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HEALTH LAW AS AN INDEPENDENT BRANCH OF THE GENERAL LAW

(Item proposed by the Government of Peru)

If we consider that, from the philosophical standpoint, the purpose of a right is its full enjoyment, and that health is the sole means by which all of the constitutionally guaranteed and legally recognized rights may be fully enjoyed, we must conclude that there is such a thing as health law as a branch of the general law with its own juridical characteristics, and its distinctive principles.

The defects apparent in health legislation in force throughout the Western Hemisphere make it imperative to proceed with the formulation of a suitable legal instrument, subjected to a method and a system that will attain for it the same level that has been attained in the technical progress of public and private health, by the regulation of those institutions of health law whose existence is clearly demonstrated.

Although there is no intention to disregard the importance of all that has been accomplished in the field of health legislation in the Americas, the most elementary analysis leads us to believe that very special circumstances have evidently contributed to the lag in the development of the legal aspects of health, in contrast to the increasingly more impressive achievements in the technical aspects of public and private health. This has come about within a broad panorama of legislation, in which many of the provisions have been enacted solely in response to the most pressing need to solve the problem of the moment.

This phenomenon has given rise to disarticulation in health legislation that now often makes its application, even in the same field, ineffective.

It must be observed that there has been a lack of adequate organization and working methodology in the formulating of health legislation, with a resultant dispersion of such laws that makes them inadequate as a legal instrument

for the reason that the effort to harmonize related provisions, without method, has only succeeded in many cases in altering an existing juridical system. The exaggerated importance accorded to the purely administrative field has been to the detriment of the legitimate Institutions in the field of health law.

The need to maintain the existing juridical system intact enhances the intention, which could have had a useful purpose, of bringing together related provisions that lack the legal force of an Institution.

It is therefore essential to bring about legislative coordination by seeking and finding a new point of departure, in the form of a new concept to govern the content of modern health legislation.

Too much emphasis has been placed on the requirement that the administrative activity be manifested, thus giving rise to a situation in which the agencies of the State impose restrictions that affect the juridical relationship in the field of health law, and this comes about for the very reason that it is incorrect to regard health action as conduct rather than as a right.

In the health field, there is legal tie of one person to another; thus there is a vital relationship that must be governed by law. In health law, there is not only the juridical relationship resulting from the action of the State with regard to all persons but also the juridical relation that has, and creates, relationships between one person and another with the intervention of the State. For this reason, it is unsound to envisage health legislation either as the conduct of the government or as the conduct of the governed.

If this is true, how can we find a new point of departure or a different concept to govern the health legislation of the future?

In the field of comparative legislation, if we examine the Pan American Sanitary Code approved at the Seventh Pan American Sanitary Conference held in Havana in 1924, we will find little or nothing to help us to find this new point of departure or distinctive concept we seek, although it does show us, and we must lament the fact, that there has been no concern to declare the existence of the right to health which, by its very nature, is the most basic of all rights from the point of view of logic, biology, ethics and principle.

Although it is true that the concept of codification is not common to all of the countries, the revised Sanitary Codes of the various countries in the Western Hemisphere are nothing more than systematically arranged texts of regulations designed to bring together various legislative provisions related exclusively to the problem of disease, without any method that will endow them with legal validity so that they might indicate a new road to be followed in our attempt to frame health law as a legal discipline, with its own distinctive features.

While some laws have appeared that give priority to the regulation of the government's conduct, others have regulated the conduct of the governed, but all of them have been enacted within a purely objective methodological fromework that makes them merely administrative regulations designed to solve the problem exclusively from the point of view of the administrator.

Among these laws the traditional tendency appears to retain health law within the body of administrative law, forcing it into moulds that do not allow it freedom of action as a law with its own juridical features. And because health law operates within an individual field of action, it is imperative to claim for it the distinctive principles that will give it existence as an independent branch of the general law.

There is nothing in the life of man that is more intimately connected with his development, in all fields of activity, than health. It governs his personality and his capacity as a subject of the law, and it is manifested at all points in his life cycle.

