

THERAPEUTIC JURISPRUDENCE AND LINGUISTIC RIGHTS: BEYOND ACCESS TO CARE

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Abstract: Therapeutic jurisprudence is an interdisciplinary examination on the effect of the law on the mental and emotional health of those implicated in the judicial process. It concentrates primarily on the psychological impact of legal rules and procedures, as well as on the behaviour of legal players. TJ is a tool not often used in the promotion of linguistic rights. Endowed with a double mission, both normative and descriptive, TJ makes it possible to measure the impact of health incidences. In providing legal reformers with more precise tools to assess the health impacts of new linguistic rights standards TJ offers such a path of implementation of linguistic rights – not only from the formal point of view, but by keeping in mind their actual effectiveness – integrating law and languages in a way to mitigate their consequences on a population’s health.

Keywords: Therapeutic Jurisprudence; linguistic rights; health care; accessibility; components of health.

ORZECZNICTWO TERAPEUTYCZNE I PRAWA JĘZYKOWE: POZA DOSTĘPEM DO OPIEKI

Abstrakt: Jurysprudencja terapeutyczna zajmuje się badaniami interdyscyplinarnymi wpływu prawa na zdrowie psychiczne i emocjonalne osób zaangażowanych w proces sądowy. Koncentruje się przede wszystkim na psychologicznym wpływie przepisów i procedur prawnych, a także na zachowaniu osób biorących udział w procedurze. Jest ono narzędziem rzadko używanym w propagowaniu praw językowych. Wyposażona w podwójną misję, zarówno normatywną, jak i opisową, jurysprudencja terapeutyczna umożliwia pomiar wpływu badanych zachorowań na zdrowie. Zapewniając twórcom prawa bardziej precyzyjne narzędzia do oceny wpływu nowych standardów praw językowych na zdrowie, propaguje ścieżkę wdrażania praw językowych – nie tylko z formalnego punktu widzenia, ale uwzględniając ich faktyczną skuteczność – integrując prawo i języki w celu łagodzenia ich wpływu na zdrowia populacji.

Słowa kluczowe: Jurysprudencja Terapeutyczna; prawa językowe; opieka zdrowotna; dostępność; składniki zdrowia

1. Introduction: Therapeutic Jurisprudence and the Medico-Legal Alliance

There is a long-standing body of literature in science and the social sciences affirming what has been stated as “rights are not enough”. On a sliding scale towards bearing a greater effectiveness, linguistic rights ought to be understood not in terms of their validity, but of actual observance and internalization by the various actors involved in their promotion. As was aptly said “I will argue that the role of law reformers is not to ignore the impact of “rights”, but to move beyond this response, to look more broadly to how “rights” are lived, exercised and used by real people.” (Des Rosiers, 2015: 444). Hence enters the notion of Therapeutic Jurisprudence, or TJ:

Therapeutic jurisprudence is an interdisciplinary method of legal scholarship that aims to reform the law in order to positively impact the psychological well-being of the accused person. In 1990, law professors

David Wexler and Bruce Winick coined the term “therapeutic jurisprudence” to acknowledge the socio-psychological consequences of any legal action and that these consequences can be impacted by the interpretation of substantive legal rules and procedures. *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* by David Wexler (Wexler 1990, cited under General Overviews) asserted that the law was capable of operating as a therapeutic agent. (Chesser. 2020)

Therapeutic jurisprudence is an interdisciplinary examination on the effect of the law on the mental and emotional health of those implicated in the judicial process. It concentrates primarily on the psychological impact of legal rules and procedures, as well as on the behaviour of legal players. (Babb and Wexler 2014.)

From the standpoint of TJ, the law is a social force that produces therapeutic and anti-therapeutic consequences. Professor David B. Wexler initially coined the term in 1987 and further developed the concept in 1992 with Professor Bruce Winick in their book *Essays in Therapeutic Jurisprudence* (Wexler and Winnick 1992).

