# The definition of health and illness between juridification and medicalization: a private/public interest perspective.

Cinzia Piciocchi, Associate professor of Comparative constitutional law,
University of Trento, Faculty of Law

Abstract
This article addresses the interactions between medicalization and juridification and their impact on the concepts of health and illness.
Juridification, de-juridification, medicalization and de-medicalization are defined in many different ways and it is particularly interesting to see how they affect each other, impinging on individual freedom and contributing to shaping the definition of health and illness and their public understanding. Juridification and medicalization are particularly affected by the shifting perceptions of the public and private interests at stake, even if the identification of the public or private interest is not an easy task, especially when ethically controversial issues come into play. Nevertheless, the private/public interest analysis is a crucial issue in the understanding of the interactions between these two concepts and in the identification of the boundary lines between them, giving an important key to the understanding of their influence on the rights and liberties at stake.

Keywords: medicalization, juridification, health, illness, sickness, over-medicalization

## 1 Introduction

According to the WHO Constitution, health is 'not merely the absence of disease or infirmity', but a 'state of complete physical, mental and social well-being'.[1] In 1946, when it was adopted, this definition aimed at encouraging a holistic approach towards the concept of health and improving disease prevention, promotion of the social environment, or of healthy lifestyle.[2] This concept has been further developed and extended to other categories including those who live with chronic disease or with long-term conditions, or even to the ability to interact with one's own personal and social environment.[3] The WHO definition of health has also been criticized from an ethical and (bio)political point of view, promoting 'healthism' and leading to the medicalization of human well-being and expanding, as a consequence, the role of the medical profession. Nevertheless, new scenarios such as e-pharmacies or cyber-medicine – meaning the impact of the Internet on public health and medicine[4] – are drawing attention to the risks of 'layfication'[5] and to the empowerment of subjects, such as pressure groups or self-proclaimed experts, other than health professionals.

Although health is not merely the absence of illness, these two concepts coexist and mutually define each other since, when we receive a diagnosis, the existence of a disease will probably contribute to defining us in a new way.

---

[1]See the Preamble to the Constitution of the World Health Organization (signed on 22 July 1946, entered into force on 7 April 1948).

[2] M. Huber, J.A. Knottnerus, L. Green, H. Horst, A.R. Jadad, D. Kromhout, 'How should we define health?', *BMJ* (2011) 343 doi: https://doi.org/10.1136/bmj.d4163; C. Swan, P. Morago, 'Health care in context', in A.M. Barry, C. Yuill, *Understanding the Sociology of Health*, (London: SAGE Publications, 2012).

[3] P. Skrabanek, *The Death of Human Medicine And The Rise Of Coercive Healthism* (London: Social Affairs Unit, 1994). See also the definitions of health proposed by N. Sartorius, 'The Meanings of Health and its Promotion', *Croat. Med. J.* 47(4) (2006) 662-664.

[4] G. Eysenbach, 'Towards the Millennium of Cybermedicine' [1999] *J Med Internet Res* 1(Suppl 1) (1999), doi:10.2196/jmir.1.suppl1.e2; J. Reed, 'Cybermedicine: Defying And Redefining Patient Standards Of Care', *Indiana Law Review* 37(3), (2004) 845-877, http://dx.doi.org/10.18060/3665.

[5] N. Glover Thomas, J. Fanning, 'Medicalisation: The Role Of E-Pharmacies In Iatrogenic Harm', *Med Law Rev.* 18(1) (2010) 28-55, doi: 10.1093/medlaw/fwp026.

Illness is a very personal experience, dealing with the awareness of our physical self and affecting our own idea of well-being. The perception of disease might be very different from one person to one other, even before or after actually experiencing a disease. Predictive genetic testing, for example, may identify an increased risk of health problems, which may never show up during someone's lifetime; but the person may experience fear or anxiety, without ever developing any disease.[6]

Moreover, some illnesses, such as psychiatric disorders, for example, are often accompanied by stigma and discrimination and seem to stick to a person for life, even after full recovery, as if mental illnesses were not considered as a condition, but rather as a personal defining feature.[7]

Patients cope with disease in many different ways, reacting to the same diagnosis and to its emotional consequences on their life and on the life of their loved ones. Therapeutic goals and needs vary from person to person, taking into account not only medical necessities but also the decisions taken by the patient, on the premises of his or her moral autonomy.

