



REVIEW ARTICLE

GERIATRICS AND NATURAL LAW: THE MISSING LINK

ABSTRACT

Geriatric community is a vulnerable group under a high risk of losing social network, cognitive abilities and health status. Therefore, they have to be given easy access to healthcare services as a part of their socioeconomic rights. However, healthcare rights and other socioeconomic rights are not deemed strongly enforceable against public authorities in contemporary public opinion. Although many constitutions and international treaties provide socioeconomic rights for citizens, national legal systems resist not to recognize these rights and give them enforceability. This study offers the approach of natural law to be referred when the ethical side of socioeconomic rights of vulnerable groups are dismissed by lawmakers.

Key Words: Geriatrics; Health Services for the Aged/Legislation & Jurisprudence; Health Services for the Aged/Ethics.



DERLEME

DOĞAL HUKUK VE GERİATRİ: GÖZDEN KAÇAN BAĞ

Öz

Yaşlı nüfus, kişisel sağlık durumlarını, sosyal ağlarını ve algı yeteneklerini kaybetme riski yüksek bir kırılgan sosyal gruptur. Bu nedenle, sosyoekonomik haklarının bir parçası olarak bu gruba sağlık hizmetlerine daha kolay erişim hakkı verilmelidir. Buna rağmen, çağdaş kamuoyunda, sağlık hizmetleri ve diğer sosyoekonomik hakların kamu otoriteleri önünde hukuksal zorlayıcılığı olmadığı kabul edilmektedir. Birçok anayasa ve uluslararası sözleşme, vatandaşlara sosyoekonomik haklar sağlarken ulusal hukuk sistemleri bunları tanımamak ve zorlayıcılık gücü vermemek konusunda direnmektedir. Bu çalışma, yaşlı nüfus gibi kırılgan grupların sosyoekonomik haklarının etik yanları yasa koyucular tarafından göz ardı edildiğinde mutlaka doğal hukuk yaklaşımının göz önüne alınmasını önermektedir. Böylece toplum sağlığı için tamamlayıcı bir hukuksal yaklaşım elde edilebilecektir.

Anahtar Sözcükler: Geriatri; Yaşlılar için Sağlık Servisleri/Mevzuat ve Uygulamalar; Yaşlılar için Sağlık Servisleri/Etik.

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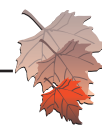
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Geliş Tarihi: 15/08/2014
(Received)

Kabul Tarihi: 24/04/2014
(Accepted)

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INTRODUCTION

This article aims to offer a theoretical analysis of natural law in the context of geriatric healthcare, which affects the lives of 8 to 10% of the global population over the age of 65 (1, 2). A vigilant consideration of the healthcare needs of this vulnerable group is vital for the social state, which derives its power from the natural law of citizens under social contract (3). However, socioeconomic disparities and a lack of strong legal protection lead to health disparities (4).

Among other vulnerable groups, older adults are at higher risk of health disparities as a result of their health status, cognitive ability and social network. They often experience decreasing information processing and problem solving abilities due to declining memory capacity, and are less socially integrated because of physical problems with mobility (5). Therefore, older adults need more intensive care and easier access to health services than any other vulnerable group.

Another point of vulnerability arises from unintentional paternalism influencing the provision of services for this group. In order to avoid paternalism, ethical principles such as beneficence, non-maleficence, justice, autonomy and acts of government are applied (6). However, answers to the question "How should society provide healthcare services to older adults?" must consider not only the vulnerability of this group, but also the spirit of public services (7).

This analysis considers healthcare for older adults exclusively from a legal perspective. It first defines two prominent concepts, social and economic rights [hereinafter socioeconomic rights] and natural law. Next, it presents an argument against a common prejudice against the basic idea of social rights and their so-called "non-enforceability." In order to eliminate this prejudice, the concept of social values and the application of these values to social life by virtue of natural law will be discussed with reference to one of the most significant legal theories on rights, by Dworkin (8). This consideration of legal theory is followed by an ethical proposition for what natural law can offer when positive law does not sufficiently address the needs of vulnerable groups who share the moral values that public services represent (9).

DEFINITIONS

Natural Law: Natural Law is generally defined as a system of law, composed of rules and principles that are determined by nature and are supreme to state power. Even in the *Ancien Régime*, individuals were conferred a limited set of rights (10,

11). Similarly, industrialisation in the 18th century facilitated urbanisation and a new form of institutionalisation, in which societies developed shared ethical and moral values (10, 12).

