

### **Palabras clave**

Derecho a la salud; pandemia de COVID-19; pretensiones de salud

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## Introduction

With immense satisfaction, we present the dossier derived from the workshop *Rights and interests after COVID-19: From the judicialization of health to the healthization of law*. This collaboration between Germano Schwartz and Matteo Finco, proposed for the International Institute for the Sociology of Law in Oñati, now proudly integrates the prestigious *Oñati Socio-Legal Series* journal.

Unfortunately, the workshop did not take place for reasons imposed by the pandemic itself. Its purpose was to define themes and perspectives for a theoretical-sociological approach to health in its dimensions of right (to be promoted and which could be legitimately claimed) and interest (which could be expressed and promoted), considering the effects of the COVID-19 pandemic on the legal system. The basic objective was to explore the emerging characteristics of the relationship between law and health, analysing the connection between them and the challenges arising from the pandemic.

The initial assumption of our project was the fact that nowadays it is getting progressively more and more difficult distinguishing between claims of rights and interests: this is true in general, but especially when health is at stake. If we conceive expectations as references which provide a relatively stable orientation to specific contents and events, and claims as expectations which their possible fulfilment is considered particularly important, then we can define claims of rights as claims legitimated by Law, while claims of interests as demands related to rights and access to resources that are not – or not yet formally and fully – legitimated by Law, but which could be socially legitimated by other spheres (economy, religion, family and so on) or strongly supported by common sense or public opinion.

When we talk about health, both rights and interests demand for protection or promotion of health and well-being. The problem is that is not uncommon that these two typologies tend to get confused and hard to distinguish, especially when we talk about the access to services and treatment by patients. It is true that minimum level of performances of national health systems could be defined or fundamental rights could be constitutionalised. At the same time, definitions of health as the one provided by the World Health Organization in 1946 (“a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”, which imply the “human right” consisting in the “enjoyment of the highest attainable standard of health”) legitimise the expectation of a progressive (and never ending) improvement in standards of care and access to treatment and measures of prevention. This also means the emergence of ever new and different specific needs (expressed by people), goals and objectives, which States and organisations should take charge of.

The Brazilian case is exemplary here: the Constitution of 1988 defines health as a “duty of the State”. That is: while it is difficult to define the right to access healthcare, at the same time something as an entitlement to be healthy is already claimed, leading to frequent misunderstandings (for example: should the State pay for extremely expensive therapies or treatments, even if the national healthcare system cannot provide them?).

Then, what Niklas Luhmann called the “inflation of claims” makes the same distinction rights/interests almost meaningless: individual expectations – at the normative,

cognitive, temporal and also affective levels – are growing, while the health dimension as a public interest and good is often ignored, and the judicialisation of health become a routine.

To sum up, health is, first and foremost, an ideal: that is, a horizon whose concrete content is differently defined by specific cultures and perspectives and strongly dependent by social determinants (the conditions in which people are born, grow, work, live and grow old, such as economic status, education, ethnicity and so on).

Moreover, health is also a field of personal experience (individual level); a theme of communication (public opinion); an ensemble of organisations; and even a sphere (or system) of society (with the goal of curing diseases and promoting wellbeing). Sometimes in the public debate these different levels are confused or not considered, with a consequent lack of clarity and effectiveness of the analysis.

The COVID-19 pandemic showed this quite clearly: on the one hand, in Western perspective health is a supreme value – absolute, sacred, in whose name it is possible (or even desirable) to operate restrictions on individual freedoms and rights, even in democratic and liberal countries. Not only individuals, but also institutions, government and every social spheres (economy, science, education, religion, law, mass media, families and so on) must comply with the imperatives and demands of health: this is not just a question of urgencies and needs of not overloading national public health systems (physical distancing, closing of shop and public services, State intervention to provide the supply of sanitary materials, etc.), but to put health upon any other priorities. At the same time, this imperative relegates to the background a lot: for example, the needs and, above all, the fears of individuals, and the effective problems of healthcare facilities and personnel.