The health of the mother is protected during the gestation period and at the moment of childbirth, to assure the viability of the infant; the health of the child is protected from the moment of birth to school age; his health is cared for as he receives his education; subsequently, the adult begins to work and produces and his health continues to be protected; and his old-age demands renewed concern for his health. In other words, health is of such importance in the life of a man that it could well be said: There is health without education, but never education without health; there is health without work, but never work without health.

Thus health so affects the life of each individual and the social and economic development of a nation that we need have no fear in stating as a universal principle that man's right to health is analienable, unprescriptible and irrenunciable.

And it is in this light that health law appears within the contemporary juridical framework, fully justifying the necessity of removing it from administrative law in order that it may be constituted into an independent branch of the general law.

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THE HEALTH AUTHORITY

Etymologically, law is closely related to the concept of authority and hence the importance of the concept of health authority in this branch of the law.

Despite the different meanings that have been given to the word, authority, the fundamental concept within which it acquires its true sense

can be readily identified. In our thesis, it appears as that authority one person has in relation to others; but since this idea cannot be taken to mean merely the authority to make decisions, it is essential that we keep it related to the concept of power.

Both power and authority are social phenomena; and, since health action is eminently social, it may be seen that the meaning of health authority must be sought in both concepts for the reason that it requires both the capacity to compel in fact (power), and the means of legitimatizing such power, which is the legal faculty of compulsion (authority).

Nothing can be accomplished in health action by the legal faculty of compulsion if we do not have the element capable of producing the social phenomenon of obedience.

Following this line of reasoning, it may be stated that the health authority is that authority belonging to the agency of the state that has, with respect to persons, the power to impose health action.

This is the source of the health authority's position in dealing with health problems, a position that is derived from supreme power in the framework of a governmental policy.

Now, this power imposes an obligation and creates a right directed to the promotion of health, the protection of health and the restoration of health; hence the concept assumes greater importance when the health authority is conceived as the subject of health law and as the basis for a determination of the field of health jurisdiction.

On the foregoing basis, the health authority appears in the health action, not as the conduct of the administrative organ but as a regulatory function in a juridical relationship.

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HEALTH JURISDICTION

If we consider jurisdiction in the regulation of health law from the standpoint of substantive law, we are not complicating it with principles that pertain to procedural law. It is not incorrect to say that in determining the field in which the juridical relation functions within the framework of health law, the solution gives us procedural law.

The authorities, Carnelutty and Calamandrei, have undertaken to prove that there are institutions in procedural law, the regulation of which cannot be comprehended within the procedural concept. Among them are jurisdiction and, logically, competence since there can be no jurisdiction without competence. In health law, especially in our countries, jurisdiction and competence give rise to a very real conflict of authority that in many cases

obstructs the action of the jurisdictional authority in the health field and hence to a certain extent prevents the public authorities from having sufficient independence in their specific actions to arrive at an overall solution of the health problems of a given country. The intervention of some agencies, interfering with others, creates situations that generate actual unnecessary contests of competence, simply because there has been a failure to define with precision the limits of jurisdiction and competence of each agency. And this jurisdictional confusion is manifested in health problems when actions of the central government are not coordinated with those of the local governments, as well as when the different agencies of the same central government, in an attempt to solve the same problem, go outside their own field to invade another, to the prejudice of their own. And it must not be said that this is a structural problem. It is rather that they simply do not want to understand, and much less to seek, the limits of their legitimate field of action.

As a result of this mistaken concept, it is customary in our countries to have various authorities in the health field. Human health on the one hand and animal or plant health on the other are mistakenly constituted as two different health jurisdictions. This is a mistake because health ought to be a single jurisdiction, with power vested in a single health authority. Animal and plant health fall in the field of environmental health, so that if environmental health is a single concept there is no reason for such separation, since both animal and plant health constitute a de facto means of alteration, and consequently constitute a legitimate objective in the field of health.