Law and medicine, both in profession and disciplinary knowledge, share a variety of traits too often obscured by the schism between “science” and “law” and seem often considered as an obstacle to any type of comparison. However, there are many relationships between medicine and law that take place in a variety of contexts. Certain key elements and interdisciplinary meetings bear noting of and in particular historical contexts, required the collaboration of law and medicine. Among many examples, the *Nuremberg Code* is one that, in recent history, demonstrates a combined reaction of law and medicine in light of fundamental rights violations (Roy et al. 1995), which resulted in the expression of a standard based on ethics, medicine and law. Certain authors also hold that the bioethical field, then emerging, followed and continues to follow a trajectory that is sensitive to the variations, fluctuations, progresses and setbacks of legal knowledge (Wolf, 1994; William, 1994: 1021) some going as far as qualifying the relationship between law and medicine as symbiotic (Owusu-Dappa, 2014; Tupanceski et al., 2014).

The TJ movement, as an approach aiming to assess the *health* impacts of legal activity, is another example of medical methodology, or epidemiology (Makela 2010), applied to law. What impacts do rules of law have on the health of populations? TJ asks questions such as, “What impact will it have on patients’ health if one surgical procedure, rather than another, is reimbursed by a hospital’s public or private

insurance?”, “What impact will the change in language on a hospital display have on the health of patients, is that impact measurable and if so, how to measure it?” In so doing, the impact of judicial activity and legislative output on the health of populations become the object of study. In addition to identifying potential “perverse effects”¹ of certain standards, TJ is at the heart of a reform movement in law *targeting the growth of awareness of biomedical sciences within the framework of the legal reason*. To give but one example, TJ is one of the main promoters of implementation of a variety of specialized tribunals to take into account the particular mental health conditions of citizens (Jaimes, 2009: 171; Léger-Riopel, 2016).

2. Linguistic Rights as a Key Determinant of Health

TJ is a tool not often used in the promotion of linguistic rights. Endowed with a double mission, both normative and descriptive, TJ makes it possible to measure the impact of health incidences. In providing legal reformers with more precise tools to assess the health impacts of new linguistic rights standards, TJ also breeds reflection beyond standards established by positive state law. As president of the Law Commission of Canada, Natalie Des Rosiers reminded:

One of the first lessons of TJ was to look at the impact of the law on people. It challenged some of the traditional assumptions that jurists hold without much question, i.e., that freedom is always better than constraints, that winning one’s case is preferable to losing it, that more money is always better than less. TJ did not deny the validity of these assumptions, but sought to put them in context.¹ It asked the question whether these assumptions held true for everyone; in particular, it asked whether they held true in the mental health field. ¹² The point was to ask about the effect of the law and legal processes on the lives of the people affected by them. (Des Rosiers, 2015: 445)

TJ is therefore a useful tool to evaluate certain health consequences arising from breaches to linguistic rights. The analytical framework that concentrates solely on standards and their intended

¹ This term having being coined by one of the founder of the sociology of sciences, Pr. Robert K. Merton.

consequences will often miss the consequences of linguistic rights breaches, when in fact, they can substantiate the analysis based on conclusive data. From that perspective, the following section aims to identify certain paths of reflection allowing to better assess the consequences that linguistic rights breaches have on health.

The *International Covenant on Economic Social and Cultural Rights* provides the following in respect to health law:

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.**

There are various sources clarifying that the respect of linguistic rights has impacts on health, particularly on availability and accessibility of health care. For instance, the *General Comment 14 on the International Covenant on Economic Social and Cultural Rights* clearly indicates that the *availability* of health care will vary according to the level of development of a signatory state but must nonetheless respect the « **underlying components of health** ». Various studies have clearly established that language can be an important barrier in fulfilling the **components of health** (Schelmmmer et al., 2006: 1084; Steinberg et al. 1998: 982).