Law system (basically, courts) is called not only to answer to individual and social claims related to health, but also it has to face requests for analysis of constitutional legitimacy of political decisions (laws, emergency measures, etc.); to regulate concrete conflicts between fundamental rights (for example: right to self-determination and freedom to choose in healthcare vs. mandatory use of the mask and vaccinations; restrictions of personal freedom vs. health as a collective rights) and between the different institutions of the State (powers of local vs. national governments); to approve or react to unprecedented restrictions of constitutional freedoms and rights, pillars of western civilisation; and also to anticipate problems relating to the near future (ex: should a vaccine be mandatory?; should it be for free?).

We put forward the hypothesis that this scenario could be grasped with the formula Healthization of Law, i.e. both a kind of supremacy of Law on other spheres of society when health (public or individual) is at stake, but also the fact the Law is strongly conditioned by the emergence of health as the highest and most important value to which all spheres of society must orient themselves. For this reason, it is necessary to investigate the right to health by analysing the relationship between the structural conditions of world society and the semantics of health (how it is thematised in the communications and the consequent expectations and claims). Therefore, it is necessary to interpret, identify and analyse the emerging expectations and claims related to health (in other words, how the semantics of health describes and influences the social

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structure) and how the structural societal conditions make the same expectations and demands possible.

In sociological terms, this relationship between the structure of society and the semantics could be observed both on the side of semantic adaptations to structural changes, and on the side of societal structural adaptations to semantic evolution. The two processes have a circular relationship: describing society and its changes, semantics also contributes to the definition and determination of the structure itself. This happens because the forms through which semantics represents the structure, will condition subsequent descriptions.

The COVID-19 pandemic represented a great opportunity to do this kind of work. In fact, claims related to health (such as the access to treatments, drugs, vaccines and services) spread during the pandemic, due to the fears and (new) priorities it generated. While the judicialisation of health was already a quite common phenomena in different countries (leading to an increasing difficulty in distinguishing between rights and interests), with the pandemic something new happened: health itself – conceived both as value / (human) right, and as a topic of communication – became dominant. At least for a while. On the one hand, individual and interpersonal relations, organisations and institutions, governments and the most different social spheres (economy, science, education, religion, law, media, families, etc.) had to comply with the imperatives and demands of health, that is, the only value that, beyond all the possible differences between cultures and political systems, could not be questioned or underestimated. Then, pandemic imposed to everyone to adapt itself to the universal priority of limiting the spread of the virus as much as possible, and fighting its effects. On the other hand, health became a topic which no one (individual, organisation and system) could escape and which, in terms of importance, left any other topic in the background. In this sense, every decision related to new events and situations was being interpreted on the basis of its effects and consequences in terms of public and individual health or on the basis of the temporal break that the pandemic marked: here is relevant not so much the (quite common) idea that after pandemic “nothing would ever be the same again” (a naive but genuine and understandable reaction to novelty and disorientation generated from pandemic), but, much more, that the pandemic was seen as a crisis so strong that it marked an epoch.

Obviously, sociology should have a lot to observe here. It could try to investigate not only what was happening at that time, with its effects on society – or, put it otherwise, how society reacted to pandemic –, but also to what extent all this changed the idea of health itself as (supreme) value / right (on a general and abstract level), with its effective power to provide a horizon of possibilities for the future. In fact, the characteristics and the strongness of the health conception imply the possibility of legitimisation of certain expectations related to health itself – expectations that permit, in the present, to establish present futures (that is, the future that is imagined in the present), but also to “open” the future to other possibilities, which cannot be imagined in the present.

Here it means interpreting, identifying and analysing a) how new situations and conditions imposed by pandemic make health expectations and claims possible and b) how the semantics of health (and wellbeing) describes and affects social structure and its changes.