It may be said without hesitation in declaring that health jurisdiction extends to the entire world, not because the health authority manifests itself beyond the borders of a single country, but because its regulations affect persons beyond those borders. It is for this reason that the health problem on the international plane has very distinctive features.

In the field of health, no man could claim his territorial law in another country. Wherever he went he would be subject to the health law under the prevailing health regulations, and this is the universal custom for the protection of his health and that of others.

Whatever name is given to the governmental agency responsible for the public health, whether it be a ministry or a department in the different countries, it must, of necessity, be the paramount jurisdictional body in matters of health, since it is through its action that the State carries out one of its primary functions - the promotion, protection and restoration of health - and it does so with the special feature that in law is called compulsory or summary jurisdiction.

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PERSONS IN HEALTH LAW

It must be pointed out that if we depart at any time from the traditional concept of persons as far as their rights and obligations are concerned, we do not in any way alter the unifying principle. Although it is true that principles in general cannot be mutually contradictory, in law this is possible. If such contradictory principles do exist, one of them must be excluded since only one of them can be the correct one. For the rest, it is logical that principles derived from an axiom are not excluded, but the contradiction is valid in law for a particular juridical order, provided that the unifying principle is not altered.

Taking the traditional concept of "persons" in law as a point of departure, and their status, personality, capacity and other characteristics as the principal element in all legal relationships, it becomes necessary to define the very special characteristics of "persons" in the field of health law, with reservations as to the possible inconsistencies that may be deduced from the interpretation of this point of view.

According to the traditional definition, "persons" in legal terminology are those human beings capable of possessing rights and obligations. It is also argued that children and the insane are persons, although they do not have the capacity of consent; and from these definitions the characteristics of the person as a subject of law are drawn.

Under Civil law, personality begins with birth and ends with death. The unborn child is regarded as having already been born, insofar as his rights are concerned, providing there is viable life at birth. In Civil law, if such viability has not come to pass, no rights have been created, and this condition is subject to proof based on the opinion of the medical expert who must determine, according to pre-established principles, whether or not there has been a live birth.

From the standpoint of health law, there is life prior to the moment of birth; and, if this is the case, it must be concluded that this creates a right and generates an obligation.

We have said earlier that the health of the mother during gestation is safeguarded so as to protect a life that has already begun and, in silence, is claiming the right of protection. If it is acknowledged that such a right and such an obligation exist, it must be concluded that, without contravening the unifying principle of health law, the person to be born is an individual, capable of possessing a right, who demands the fulfillment of an obligation because of his right to life.

The first moment that gives rise to this apparent inconsistency is complemented in health law by another moment, the definition of which would appear to alter a concept.

In health law a problem is created by death, which extinguishes personality; and, since it is impossible to speak of an extension of personality after death, under health law, that which was the subject of the law becomes an object of the law in defense of the health of others.

This personality, which is expressed through the capacity or the incapacity to exercise rights in general, suffers an apparent alteration when considered from the standpoint of health law, under which the subject that is absolutely incompetent in civil law becomes a competent subject in health law, and not only with regard to the fulfillment of an obligation, but as the recipient of action for the protection of his health or for its recovery. In health law, the idea of representation, guardianship or trusteeship is inconceivable, since if incapacity is an alteration in the state of health, no one can be represented for its recovery. Health action cannot be received through any person other than the one who has suffered the alteration.

If both the health authority and the person are the subjects of health law, how can the relationship between them be defined?

It is an accepted principle that all law necessarily has an active subject and one or more passive subjects, who, whether active or passive, can only be either juridical or natural persons.

This statement is based on the so-called "Theory of the Two Subjects", advanced by Ortolán, and developed by Roguín in his "Theory of Performance" and inasmuch as there are two subjects in health law, and there is the obligation, or the performance of a service, there can be no doubt that a juridical relationship, with all of the elements that shape it, does exist.

Thus, within the general theory of law, the active subject is the one that initiates and activates the legal relationship; and either as the owner or beneficiary of the right, claims the obligation or performance. The passive subject is the one that is bound, that is compelled to fulfill the obligation or perform.