Socio-Economic Rights: Contemporary public law encompasses the following social and economic rights:

- Labour rights,
- Right to fair payment for workers,
- Rights related to trade unions,
- Right to organise and workers' right to strike,
- Collective bargaining,
- Social security rights,
- Right to a fair living standard,
- Right to a health standard,
- Right to education,

Rights provided to protect family, women, children, younger adults, older adults, and immigrants; right to be protected against poverty and social exclusion; and right to accommodation (13).

Socio-economic rights are also granted to citizens through international treaties. Common to these treaties is relaxed definitions of civil and political rights. The vagueness of these definitions is directly related to vague protection standards (14).

THE ARGUMENT

Does Natural Law Provide Social Rights to Citizens/Vulnerable Groups?

During the decade following World War II, higher values of humanity have been incorporated into positive law. Instruments used by positive law are fundamental rights catalogues, constitutions or multinational charters. Schlink, an expert in German Constitutional Law, intensely underlines the fact that the corrupt justice system of the *Third Reich* arose from the dismissal of natural law and ethics (15). However, at the end of the war, the "divine" and "non-destroyable dictatorship" of "positivist law" collapsed. The disciplines of Philosophy of Law and History of Law defined the next era in world history as a "Renaissance of Natural Law," where the fundamental rights and liberties of human beings are re-considered under a new legal order on both national and international planes, within the context of international treaties such as the Universal Declaration of Human Rights, European Convention on Human Rights, UN Covenant on Civil and Political Rights, European Court of Human Rights, Inter-



American Court of Human Rights, European Social Charter, etc.

The types of rules assessed within the context of the above mentioned documents have supremacy in case of conflict with rules of positive law provided under national legal systems. Generally, in order to grant the natural law a sphere in hard law, some of these values are given space within the context of provisions of positive law. However, in some cases, citizens allege the presence of non-codified rights, which are not recognised by public authorities (14). What should public authorities do when non-codified forms of rights are invoked by citizens? (8)

The rights and freedoms granted to citizens under constitutional and international documents become the responsibility of public authorities, against individuals who are the subjects of those rights-freedoms. It is also possible to give reference to state responsibility in international law, where protection of fundamental rights and freedoms becomes an international duty under a treaty signed by a state party (16). Others are national duties which generally arise from a social contract such as a constitutional right-freedom. *Differentia specifica*, (According to Aristotle, it is the attribute by which one differs from all others of the same genus. <http://pennance.us/home/downloads/definition.pdf>) between two, is the partial autonomy that occurs during monitoring of the implementation of international responsibilities. Governments have to take part in international treaties through constitutional regulations. At this stage, the case is not only a question of international responsibilities, but also a question of national constitutional task (17).

Legal enforcement of fundamental rights before constitutional adjudication has been the first step to create strong constitutional rights in the realm of social healthcare. US constitutional lawyers claim a “*state action doctrine*” where constitutional norms are applied with background rules to law, tort law, contract law, property law amount to social welfare rights that include healthcare, housing, labour, etc. (18). These norms are only applied with any real strength to the intimidating power of the state against the individual. Unfortunately, *state action* is a barrier to the maintenance of socioeconomic rights. Therefore, it is nearly impossible to rely on constitutional norms if pension rights are invoked against private parties. Another noteworthy process for the treatment of such disputes between private parties is the “horizontal effect,” a back door when social rights are blocked by *state action* (18). One has to learn whether the social rights in question are subject to *state action* or *horizontal effect*. When consti-

tutional norms have a horizontal effect, individuals can rarely invoke this right to block *state action*.

Back to the core argument, may a geriatric patient – apart from other legal proceedings – invoke her/his constitutional “right to health” before national authorities in response to any inconvenience arising from treatment procedures? Or may she/he claim lack of health service on the same basis? Justiciability is another question. Specifically, the weak character of rights and catalogues affects the level of protection before the courts. There is no single and substantive principle determining how courts react when they are asked to enforce rights that are weak in nature. Traditional judiciary resists social welfare rights on the grounds of justiciability objections. However, an objection of this type does not have a basis in legal argument for any court to apply. Inconsistent and non-standardised responses of the courts against justiciability objections remain a grey area in terms of the existence of moral rights. Moreover, from the citizen’s side, such a grey area infringes on the principle of legal certainty (8). Consequently, a geriatric patient who invokes the “right to health” does not have “one hundred per cent” reliable legal protection under positive law.