Respect of linguistic rights will also affect accessibility to health care. The *General Comment 14* states that access to health care is expressed by various facets, such as physical access (i.e. distance), non-discriminatory access, and economic (“affordability”) access. Informational access is “Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should

not impair the right to have personal health data treated with confidentiality”.

According to Haricharan et al., it is not possible to practically discuss access to health care without addressing the question of language:

While General Comment 14 appropriately foregrounds the notion of informational accessibility, we argue that it is insufficient to speak of informational access without addressing language as a prerequisite for informational access. General Comment 14, an important guide for implementing the International Covenant on Economic, Social and Cultural Rights, includes informational accessibility as a criterion for meeting the right to health, but is silent on language. General Comment 14 should therefore explicitly address language because without professional interpreter services, there is no informational access. (Haricharan, 2012: 7)

A study has shown that language barriers have varying degrees of consequences in providing health care services:

insufficient English skills may lead to:

- an inability to benefit from prevention information,
- low use of primary health services,
- unreliable and invalid data in research, lack of trust in health professionals,
- and communication misunderstandings with the therapist resulting in misdiagnosis and inadequate treatment / offer specific innovative recommendations and techniques to help close the linguistic gap in written and oral communications (Preciado et al. 1997)

In addition to national and international norms emphasizing the promotion and protection of linguistic rights, respect of linguistic rights also has measurable impacts on health care accessibility and availability, mainly in terms of primary care. Furthermore, respect of linguistic rights overlaps with ethical and legal obligations of health care professionals, notably in quality of care and the obligation of health care professionals to provide information (which must be communicated according to the needs of the patient), in order to obtain informed consent regarding their care. Sufficient knowledge of, and compliance to, linguistic rights of patients is integral to the responsibility of health care professionals. Language related errors are a primary cause of otherwise preventable iatrogenic events in clinical

settings (diagnosis errors, inadequate treatment, lack of compliance/understanding of the proposed treatment) (Moissac et al. 2018). It is worth noting that, aside from clinical contexts, violations of linguistic rights have profound impacts on development of health care policies and quality of research in health care matters. Low compliance with linguistic rights affects a wide spectrum of health services, from bedside to research bench.

3. Concluding Remarks

The literature regarding public health policy reveals that awareness of linguistic rights, as important as it is, is insufficient to provide services that are appropriate to the language of the patient: “Awareness of language law is not sufficient to resolve language barriers for LEP individuals. Provider and organization level barriers to language access must be addressed.” (Grubbs et al. 2006: 683) The problem seems to be particularly acute when it comes to native populations². This is to say that in addition to the solemnity of linguistic rights as stated (or alternatively, denied) in national or international legal frameworks, the health of populations is affected. TJ offers a greater path to strengthen linguistic rights and their effective implementation relative to health care. In doing so, TJ allows for the inclusion of analysis on issues that would have otherwise evaded a classic positivist analysis. For example, the loss of a language and its gradual disuse equally signifies the disappearance of traditional health care knowledge, notably regarding the use of certain flora and fauna, traditional practices, and the use of plants that have often unknown medical value (Turin 2009: 4). Protection of linguistic rights is a crucial factor for access to health care, but is also a condition of successful health policies and effective

² « [T]here is a vigorous indigenous linguistic rights movement relevant from a global health perspective. At the international level, a trend exists towards greater support of indigenous rights as evident in the UN Declaration on the Rights of Indigenous Peoples adopted in 2007. At the country level, the degree of state protection and promotion of indigenous languages varies substantially in the approximately 90 countries where indigenous people reside, and legal status can differ from de facto policy. In Guatemala, for example, the 2003 Language Law codified the right to access government health services in indigenous languages, although this right is not protected in practice.” (Flood et al. 2018)

prevention and management of health crisis. TJ offers such a path of implementation of linguistic rights – not only from the formal point of view, but by keeping in mind their actual effectiveness – integrating law and languages in a way to mitigate their consequences on a population’s health, often in an urgent and critical context that affects vulnerable minority populations.