In health law, the State is the subject of the obligation to the extent that it is responsible for the public health and the protection of private health , and performs the service or fulfills the obligation - in other words, the activity or the abstention from the activity - to which it is obligated, in certain instances preventing an alteration in health, and in others restoring the state of health that has been altered. In other words, it is at all times the passive subject of the relationship, despite the fact that it initiates and activates it, by imposing it. And since it generally intervenes as the agency of power, resolving the trilogy of the health problem - the healthy, the sick, and the vector - it completes the full circle of the health problem.

And in order to perform its function as the subject of the obligation, the State imposes its authority unilaterally without the need to introduce the subjective element of the other subject or subjects: consent. Thus we

have the situation under health law in which the passive subject is the one that has the advantage in the juridical relationship.

This apparent inconsistency is resolved when it is recognized that just as the State takes official action in defense of the society that has been affected by a crime, so the State takes health action in defense of the public health and private health that have been altered.

Thus, in this instance where one is the subject of the obligation and many are the beneficiaries of its action - since the obligation or the rendering of the service is invariably the responsibility of the State, it may be said with apologies to the recognized authorities, that there are three subjects and one obligation.

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THINGS IN HEALTH LAW

Another instance in which health law presents very distinctive features that require at least a brief outline is that derived from the use of things. But as this is only to give us a general idea of the problem, we shall restrict the argument of this Institution of health law to the use of property.

The problem comprehends both urban and rural property, in the concept of environment in the health sense; but it is in the field of housing that it presents the most distinctive features and we shall limit our discussion to this instance.

There can be no question about the need for a system for regulating health and sanitation in connection with housing, since it is the dwelling, in a general sense, that assures the protection of health and makes possible the physical,moral and social development of a population, given the fact that those elements and human welfare are so intimately linked to man's existence and are of such vast importance in maintaining the required balance between health and social progress.

It is an obvious and universally accepted principle that property must be used in consonance with the interests of society and that, consequently, there must be limitations on that right when its exercise injures an inalienable right. It is further obvious that the use of property in whatever form, in a condition unsuited to the purpose for which it is intended, constitutes an abuse of the right.

Since all of the foregoing is true, it is essential, in order to maintain our juridical structure, that such limitation be regulated in each case by a law that pertains to the appropriate agency of the State; and there is similarly no question that the problem must be situated in its proper

field. If it is a matter of the control of health and sanitation, the field can be none other than health law and the legislation that regulates it.

In the play of relations under health law there arises, in connection with the use of property, the need to safeguard an interest, health. This is an interest that must be subject to compulsory regulation, based on the needs of the society and related to the problem of law: the appropriate use of the thing.

From the foregoing it may be deduced that the need for health and sanitary control of property, for purposes of health, under the obligation imposed on the State, has its scope in the generality of the regulation devised to solve the problem. When looked at in this way, the problem appears as a consequence of this play of relationships, and the reciprocal rights and obligations that it creates.

Consequently, if the right is created only by virtue of an expressed will (consent), and if it cannot be said that the exercise of the right proceeds unilaterally, it must be established that the right proceeds from the persons capable of exercising it, through the regulation that originates in the general will, engaged in guaranteeing and safeguarding the sole interest in health law: health itself.

In this statement, what is the implication within the customary legal framework of overcrowding, poor distribution of space, a lack of light, air and ventilation, along with other health defects that make the dwellings dangerous to the health of those who live in the unhealthy housing and for those who live in the neighboring structures, and that they constitute factors conducive to the spread of all types of disease?

It is a question of the lack of a regulation or law defining the crime or offense.

Theoretically, crimes against the public health fall into the category of those that are suppressed as contrary to the collective safety, on the basis of the interest in preventing injury to the general health of man in general, not only by direct action but by the maintenance of conditions prejudicial to the life of the inhabitants of the building, or of the community. If a particular personal right is constituted in this way, when it becomes a part of the relationship with a group of individuals, the personal right becomes a social right common to all of them.