But still, the conceptualization of illness is the result of individual as well as and societal factors and the articulation of definitions like 'disease', 'impairment' , or 'disability' is affected not only by personal values, but also by the public understanding of health. Public health choices take into consideration individuals as such, but also as part of population, data gathering, confronting numbers and using statistics. It is difficult to be wholly aware of the coexistence of these two perspectives and patients may be uncomfortable, feeling that their personal experience of illness, being a part of their individuality, is watered down by this public health perspective. Patients' decisions to enroll in clinical trials, for example, might be motivated by a hope of improving their own condition, even when it is made clear that their participation will benefit other patients in the future and not themselves. Again, a number of parents refusing vaccinations for their children may be aware that under-immunization can constitute a risk population, nevertheless their primary concern is to protect their children's health, assuming it may be dangerous for them.

There are many examples of these different perspectives, which are not necessarily in contradiction with one another, but which show the complexity of the conceptual terrain regarding the definition of disease and health, laid out at personal and at societal level as well, concerning individual rights and public health, personal experiences but also epidemiology which, as it has been said, 'focuses on the forest, rather than on the trees'.[8]

Concepts like health and illness take on different meanings from one context to another, such as the workplace, educational institutions or other environments. And again, all these definitions are the result of personal and collective factors, dealing with individuals as well as with the population, with individual rights as well as with standards and they are taken into consideration by legal and medical definitions.

It has been argued that a distinction should be made among the concepts of disease, illness and sickness, dealing respectively with physiological impairments, subjective perception of symptoms and to social identity, thus with the definition of health problems with reference to the social context.[9]

Medicalization deals with all these issues: the biomedical definition of disease, the self-perception of illness and the social variables affecting the concept of sickness: despite starting from

---

[6] A. de Paor, 'Regulating Genetic Information-Exploring the Options in Legal Theory', *European Journal of Health Law* 21(5) (2014) 425- 453, doi: 10.1163/15718093-12341335.

[7] See for example K. Redfield Jamison, The many stigmas of mental illness, *The Lancet* 367 (9509) 11 February 2006 533-534, doi: http://dx.doi.org/10.1016/S0140-6736(06)68187-7.

[8] V.J. Schoenbach, W.D. Rosamond, *Understanding the Fundamentals of Epidemiology an Evolving Text* (University of North Carolina 2000).

[9] B. Hofmann, 'On the triad disease, illness and sickness', *J Med Philos* 27(6) 2002 651-73, doi: 10.1076/jmep.27.6.651.13793.

different premises, all these processes must be taken into consideration when dealing with medicalization and healthcare rights.[10]

Health and illness are also defined and approached by legal systems, when dealing with health protection, health politics and healthcare strategies. This process of 'juridification' involves different policy areas such as, for example – according to the EU – 'social and regional policy, taxation, environment, education, research'.[11] These different factors, the so called 'determinants',[12] have an impact on health and must be taken into account and coordinated, being part of the obligation to protect these social rights.

This paper will consider the interactions between medicalization and juridification and their impact on the concepts of health and disease, notably considering how the public/private interests at stake affect the interactions between these two concepts. In the first part, it will consider the notions of juridification and medicalization and of their opposites (de-juridification and de-medicalization). In the second part, it will analyze the interactions between juridification and medicalization, in the light of the concepts of health and illness.

## 2 Juridification and de-juridification

Both juridification and medicalization may be defined in many different ways.

