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健康权研究

Research on the Right to Health

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内 容 摘 要

健康问题是人的完好状态和人的尊严的核心,也是人权的核心理。国际社会所普遍认同的人权规范的一个基本立足点是,作为人权的两种基本分类,公民和政治权利是一方面,经济、社会和文化权利是另一方面,二者是普世的,不可分割、相互依赖和相互联系的。^①作为社会权利,健康权被视为生命权、自由权和追求幸福权利的基础,^②是行使其他人权不可或缺的一项基本人权。每个人都有权享有能够达到的、有益于体面生活的最高标准的健康。进入21世纪,健康维权愈来愈受到各国的重视。^③但是,由于我国对健康权的研究起步较晚,且主要限于私法领域,人们对健康权的认识还很模糊,也存在诸多争议与困惑,对健康权的系统研究还是空白。我国公民健康权的尊重、保护和实现存在诸多问题。新一轮医疗改革正在热议,加强健康权研究有重要的理论和实践意义。本文首次从人权、宪法权利和民事权利相结合的角度,从界定健康、健康权的法律概念开始,综合运用类型分析、比较分析、历史分析等方法,紧紧围绕健康权作为人权、宪法权利和民事权利统一体这一主线索,就健康权的本质、构成及其保障与救济为展开,对健康权进行法律阐释和制度构建。

除导言外,全文共五章。

第一章源流论旨在通过对健康和健康权概念的界定以及健康权的历史源流考察,探寻健康权的历史演进脉络,为科学把握健康权本质及由此展开对健康权构成及其保障和救济的研究形成可供贯穿其中的主线。本章第一节评析了学者对健康的内涵与外延的不同看法,梳理考察了医学健康观的历史流变,以当代三维的医学健康观,即生物——心理——社会医学模式为认识论基础,评析了把健康定义为生理健康或者定义为生理、心理和社会健康等四种观点及其适用背景,提出了作为法律概念的健康仅包括生理健康与心理健康的观点,为科学地界定和剖

① Auedry R. Chapman. Conceptualizing the Right to Health: a Violations Approach[J].Tennessee Law Rev., 1998,65(4):392—393.

② Christine Cassel,M.D. The Right to Health Care, the Social Contract, and Health Reform in the United States[J].St.Louis U.L.J. 1994(39):55.

③ 高枫.依法维护健康 构建和谐社会[A].曹建明.法治与国际和谐社会——第22届世界法律大会论文集[C].北京:人民法院出版社,2006.384.

析健康权奠定基础。第二节从分析国际或区域性条约文本、国内法律规范有关健康权的用语规范,评析健康权在条约规范性文本和学术观点上的八种不同概念界定,以人权及民事权利理论为指导,提出了健康权法律概念是“人人享有有可能达到最高标准的,维持身体的生理机能正常运转以及心理良好状态的权利”的新观点,在延续第一节健康科学内涵的基础上凸显了健康权的人权特征。第三节以健康权性质的进化为主线,探寻健康权从古代习惯保护到私法保护,再到正式确立为人格权以及人权之社会权类型的历史流变。分析了不同历史时期的健康权及其主体、客体、内容和性质的扩张或演化,指出当代健康权作为宪法权利和国际人权之确立所蕴含的丰富的人权理论、古典自然法学和功利主义的哲学思想。以作为主体的公民之间及公民与国家(政府)之间健康权法律关系的演变为线索,提出了公民与政府间的健康权法律关系经历了政府无责任到政府承担道义责任,再到承担法律责任的“三阶段论”。指出健康权的历史演变遵循着从非独立的私法权利到成为独立的私法人格权类型、再到人权之社会权及宪法权利的流变进路,提出是17世纪人权概念的勃兴和功利主义思想的影响,在工业革命和资产阶级革命的推动下,健康权从自然的不可转让的权利上升为人权来捍卫;是20世纪初大萧条及对第二次世界大战期间大屠杀的反思推动了健康权作为宪法权利得到重视。本节首次从年代学的角度梳理、探讨和厘清了健康权性质的发展史,形成了贯穿以及由此展开本论文其他问题研究的主线索。