Therefore, the aims of the special issue are:

1. defining topics, themes, perspectives and a research agenda for a theoretical-sociological approach to health in its dimensions of *right/interest* and of theme of communication;
2. identifying and pondering the effects and consequences of the COVID-19 pandemic on the Law system and on individual and collective claims related to health.

In this sense, by investigating the intersection between health and law – in particular, but not exclusively, from the perspective of Social Systems theory –, the articles in this dossier offer quite interesting contributions. The interaction between law and health, from the perspective of Luhmann's Systems theory, reveals the autonomous coexistence of two differentiated social systems. The legal system operates independently of the health system: the first establish what complies with law and what not, while the second is guided by medical terminology and clinical practices. From the one hand, each of this spheres of modern society sees the other one as something external, which is relevant only if what happens in it is “translated” into their own “terms”: the legal system could decide if a doctor respected the law, but has no interest in defining diseases or therapies; medicine and health do not decide if a vaccine is mandatory or not, but when it is, health personnel is called to administer it. From the other hand, although distinct, these systems are interconnected, facing challenges when their spheres overlap. Judicial decisions can shape medical practices, and ethical and clinical issues in health can turn into legal disputes, especially in pandemic periods. The dynamics between law and health illustrate the complex coevolution of autonomous social systems, highlighting the need to understand their interactions for a sociological approach to such issues.

In this regard, in *Right to health during COVID-19 pandemic*, Giuseppe Ricotta analyses social inequalities during the pandemic, emphasising the coloniality of power and colonial sociability as crucial lenses. This interdisciplinary approach reveals health not only as a medical issue but as an intricate system linked to social and legal structures. In this sense, if the management of health, especially in situation of emergencies and crises, takes charge of narratives other than the usual and dominant ones, could represent a pathway for destigmatisation and also emancipation.

In *Functional differentiation of law in pandemic times: When health becomes law*, by Germano Schwartz and Renata Almeida da Costa, the interaction between global pandemic communication and social systems is highlighted. Using the Theory of Social Systems Applied to Law, the authors discuss the need to maintain the functional differentiation of the legal system, addressing challenges such as the judicialisation of health and the inversion, where health becomes law, in particular in the case of vaccines.

*Challenges for the welfare state and the right to health after the pandemic: The Italian case*, by Carmelo Bruni and Matteo Finco, examines the ramifications of the pandemic on the Italian National Health System and how this crisis put in danger an already strongly weakened Welfare system. Highlighting changes in the perception of health, it underscores the growing influence of the private sector and individual interest, emphasising contradictions in public policies and the tendency to conceive health more and more as a business matter than as a right.

*Regulación de la desinformación digital: Un estudio sociojurídico sobre las fake news sanitarias en el caso brasileño*, by Marco Antonio Loschiavo Leme de Barros and Lucas Fucci Amato, addresses digital misinformation, highlighting Brazilian regulation of health-related fake news, which imply a combination of legal, educational and technological measures, and the need for preventive proposals which could guarantee, on the one hand, protection against disinformation, and on the other freedom of expression and access to information.

*Citizenship and housing cultures after COVID-19*, by Marina Ciampi and Tito Marci, explores citizenship and inhabiting dynamics after the pandemic, reconsidering social relations in terms of political rights, housing cultures, and public health. While pandemic invites to reconsidering and rethinking citizenship in a more “open” way, intrinsically exposed to risk and transformation, it affects also the way how social space and culture are lived – both through the concrete experience of the body and in the interpersonal relationships – calling into question the configuration of both public and common and private and personal living spaces.

This dossier not only tries to expand our understanding about post-COVID-19 but also lays the groundwork for future research. Each article offers a unique perspective, prompting reflections on necessary transformations in the fields of sociology of law, public health and social policy, and also Systems theory. This interdisciplinarity not only enriches existing academic dialogue but also catalyses new and exciting investigations at the critical intersections of health and law.

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