Finally, Dworkin argues that even a perfect constitution may not be helpful in defending a citizen’s constitutional rights (8). Many authors, including Dworkin, highlight the position of “conscientious objectors on philosophical grounds,” which argues for exercising a moral right even at the expense of a conflict with public authorities, legislation, and adjudication. The scope of the constitutional right provided for citizens in this situation may be vague and ambitious. It is possibly weaker than a constitutional duty such as compulsory military service. No one can clearly tell what the origin of such a weak right is and how it has descended into an invokable moral right (8). According to Dworkin, two paradigms are possible: the first is the narrowed moral rights of the individual by public authorities (e.g., constrained rights of elderly), which later lead to infringement; and second, the widened moral right of individual against public, which later remains an insecure public area to the community.

The first has a social cost. The scope of public liberties such as right to express, freedom to establish union and right to public demonstration is considered at this point. Social welfare rights including right to pension, right to healthcare, and right to accommodation are in the second group. The first group of rights have a strong standing, so that constraining rights with restraining orders causes a serious social cost. The latter, contrarily, has no direct social cost. Constraining



socioeconomic rights has an indirect impact causing socioeconomic cost to the individual right holder, who continues living in a peaceful environment.

Dworkin underlines a point where community rights and individual rights are confused (8). With reference to the famous Criminal Law example, it is not possible to substitute the right to security of a person with minimum standards of accused rights or vice versa. Shortly, accused rights and liberty rights of persons will be neither interchangeable nor competitive. Modern law never proposes to dismiss accused rights for the purpose of maintaining secure streets for citizens. Therefore, the first paradigm collapses.

Does Natural Law Provide Healthcare Rights Among Other Social Rights?

Contemporary natural law theory, analysed by John Finnis, is an innovative understanding subsidiary to Thomas Aquinas after seven centuries. In his book, *Natural Law and Natural Rights* (1980), he reformulated a contemporary theory of natural law. Although his evaluation of ethics is a reference for the next section, his total work on political society, state, and law is a theory of ethics (9).

Finnis opens his argument asking the famous question of the Ancient Greek philosopher Aristotle: “What constitutes a worthwhile, valuable life?”. He answers by recommending seven universal “basic goods” of humanity contributing to a fulfilled life: Life, Knowledge, Play, Aesthetic Experience, Sociability, Practical Reasonableness, ‘religion’. Specifically, the first one – ‘life’ – includes every fragment of life that puts a human being in a wellness of self-determination, consisting of bodily health and freedom from pain. The second one - ‘knowledge’ - includes access to information and not being left uninformed. ‘Sociability’ includes solidarity between men at a minimum standard of peace and harmony (9).

Focusing on the value prospects by Finnis, the primacy of “life” among other “basic goods” is an important element. Therefore natural law creates, primarily, a natural “right to life” and a “healthy living standard” without bodily harm and pain.

What about the healthy living standard of natural law and other socioeconomic rights? Is there a question of primacy? May the public authority give some social rights superiority and primacy over some other social rights? If yes, what criteria might be applied to create such a classification? Wherever law is separated from morals, values are separated from public order. Leslie Green offers an argument for the inseparability of law and morals (19). Non-maleficence is both a rule of

ethics and morals. Moreover, its existence in provisions of penal law, torts law and constitutional law is undeniable. Therefore non-maleficence is a common value for law, ethics and morals. Respect for the principle of *non-maleficence* is a pre-requisite for the healthy living standard of a patient.

What Impact Prevents Authorities from Providing More Intensive Geriatric Medicine and Healthcare on Grounds of Moral Rights and Ethics?

In such a limited and subjectively perceptible world, it is generally believed that moral acts have humanistic features. Morality with deliberate and conscious decision-making cannot be attributed to an animal or a humanistic robot. Even though domestication of animals teaches them to “behave well” or an algorithm can teach a robot to imitate human behaviours, these subjects are not capable of acting with morality. Considering their inability to internalise what they are taught, it is not possible to speak about their moral sense. A *deliberate* and *conscious* act is the consequence of judgement. Such acts are demanded by a certain norm that answers a “why?” question—why we ought to act in a certain way is the root of ethics.