Bibliography

- Bruinsma, Gerben, and David Weisburd, eds. 2014. *Encyclopedia of Criminology and Criminal Justice*. New York: Springer.
- Chesser, Brianna. 2020. Therapeutic Jurisprudence. *Oxford Bibliographies*.
<https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0203.xml> (accessed April 2, 2020).
- De Moissac, D., S. Bowen. 2018. Impact of language barriers on quality of care and patient safety for official language minority Francophones in Canada. In *Journal of Patient Experience*. 4 :1–9.
- Des Rosiers, Nathalie. 2015. Rights are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers. In *Touro Law Review* 18: 443–58.
- Flood, David, Peter Rohloff. 2018. Indigenous languages and global health. In *The Lancet Global Health*, February 1rst.
- Grubbs, V, Chen AH, Bindman AB, Vittinghoff E, Fernandez A. 2006. Effect of awareness of language law on language access in the health care setting. In *Journal of General Internal Medicine*. 21:7 683–688.
- Haricharan, Jensen, Hanne & Heap, Marion & Coomans, Fons & London, Leslie. 2012. Can we talk about the right to healthcare without language? A critique of key international human rights law, drawing on the experiences of a Deaf woman in Cape Town. In *South Africa. Disability & Society* 28. 1–13.
- Jaimes, Annie, Dragana Kiprikanovska. 2009. Les Tribunaux de santé mentale : déjudiciarisation et jurisprudence thérapeutique. In *Santé mentale au Québec* 31: 2–171.

- Léger-Riopel, Nicholas. 2016. Le critère de la dangerosité et l'admission involontaire du patient mineur en matière de santé mentale : une impasse pour la pédopsychiatrie?. In *Droits et santé mentale des enfants et des jeunes*, eds. Nicholas Léger-Riopel, Malaika Bacon-Dussault and Christian Whalen, 243. Moncton: Revue de l'Université de Moncton.
- Makela, F. 2010. *Explaining legal norm transmission using an epidemiological model : the case of employment drug testing* . PhD dissertation, Université de Montréal.
- Owusu-Dappa, Ernest. 2014. The Historical Development of Health Care Law and Biotethics in England and in Wales: as symbiotic Relationship?. In *Medecine and Law* 33: 22.
- Preciado, J., M. Henry. 1997. Linguistic barriers in health education and services. In *Psychological interventions and research with Latino populations*, eds. J. G. García & M. C. Zea, 232–254. Needham Heights: Allyn & Bacon.
- Roy, David, Jean-Louis Baudouin, Bernard M. Dickens, and John R. Williams. 1995. *La bioéthique : ses fondements et ses controverses*. Quebec: Éditions du Renouveau Pédagogique.
- Schlemmer, A., and B. Mash. 2006. The effects of a language barrier in a South African district hospital. In *South African Medical Journal* 96, no. 10: 1084–7.
- Steinberg A.G., V.J. Sullivan, R.C. Loew. 1998. Cultural and linguistic barriers to mental health service access: The Deaf consumer's perspective. In *American Journal of Psychiatry* 155: 982–4.
- Tupanceski, Nikola, Dragana Kiprikanovska. 2014. Medicine, Law and Human Rights: A Symbiotic Relationship. In *Medecine and Law* 33: 40.
- Turin, Mark. 2009. Language Endangerment and Linguistic Rights in the Himalayas: A Case Study from Nepal. *Mountain. In Research and Development* 25: 4–9.
- Wexler, David B., and Bruce J. Winick. 1992. *Essays in Therapeutic Jurisprudence*. North Carolina: Carolina Academic Press.
- Williams, Susan H. 1994. Bioethics and Epistemology: A Response to Professor Arras. In *Indiana Law Journal* 69: 4–1021.
- Wolf, Susan M. 1994. Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism. In *Am JL & Med* 20: 395.