第二章性质论旨在揭示健康权究竟是什么性质的权利,是承上启下的一章。本章评议了关于健康权性质的四种学说争议,以伦理、法理与实证法三个方面的依据证成健康权是人权,指出作为宪法权利的健康权与作为民事权利的健康权是健康人权的实证法化,提出了健康权是兼具公、私法权利双重属性的“混合权利说”与健康权作为公、私法权利的“分工协同说”,指出宪法上的健康权具有防御权功能、受益权功能和客观规范功能,作为宪法权利的健康权是作为民事权利的健康权的地位提升与功能进化,作为民事权利的健康权必须做符合作为宪法权利的健康权的规范解释,二者的分工协同构成了保护作为人权的健康权的法律安全网。在学者中首次综合运用私法、宪法和人权法的基础理论,全面分析和论述了健康权的性质。本章第一节论述了关于健康权性质的“否定说”、“商品说”、“道德权利说”和“法律权利说”的学术争议。分析了四种学说的主要观点和法理根据。

第二节论证了健康权是人权的观点,并阐述了作为人权的健康权的重要意义,批判了“否定说”、“商品说”理论错误。第三节论证了健康权是宪法权利,并阐述了作为宪法权利的健康权的重要意义。第四节分析健康权三种表现形态之间的关系,指出作为人权的健康权是原权,健康权是公、私法混合权利,二者分工协同。

第三章健康权构成论。本章指出:随着健康权性质的转变,健康权的主体、客体和内容都发生了蜕变。当代健康权的权利主体除了强调抽象的个人和集体等一般主体外,更多地关注差别化的特殊主体,如老年人、残疾人、儿童、妇女、非法居住的移民、在押人员和土著人或少数民族等。健康权的义务主体也不仅仅限于国家,还包括相关的国际组织、跨国公司及国内法规定的法人、其他组织和其他社会成员。作为人权及公、私法混合权利,健康权客体也从片面的身体健康转向身体和心理健康的统一体。本文首次运用心理健康研究的最新医学成果,结合对一些国家司法判例的分析,提出了表征为恐惧感、悲痛和精神打击、焦虑与忧郁、耻辱的情绪类型以及个性改变是对心理健康权的侵害的观点。健康权的本质决定了当代健康权内容的丰富与扩张,除了传统的消极权利内容外,健康权的积极权利内容包括了医疗权、基本药物获得权、环境健康权、职业健康权、生殖健康权、性健康权、公共健康权、获得医疗救助权、健康相关产品安全权等。其中本章第一节论述健康权主体;第二节论述健康权客体;第三节论述健康权内容。

第四章是保障和救济论。旨在通过分析不同的健康权保障和救济的理论及制度模式,为健康权的保障与救济提供可行的制度性经验借鉴与理论依据。本章指出:健康权的保障是在其未受到侵害前的保障。其最主要者有法律保障和社会经济保障。基于对健康权本质的不同认识,健康权的法律保障在各国宪法、民法和卫生法三个层面得到不同类型的体现,外国法上健康权的社会经济保障模式也有多种形态。总体趋势是:法律保障方面,宪法趋向设定权利型、民法趋向权利化立法、卫生立法趋向健康权基准法制订,以体现当代健康权的本质;社会经济保障方面,以保障健康权作为权利的实现为指导思想,兼顾国情及社会公平成为当前许多国家医疗保障制度改革的前进方向。健康权的救济是健康权受到侵害后的补救措施。司法救济是最有效、最常用的救济途径。健康权的司法救济充满了争议,作为人权法和实证法上的权利,认为健康权不具有可诉性的观点是错误的,健康权有充分的可诉性理由和判例支持。本章第一节论述健康权法律保障的制度

立法类型与经验。第二节论述国外法上健康权社会经济保障的四种主要医疗保障制度模式及我国的实践，分析其发展趋势。第三节探讨学界关于健康权可诉性的争议，系统地论述了健康权可诉性的理由及其意义，通过对国际准司法实践和各国国内司法判例的考察，证明了健康权在理论和实践上的可诉性。

第五章我国健康权保障的挑战与展望。本章是对健康权研究的出发点和落脚点。从分析健康权在我国实践中所面临的健康权观念缺失、法律保障体系不完善、社会经济保障存在制度性缺陷、健康权司法救济制度缺失等一系列挑战，从而对我国该如何履行对健康权的尊重、保护和实现义务提出制度构建和实践改善建议。