The consequent damages arising from crimes against the public health are not indirect but direct damages, inherent in the isolated act, that must be viewed in the light of its possible repetition. The damage that such a crime may cause is liable to spread easily, and that is the danger that must be taken into account in preventing it.

Within the framework of health legislation, there are already provisions establishing the conditions that must exist to render a property habitable; provisions that have a preventive nature, for the very purpose of preventing injury to health.

If through ignorance, through negligence or by the continuation of a condition in effect prior to the action or the omission causing the injury, these provisions are not complied with, they must be enforced with all the power of the law. This is from the standpoint of the act or omission conducive to the crime. But, how are we to view the problem from the point of view of health law?

We sincerely believe that in consonance with the precepts of the Civil law, we must arrive at the concept of abandonment.

Failure to comply with regulations to control health and sanitation with regard to a structure that serves as a dwelling, because of its gravity, must constitute abandonment of the thing, insofar as it constitutes an indirect and direct injury to the state of health.

This evokes one question: what is the implication, within the framework of health law, of a refusal to establish the conditions that must exist in a structure to render it habitable, when in fact they are the causes of injury to the state of health, which is an inalienable right?

We believe in all sincerity that some thought must be given to this question, since the State, which has an obligation to protect health, cannot consciously permit an act or omission in the use of property for any reason to cause an injury to the state of health of persons, with the special circumstance that no distinction can be made between use by the owner or its use by a tenant. If in the juridical relationship under health law, the subjective element of consent is not introduced, the law has the responsibility for regulating the relationship and in so doing will give effect to the established legal principle that property must be used in harmony with the interests of the society, establishing the limits and processes of the health law, and preventing any abuse of the legal maxim that the law does not protect the abuse of rights.

Failure to comply with the sanitary code concerning real property constitutes abandonment. Not the abandonment that may be synonomous with renunciation. Not abandonment of the property, which appears as a distinct legal matter and one in which the objective element of visible manifestation prevails. Not abandonment of the property that constitutes the material renunciation through a clearly defined legal act as an expression of will, and not as the internal attitude that is produced in the loss, first, of possession and then of ownership. It is rather a form of abandonment with very special features - an abandonment that is produced by failure to comply with the sanitary code that endangers health and that by its repetition constitutes a crime.

Accordingly, it is clear that this type of abandonment cannot be established without the legal requirements that compel a warning that can be nothing other than that of the loss of the thing.

With these four juridical aspects of the four principal institutions of health law established, it is necessary to complete the line of reasoning: that the existence of a legal act and a legal object must be posited in all legal relationships.

In health law, the materialization of the act leads us completely away from the philosophical concept of the cause, that with complete independence produces the effect, requiring a search for the primary cause; this is not a matter of the primary principle productive of the effect. But since there is no effect without cause, we must seek the act, at the moment in which the cause is materialized to produce the effect; then we can say with complete assurance that the legal act in health law is the factor, or series of factors, the phenomenon or series of phenomena, that causes an alteration in the state of health. Thus, if the legal act is the moment when the cause is materialized, the legal object must be the effect,i.e. the alteration in the state of health, and it is this change in the thing that completes the juridical relationship because it is the motive for the performance of the service or fulfilling the obligation, i.e. the health action.

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HEALTH PROMOTION

It is a function of the highest echelon of the health administration to promote the best physical and mental development of the individual. This principle is the basis for the phenomenon of health promotion projected into all fields in which the health phenomenon appears, and it is the subject of legal regulation, for the reason that it is essential to have the required provisions enacted under a substantive and permanent code, to assure protection of the mother and child in the prenatal period, during lactation, in the pre-school and school age; and to control the hygiene of food and housing, of medicine, of employment protected against occupational risk and treating the diseases contracted or arising from the occupation, regulating rehabilitation methods as a means of recovering vital human capital; pointing the way to improved mental and personal hygiene for the adult - all on the basis that health promotion encourages development of the individual's maximum potential to achieve a state of total physical, mental, and social well-being.

