

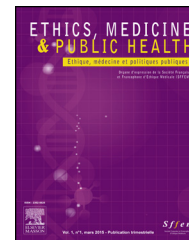


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COMMENTARY

Commentary on an essay by Konnoth CJ. Medicalization and the new civil rights



Commentaire sur un essai de CJ Konnoth – Médicalisation et nouveaux droits civiques

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Summary This commentary, on an essay written by Konnoth, considers the stance taken and motivated by the said author whereby the term “medical civil rights” and the application thereof should be recognised, specifically in context of the “language of medicine”. The author departs sharply from the existing American legal scholarship, by defending medical rights-seeking. In essence, the commentary concurs with the said author’s stance and illustrates the incidence and application thereof with examples of the Constitutional jurisprudence (case law) in South Africa as specifically pronounced by the Constitutional Court. The commentary concludes that the recognition of medical civil rights should find universal application and that underpinned values in Human Rights law (for example solidarity, justice and the right to dignity), relevant legislation, medical science and bio-ethics will be guiding sources in the recognition and application of medical civil rights to ultimately achieve transformation.

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MOTS CLÉS

Bioéthique ;
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l’homme ;
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Résumé Ce commentaire, d’un essai écrit par Konnoth, considère la position prise et motivée par ledit auteur selon laquelle le terme « droits civils médicaux » et son application devraient être reconnus, en particulier dans le contexte du « langage de la médecine ». L’auteur s’écarte fortement du savoir juridique américain existant, en défendant la recherche de droits médicaux. En substance, le commentaire rejoint la position de l’auteur et illustre son incidence et son application avec des exemples de la jurisprudence constitutionnelle en Afrique du Sud telle

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von qu'elle a été spécifiquement prononcée par la Cour constitutionnelle. Le commentaire conclut que la reconnaissance des droits civils médicaux devrait trouver une application universelle et que les valeurs qui sous-tendent les droits de l'homme (par exemple la solidarité, la justice et le droit à la dignité), la législation pertinente, la science médicale et la bioéthique seront des sources directrices dans la reconnaissance et l'application des droits civils médicaux pour parvenir à terme à la transformation.

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The main thrust of the article, if I understand it correctly, is in essence whether the "medical status" of a claimant may give rise to laying a claim, and whether such claims induced by the medical status can be termed as "medical civil rights" or as "a process for the development of medicalization of new civil rights". The author has indicated this is a contested space, specifically in American Law, but despite the disparity and contestation, there seem to be unifying themes [1]. After examining three salient questions in this regard: (1) is this phenomenon happening?; 2) why is it happening? and; 3) should it be happening?, the author concludes that:

"Medical civil rights are thus a site of dialogue between law and medicine and that the law can infuse the medical status with normative content. That the normative content might be punitive, and reinforce the hierarchy of doctor and patient. That as medical civil rights show, it may also be liberatory, a starting point to think about new forms of rights – positive rights that extend to family, caretaking, and social transformation."

I have found the article very instructive and the arguments advanced for the recognition of "medical civil rights" very persuasive. However, one must bear in mind that I, as a medical law academic and lawyer, find myself in a developing country (South Africa) with all its specific challenges in the sphere of medical/health law. Fortunately, South Africa has a very progressive Constitution [2] and as most human rights (contained in the Bill of Rights and relevant to the concept of medical civil rights, equality [section 9], dignity [section 10], life [section 11], patient autonomy [section 12], privacy [section 13], and access to health care [section 27]) are not self-executing, the courts, legislators and scholars are not hesitant to develop our common law and to articulate what have been coined by the author as "medical civil rights". I will thus review the article according to how I am informed in context of illustrative examples in the South African jurisprudence.

However, before embarking on the aforesaid illustrative examples, it is necessary to briefly note the fundamentals pertaining to the recognition of different kinds of rights and the so-called determinants of health. Broadly speaking, there is a general recognition of civil and political rights, but in context of this commentary the focus is on socio-economic rights which include the right to health care. The right to health was first expressed in the Universal Declaration of Human Rights (UDHR) in 1948. Article 25 provides for the right in a very broad sense that include food, clothing, housing, medical care and necessary social services. It has

rightly been observed that there is an interconnectedness with other rights and that communities who live in poverty and having access to medicines alone, in the absence of sanitation, water or food will not necessarily improve their health status [3]. Traditionally, the most obvious objection to the legal recognition of socio-economic rights (and this also rings true for medical civil rights) is that this will result in the courts interfering in the domain of the executive and legislature and that these rights require greater resources. In context of the arguments that medical status can/may propel the recognition of a specific cluster of "medical civil rights", one can refer to the views of Pinet [4] who identifies the following determinants of health: biological, behavioural, environmental, health system socio-economic factors. Socio-cultural factors, ageing of the population, science and technology, information and communication, gender, equity and social justice, and human rights. These determinants may proclaim or articulate the various medical/health themes or fields wherein "medical civil rights" are to be found or constructed.