关键词：健康权 本质 权利保障 可诉性

厦门大学博硕

ABSTRACT

Health issues are central to human well-being and dignity and thus, are central to human rights. One of the fundamental underpinnings of the international consensus on human rights norms is the principle that the two major categories of human rights-civil and political rights on the one hand and economic, social, and cultural rights on the other-are universal, indivisible and interdependent and interrelated.^① As one type of social rights, the right to health is basic to the right to life, the right to liberty and the pursuit of happiness,^② and is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. In the 21st century, people are becoming more and more aware to the significance of protecting the right to health. However, the studies of the right to health starts late in China and scholars mainly pay attention to the study of health right in private law aspect. In our country, the right to health is a relative vague concept, from which arose many disputes and confusions, and about which systematic study is insufficient. In the aspect of respect, protect and fulfill the right to health, lots of problems still exist in China. Nowadays, as people are seriously debating about the recent health care reform, it is importance to enhance the research of the right to health theoretically and practically. In this paper, the author argues from the aspect of nature, scope, systematic protection and relief for the right to health, and from a perspective which combines human rights, constitutional rights and private rights theory. By means of modal analysis, comparative analysis and historical analysis, the author establishes his legal arguments and system construction on the right to health.

This paper consists of five chapters in addition to the preamble.

Chapter one: The historical progression of the right to health. The main purpose of the chapter is to discover the historical progression of the right to health, by determining the specific concept of health and the right to health, as well as by

① Audrey R. Chapman. Conceptualizing the Right to Health: a Violations Approach [J].Tennessee Law Rev.,1998,65(4):392—393.

② Christine Cassel,M.D. The Right to Health Care, the Social Contract, and Health Reform in the United States [J].St.Louis U.L.J. 1994,(39):55.

researching the historical development stage of the right to health. By doing so, we can create a sustainable main theory, for scientifically obtaining the fundamental inbeing of the right to health, as well as for the following up research on the protection and relief theory of the right to health. In section I of the chapter, the author observes the history of the medical model of health view. Based on the natural science of the three visions of health, namely the health view of bio-psycho-social medical model, this paper illuminates the pros and cons of different definitions of health and then concludes a physically and psychologically harmonious definition of health. This is essential in understanding the objectiveness of the right to health. Base on this, the author analyzes different viewpoints of other scholars and establish a physically and psychologically harmonious legal definition of the right to health. Section II of the chapter analyses the linguistic regulations of related regional or international treaty texts and the official law statements about the right to health, providing eight different conceptual definitions about the right to health normatively and academically. Basing on the guidance of the theory of human rights and civil rights, the author develops a new legal concept about the right to health, that “everyone has the right to the enjoyment of the highest attainable standard of physical and mental health”, which in addition to the fundamental scientific connotation of health back in the first part, emphasizes the human right characteristic about the right to health. The Section III of the chapter follows the characteristically evolution of the right to health as main line, researches the social right type historical progression of the right to health, from traditional habitual protection, to protection of private laws, and finally to be officially established as a human right. Also, the author analyses the evolution and extension of the right to health, with its subject, object, content and nature under different historical period, as well as modern right to health as a fundamental right of the constitution and international human rights behind the establishment of the richful human rights theory, classical natural law and the philosophy of utilitarianism. By following the evolution of legal relationship of the right to health between citizens and the government as a guide line, putting forward the “three step theory”, which states that the historical evolution of the right to health has been through the stages of the government bear no responsibility, to bear the moral responsibility, and to bear the legal responsibility. It points out that the historical evolution of the right to health has followed the process of from dependent private law right to independent private law

personal right, and finally to social right as a human right and constitutional right; as well as the fact that it was the affluence of emerging human rights concepts and the classical philosophy of utilitarianism in the 17th century, driven by the Industrial Revolution and the bourgeois revolution, that promoted the right to health from a natural, un-negotiable right to a human right to protect; it was the reflection of the Great Depression and the great massacre during the World War II promoted the right to health as a constitutional right attention. This section arranges for the first time from the perspective of chronology, to explore and clarify the historical development of the right to health, forming a main theory which throughout the other discussions in this paper.