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HEALTH PROTECTION

The separation of medicine's two-fold role into its preventive and curative aspects is not only a methodological mistake but is also contrary to its integral and individual aspect at the five levels of:

Health promotion and improvement
Health protection
Restoration of health
Limitation of disability
Rehabilitation

Preventive medicine should be understood as the branch of medicine that includes principally health promotion for the individual and the family, which is why public health focuses on the community in its local, national and international dimensions.

Health is no longer provided for the community but is rather provided by the community. Public health presupposes a much broader field of knowledge than that of medicine, which it includes, but which must be supplemented by fields such as Engineering, Dentistry, Veterinary Medicine, Nursing, Education and Social Anthropology considered as the study of the nature of man and the forces that operate in the society, and now the Law. Hence the imperative need for the regulation of health protection in fixed and invariable provisions, within a modern health framework.

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RESTORATION OF HEALTH

If we consider only that the restoration of health is the means of incorporating all of the men whose health is altered in some form into the social and economic life of a country, it would be sufficient to indicate the pressing need that rehabilitation be regulated in the field of law, as a basis for the integration of the nation in the development movement.

These are the seven institutions in health law and it is here we believe that the new point of departure can be found, one that will be represented by a new concept in the legal regulation of health, since this is a vital relationship that should be regulated by law. Hence, it is imperative to apply a method and a system of codification that will produce an appropriate body of laws for the development and solution of the problems created by public and private health.

We believe that what we know as the Italian System, the System of English Public Health Law and the American System should be put aside, since all ot them fail to go beyond guiding legislation toward an orderly compilation of all of the provisions that relate to the problem of health, in one

way or another, based solely and exclusively on the regulation of conduct and not on the regulation of a right, and give primary consideration to the administrative and organizational concept of the health problem, based on the concepts of health and disease.

The new concept of health imposes the necessity of a new method that will regulate the health law on the basis of a vital relationship. The idea of regulating the conduct of the government and that of the governed by subjecting it to the principle of health and disease should be abandoned, because health is a fact that does not admit of regulatory separation, and disease is a special situation that is not comprehended in any concept under the philosophy of health law.

Consequently, by eliminating any principle of administrative organization that can be the subject of regulations and statutes, we must locate modern health legislation in the substantive and procedural field by means of a Health or Sanitary Code, and a Code of Sanitary Procedures.

As for the organization, the first title of the Code might consist of the declarations set forth; its books, titles and chapter would be organized on the basis of the concepts of the health authority, the health jurisdiction, the right of the individual in the field of health, the right of things in the field of health, of health promotion, health protection and the restoration of health.

In this way by following a method, we would have achieved a body of laws in the health field consistent with the undeniable progress that has been made in the technical field of public health in recent decades, stimulated by the national and international health organizations.

This proposed method and system will be developed on the following principles of health law:

I. The right to health is inalienable, imprescriptible and irrenunciable;

II. No covenants shall be concluded in contravention of health regulations;

III. The objective of health regulations is to safeguard the interests constituted by health;

IV. In the juridical regulation of health, the consideration of the public interest shall prevail rather than the subjective element of consent;

V. Property is subject to health regulation when it endangers the state of health;

VI. No alien may claim his territorial law in matters of health;

VII. No national or alien can be exempted from the obligations imposed by health regulations;

VIII. The health authority is obligated to enforce health regulations;

IX. Any act or omission that alters the state of health constitutes a crime;

X. The Public Health Agency responsible for the public health and for the care of private health in the American States shall be the competent governmental agency in health problems, with jurisdiction in this respect throughout the national territory.

The foregoing leads us to the conclusion that there is such a thing as health law, as an independent branch of the law, with its own legal features, with its own defined field of social activities within which its particular laws apply, and that there is a need to codify such law. This conviction becomes more pressing as we note the increasingly more impressive progress achieved in the technical aspect of health problems, as result of the dedicated efforts of the physicians and public health officers who are devoting their efforts to this work, so closely linked to the problem of existence.