When regard is given to illustrative examples in South African and post-constitutional jurisprudence of what could be called "medical civil rights" in context of medical status, it is instructive to focus on the incidences of patients infected with HIV/AIDS, and Drug Resistant Tuberculosis (XTBR), invoking mostly constitutional rights (to equality, life dignity, access to health care and access to medicines) to claim that the executive meets its obligations as proclaimed in the Constitution (the provision of anti-retroviral drugs) or compensation for personal injury and damages. Should the health status of a patient infected with HIV/AIDS be protected in context of doctor-patient confidentiality and in this regard the right to privacy has been invoked. It is, however, at the same time important to set limitations to these rights (for example for economic reasons or lack of resources)¹.

When dealing with specific examples, such as the medical status of a patient infected with HIV/AIDS, in context of a claim to "medical civil rights", it is to be noted that for some time that South Africa went through a time of "AIDS-denialism", where a former State President, Mr Mbeki, and his Minister of Health, Dr Tsabalala–Msimang, amazingly refuted the fact that the HIV-virus causes AIDS² [5]. This ridiculous and unscientific stance was soon legally challenged and came to the fore in the Constitutional Court case

¹ Soobramoney v. Minister of Health Kwa Zulu – Natal 1998 1 SA 765 CC.

² Treatment Action Campaign (TAC) v. Matthias Rath and Others 2807/06 C.P.D. March: 2006.

of *Hoffmann v. South African Airways*³: the plaintiff applied for a position of an in-flight steward with the South African Airways. Routinely, all applicants were screened for HIV with their informed consent. The applicant tested positive and South African Airways declined to employ the plaintiff, averring that although their actions amounted to unfair discrimination in term of the Constitution, it was a justifiable limitation to the applicant's right to equality due to operational requirements for the airline. The Constitutional Court dismissed the Airline's objections and ordered that the applicant be employed by them, ruling that people who are infected with HIV should be afforded special protection under the Constitution due to the marginalization of their rights and the historical unfair discrimination. However, this judgment is important as the Court, once and for all, and in the face of the said denialism, judicially took cognisance of the scientific cycle of the HIV virus, based on the expert medical evidence of an eminent virologist tendered during the trial. In another trial dealing with the possible medical rights and status of the applicants (all inmates infected with HIV in a prison), an urgent interdict was sought to force the prison authorities to provide the infected inmates with anti-retroviral medicines. The Court granted a so-called "structural interdict" as the particular relief and ruled that where the Constitution places an obligation on the State to comply with the right of access to health care, the appropriate remedy would be a structural interdict⁴.

In another case dealing with the medical status of patients, specifically mothers who are HIV positive and breast feeding their babies, the Treatment Action Campaign (TAC) took the government to court when the Department of Health refused to roll out anti-retroviral medicines to these mothers to prevent mother-to-baby transmission. The Constitutional Court ordered the Department of Health to provide such medicines⁵. In another ground-breaking case dealing with the doctor-patient relationship and the disclosure of a patient's HIV status without consent to third parties, the Supreme Court of Appeal ruled that a doctor may not disclose the HIV status of a patient without the patient's consent unless there is a legal duty on the doctor to disclose. In this instance, the patient's doctor, after obtaining the positive HIV status of his patient, disclosed this to fellow health care practitioners during a game of golf⁶.

However, it is not only with regard to the medical status of HIV/AIDS patients where medical civil rights are invoked in South Africa, but also in context of mental illness and transgender registration. It is to be noted that in South African legal literature there was no "legal definition" of what is meant/or classified as "mental illness". The absence of such a definition caused many interpretational difficulties, specifically where the defence of pathological criminal in capacity was invoked. The Courts simply dealt with the meaning of mental illness in a piece-meal fashion. It was, however, abundantly clear that mental illness should