Chapter two: It is a linkage chapter which intends to uncover the nature of the right to health, as well as what kind of right it is. In this chapter, the author reviews on the four controversial theories about the nature of the right to health, confirms the right to health is a basic human right grounded on both ethical and legal aspects, as well as that the right to health is approved to be a kind of right which mixed-up constitutional fundamental right and civil right. As human right, health is a primary right, while the constitutional fundamental right of health is to constitutionalize the human right to health and to enlighten the civil right to health in contents. As a civil right, the right to health is an embodiment of the constitutional fundamental right to health. Both the right to health in public law and in civil law, are to cooperate to protect the human right of health like a legal safe net. Being the first one among scholars to use the basic theories of private law, constitutional law and human rights law, comprehensively analyses and discusses the nature of the right to health. Section I of this chapter discusses the nature of the right to health base on the academic controversy between ‘doctrine of negative’, ‘doctrine of commodity’ and ‘doctrine of moral rights’ and ‘doctrine of legal rights’, analyzing the main view points and legal grounds of the four theories. Section II demonstrated the idea that the right to health is a human right, and described the significance of the right to health as a human right, and criticizes the theoretical mistakes of the criticism of ‘negative theory’ and ‘commodity theory’. Section III demonstrated that the right to health is a constitutional right, and described the importance of the right to health as the constitutional rights. Section IV analyses the relationship between the three forms of the right to health, points out that the right to health as a human right is the right of the

original means that it is the source to other rights, the right to health is a mixed-right of legal and private rights, which cooperates and work as a whole.

Chapter three: The legal ontology of the right to health. In this chapter, I want to point out that while the right to health changes its traditional nature, its subject, object and legal content metamorphoses from the traditional viewpoints. Besides general subjects of right such as abstract individual and collectivity that are stressed currently, its special subjects, taking older persons, persons with disabilities, children and adolescents, women, illegal immigrants, detainees and indigenous peoples for example, are more highlighted nowadays. Its subjects of obligation include not only countries, but also related international organizations, transnational companies, domestic organizations and other social members. Its object has also shifted from merely physical health to both physical and mental health as a whole. The paper for the first time using the latest medical research results on mental health as evident, combined with the analysis of some national jurisprudences, putting forward the idea that fear, grief and nervous shock, anxiety and depression, feelings of shame, as well as personality change is a violation to mental health right. The contents of right to health have been enriched and outstretched. The contents of rights includes right to medical treatment, right to essential medicines, right to environmental health, right to occupational health, right to public health, right to reproductive health, right to sexual health, right to medical aid, right to security use of health related products. Section I researched on the subject of the right to health. Section II on the object of the right to health. Section III on the legal content of the right to health.

Chapter four: The protection and relief of the right to health. The objective is by analyzing different theories and systems in its protection and relief, to provide practical institutional experience support and theoretical evident for the protection and relief of the right to health. The protection of right to health means to protect the right before its being infringed. Among all, legal protection and social economic protection are the most important manners. The relief of the right to health means the remedy after its being infringed. Judicial remedy is the most effective and prevalent way. In this chapter, the author discusses the drastic disputes and the meaning about the justiciability of the right to health. While reviewing quasi-judicial adjudication and judicial adjudication of the right to health in international and domestic cases, the justiciability of the right is asserted. The overall trend is: for legal protection, in order

to represent the legal nature of modern right to health, the constitution taking the trend of stipulating a right to health; the civil law legislation taking the trend of Construction of the right to health system, while health law legislation tend to a basic health law; for social and economical protection, taking ensuing the realization the right to health as a human right as main guiding ideology, taking into account specific national conditions and social justice in reforming the health care system, has become the methodology adopted by many countries. The relief of the right to health is the remedial measures after it being violated. While being the most effective and frequently practiced relief measure, the legal relief to the right to health is full of disputes. As a human right and a right in positive law, the right to health has sufficient reasons and case support for its actionable nature. Section I of this chapter demonstrates the legal system protection for the right to health and its experience, as well as analyzing system models and trends for the legal protection to the right to health. Section II discusses the four major medical security systems in the social and economic system which to protect the right to health, and the practice taken by China, with an analysis of its developing trend. Section III explores the disputes on the justiciable of the right to health; systematically explain the reason and significance for its justiciability. Through studying quasi-judicial practice of international and domestic jurisprudence, to theoretically and practically prove justiciability of the right to health.

Chapter five: The achievements, challenges and blueprint of the safeguarding of the right to health in China. This chapter is an end of this paper. The author analyses the challenges such as the lack of a conception of the right to health, the incompleteness of the legal protection system safeguarding the right to health, the defects of the socioeconomic protection system of the right to health, and the lack of the right to judicial relief about the right to health in China. and provide suggestions on how to respect, protect and fulfill the right to health better in law and in practice.

Keywords: right to health; legal nature; safeguarding of right; justiciability.

缩略语

ICESCR: 联合国经济、社会和文化权利公约

第 14 号一般性意见: 联合国经济、社会和文化权利委员会第 14 号一般性意见

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