Aristotle’s ethics and moral rules involve the *good of human kind* as an instrument to educate humanity. However, traditional ethics also include God’s revelation of commands to people and an obligation to God, a reciprocal act of God’s act of creation. Even the “divine” doctrine of the *Ancien Régime* provided limited descriptions of what a human being ought to do. The rest of the black hole in this dilemma is left to the human being to make sense of and to set up an ontological hierarchy.

The natural structure of the world presents many beings that live only at the expense of others. For instance, plants consume minerals for their well-being in their environment. However, animals need to consume organic substances. Humans, on the other hand, consume animals and other organic substances under a human-centric view. Issues regarding social justice, allocation of resources, and living conditions indicate that such a dilemma is a uniquely human question. The question produces an ontological hierarchy between various social groups among humans.

Assuming that plants have superiority over animals, animals are superior over plants and other animals, and human beings have superiority over all, according to an ontological hierarchy, is any group of human beings superior to other groups? Does a college student continue his/her free will existence at the expense of miners, fishermen, security forces, test-



pilots, and firemen? Conversely, does a fireman who fails to take the risk of entering a building on fire and survives, do so at the expense of the lives of people who did not survive?

The problem considered in this paper is simpler than the abovementioned situations. The productive work power of the last generation has enabled the prosperous existence of today's people and their elected officials. Therefore, who deserves to exist and to be valued more than the members of this last generation? Specifically, who deserves their health standards and living conditions to be bettered?

In 1993, the World Human Rights Conference adopted The Vienna Declaration and Programme of Action, which declared any form of classification or other means of establishing hierarchy among different types of rights as unacceptable on the basis of human-rights theory, stating the following:

"..... 5. *All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.....*" (Section 1, para 5)(20).

CONCLUSION

Considering budgets, society, law, and public services as a chain in social justice, vulnerable groups, especially the elderly in poverty who need public care to further their existence and welfare, are the weakest link in this chain. In order to keep this chain stable, these socio-economic rights holders must receive positive discrimination and support, and legal and *de facto* paternalism must be minimised. Inaction is nothing more than ignorance.

Thankfully, in the last decade, a number of institutional developments have offered great promise for the conduct of ethics in society. A few examples are summarised here to offer a thematic analogy. First, the OECD has proposed a recommendation to improve ethics in public services that seeks clarification of standards in order to improve certainty and public equity (21). It also requires a legal framework and public servants with proper training. Transparency and openness to scrutiny are also pre-requisites to achieving these improvements. Wrongdoing must be prosecuted with fairness and justice. Similarly, the European Union Ombudsman's Office has adopted five principles of public service: commitment to

citizens and union, integrity, objectivity, respect for others, and transparency (22).

Principles of Public Services and Older Populations

Additionally, the American Society for Public Service upheld a revised code of ethics, titled "Fundamental Principles of Public Services and Older Populations," laying out the following principles:

1. Advance the public interest where the service is for the public
2. Respect and support government laws and constitution
3. Inform the public and encourage active engagement
4. Treat all persons fair, just, and equal, while respecting personal differences, freedoms, and rights
5. Provide accurate, comprehensive, timely, and honest information
6. Adhere to the highest standards of conduct to inspire confidence in and trust to public service
7. Promote ethical organisations
8. Advance professional excellence

The most prominent elements common in the three sets of institutional ethical standards are their moral values and their ethical basis. These values are incorporated into strong documents such as human rights charters, constitutions, and multi-national covenants. However, protection mechanisms still fail.

In many cases, directly invoking constitutional or human rights receives no remedy before authorities. The final and central dilemma authorities have to face is why the authorities ought to codify constitutional values under secondary legislative instruments, such as codes of conduct, recommendations, directives, and so on. Is there any need for a secondary administrative act to remind us of the existence of the most supreme rule of a legal system? Such a need is a result of failures to apply the strong provisions of positive law that are derived from natural law. Public authorities, the judiciary, and public opinion are still not enlightened with respect to the dangers of the gradual disappearance of high values of humanity as positive law is divinised. This is a grave mistake, as Schlink underlined the emergence of these dangers in *The Third Reich*. This analysis proposes that the principle of *Primum non nocere* is integrated into natural law that is crystallised with ethical and moral values. Finally, this paper has sought to establish an unexpected yet necessary link between values protected by natural law and geriatrics, with a view to "*improving the function, independence and quality of life of older persons*" (23).



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