be defined/informed³ by expert medical psychiatric opinion based on an accepted classification or diagnostic system. This is exactly what happened when the Mental Health Care Act 17 of 2002 came into operation on 15 December 2004. According to the Act, "mental health status" means "the level of mental well being of an individual as affected by physical, social and psychological factors and which may result in a psychiatric diagnosis", while "mental illness" is defined as "a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnosis"⁷. It is thus clear that the medical status of a patient/claimant in context of mental illness will be informed by and depend on expert psychiatric evidence based on an accepted diagnostic criteria (usually the Diagnostic and Statistical Manual of Mental Disorders) (DSM-V). Invoking medical civil rights is thus dependent on expert medical opinion [6]. It is thus clear, as correctly stated by Konnoth, that medical civil rights rely on the language of medicine. This is also apparent where transgender persons want to claim and assert specific medical civil rights, mainly in context of the alteration of sex description and sexual status in birth registers to the extent that such alteration will "align" the applicant to the sex/gender to which they aspire. An instructive piece of legislation in South Africa, Alteration of Sex Description and Sex Status Act 49 of 2003, was quietly passed by Parliament and came into effect on 9 March 2009. The Act allows transgender persons, based on their medical status (with reference to defined concepts such as "gender characteristics", "gender reassignment" and "inter-sexed") to apply for the alteration of their sex description as was initially recorded at birth to the Department of Home Affairs. Once again, expert medical reports must be submitted with the application, and such an application will not be successful if there is no corroborating medical report completed and motivated by the medical practitioners who performed the medical realignment procedures. Important and significant, from a medical civil rights perspective, is the provision that the rights and obligations that have been acquired or accrued to such a person before the alteration of his or her sex description will not be adversely affected by the alteration⁸. It is also to be noted that the "medical status" of transgender persons is also recognized in Criminal Law and according to the Sexual Offences Act (which came into operation in December 2010)⁹, a transgender victim (with realignment from male to female with surgically constructed genitals) can also be raped on account of sexual genital penetration by a male or female offender, and as such the transgender victim is entitled to post exposure prophylaxis (PEP) to be automatically tested for HIV transmission and treatment with anti-retroviral medicine within 72 hours after the rape. Yet again, the legal process has to be informed by the medical language.

It is submitted that the aforesaid illustrations of "medical civil rights" in action should not merely be recognized on account of the concomitant medical status, but

³ 2001.1.S.A.1 C.C.

⁴ *EN and others v. Government of South Africa and others*, 4576/2006 D.C.L.D.

⁵ *Treatment Action Campaign (TAC) v. Minister of Health*, 2002 C.C. 2002. 5.721

⁶ *Jansen van Vuuren v. Kruger, A.* 1993. 4. S.A. 842.

⁷ Mental Health Care Act 17 of 2002, sec. 1.

⁸ *Alteration of sex description and Sex Status Act 49 of 2003*. Sec .3

⁹ *Sexual Offences Act*. 32 of 2007.

concretely also with reference to the underlying values which underpin Human Rights and then specifically medical civil rights or health rights [7]. The values of solidarity and justice play a significant role in the recognition and application of “medical civil rights”. Solidarity, as a condition of equal access to health care, refers to the notion of social justice. Social justice implies a redistribution of goods, whereas differences in medical treatment requires justification. The South African Constitutional Court’s jurisprudence provides a path-breaking illustration of the social justice potential of an enforceable right to health (albeit sometimes in symbolic context only) (this can be translated in terms of medically civil rights as well). The South African experience suggests that enforcing health rights may, in fact, contribute to greater degrees of collective solidarity and justice. It points to individual civil and social rights within a communitarian framework drawing from the traditional African notion of “Ubuntu”, which denotes a collective solidarity, humanness and mutual responsibilities to recognize respect, dignity and value of all members of society [8–10].

It is also submitted that the recognition of medical civil rights, as a distinct and definitive part of Human Rights, should also be canvassed in context of the right to dignity. In this regard, the renowned scholar from Oxford University, Charles Foster, states that dignity is often denounced as hopelessly amorphous or incurably a feel-good philosophical window-dressing. This, according to Foster, is wrong as dignity is not only an essential principle in bioethics and law; it is really the only principle. To him, dignity is the key that, properly used, unlocks all problems in contemporary medical ethics and medical law [11]. By analogy, it is submitted that this should also resonate with medical civil rights. Medical civil rights are intrinsically woven into the fabric of medical or health law which, in turn, is underpinned by bioethics.

It is also to be noted that not only will a patient with a diagnosed “medical status” (for instance, the patient infected with HIV) be able to invoke medical civil rights, but the patient who is not infected and without a diagnosed medical status will also be able to invoke medical civil rights not to be infected. An illustration of this can be found in the judgment of the Constitutional Court in the case of *Lee v. Minister of Correctional Services*¹⁰. In this case, the plaintiff was arrested and incarcerated in a prison cell with other inmates who suffered from tuberculosis. At later stage, the plaintiff claimed that he contracted tuberculosis as a result of the negligence of the prison authorities who failed to isolate and protect him from being exposed to the disease. The matter was mainly decided on the issue of causation, but damages were awarded to the plaintiff.

In view of the foregoing commentary and illustrations, I fully concur with the said author and submit that his conclusion that medical civil rights could be a starting point to think about new forms of rights which are indicative of caretaking and social transformation, are clearly acceptable and persuasive in the domain of human rights. The classification and identification of medical civil rights as stated by Konnoth certainly dovetails with Constitutional jurisprudence, internationally (notably some illustrations from South Africa in a post-constitutional vein) and the principled stance taken by him should be commended and

should find universal application bearing in mind the nature and scope of the right and that considerations of focused Human Rights Law (in context also of the underpinned values), relevant legislation, medical science and bio-ethics will be a guiding transformative source in the recognition and application of medical civil rights.

Human and animal rights

The authors declare that the work described has not involved experimentation on humans or animals.

Informed consent and patient details

The authors declare that the work described does not involve patients or volunteers.

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