The word juridification is generally used to identify different phenomenon such as, for example, the expansion of law in previously unregulated fields (or regulated only by social norms), but also an increase in legal intervention *tout court*.[13] Some authors speak of an 'explosion of law',[14] which may result in increased regulation by Parliament but also in the expansion of judicial activity, which is also identified as 'judicialization'.[15] Juridification may refer to various fields such as labour law, health law, sport[16] or discrimination, having different meanings, depending on the context. It is often compared with similar categories such as, for example, hyper-regulation, although this latter deals with the interaction between law, politics and society, hence with government actions.[17]

Different examples of de-juridification are also possible: it deals with situations in which law takes a step back, but even this definition depends on the context,[18] since 'dejuridification' in the field of constitutional law (for example in connection with suspended rights during a state of

---

[10] The concepts of disability/illness/sickness are discussed also with reference to other topics, see for example S. Favalli, D. Ferri, 'Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?', *European Journal of Health Law* 23(1) (2016) 5-35, doi**:** 10.1163/15718093-12341392 or M. Hartley, 'Stigmatisation as a Public Health Tool against Obesity-A Health and Human Rights Perspective, European Journal of Health Law', *European Journal of Health Law* 21(4) (2014) 365-386 doi: 10.1163/15718093-12341327.

[11] European Commission, DG Health and Food Safety, 'Health in all policies' <http://ec.europa.eu/health/health_policies/policy/index_en> accessed 20 February 2017.

[12] World Health Organization, Health Impact Assessment (HIA) <www.who.int/hia/evidence/doh/en/> accessed 20 February 2017; B. Toebes, K. Stronks, 'Closing the Gap: A Human Rights Approach towards Social Determinants of Health', *European Journal of Health Law* 23(5) (2016) 510-524, doi: 10.1163/15718093-12341402.

[13] J. Habermas, *The Theory of Communicative Action: Lifeworld and Systems: A Critique of Functionalist Reason*, vol. 2 (Oxford: Blackwell Publishers 2006); L.C. Blichner, A. Molander, 'Mapping Juridification', *European Law Journal* 14(1) (2008) 36-54, doi: 10.1111/j.1468-0386.2007.00405.x.

[14] G. Teubner, 'Juridification Concepts, Aspects, Limits, Solutions', in G. Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin: de Gruyter, 1987), p. 3.

[15] L.C. Blichner (note 13).

[16] K. Foster, 'Juridification in Sport', in S. Greenfield, G. Osborn (eds.), *Readings in Law and Popular Culture* (Oxford: Routledge 2006) p. 155.

[17] G. Teubner (note 14).

[18] L.C. Blichner (note 13): 'Dejuridification A takes place when constitutive rules and principles in some way limit the former competencies of the legal system'.

emergency[19]), might be different from 'dejuridification' with regard to health law (for example, in relation to abortion or homosexuality, which were illegal – and are still illegal – in some countries and were subsequently decriminalized in many of them).[20]

De-juridification takes place in different ways, generally repealing statutory prohibitions, to endorse or promote social changes. It has to be said that there is a fine line between endorsement and promotion of social change, which is an ongoing process, dealing with the mutual interaction between legal regulation and societal values. De-juridification plays an important role in both cases: it can promote social change which is still on the way, but it can also endorse social processes which have already occurred. When legal rules are still in effect, but no longer enforced, a '*de facto* dejurification' has already taken place and the repealing law has only formal value. This would be the case of some unenforced laws such as, for example, laws prohibiting and carrying criminal penalties for some sexual beahviours (e.g. adultery, 'fornication', etc.)[21], or even constitutional desuetude, which may lead to 'informal amendment' to entrenched Constitutions.[22]

The opposite may also be true, when current laws are not enforced until social change occurs: the legal regulation of duelling is a good example, since its prohibition proved difficult to enforce, so long as honour controlled private disputes between gentlemen. It was only when this practice was extended to social groups other than aristocracy, such as merchants, that this ritual fell out of practice, having lost its '*élite*-identity' defining force.[23]

There are also examples of repealing laws promoting a change that society shares only in part: if one thinks of the pictures of Little Rock student escort to school by US Army, we clearly see the role played by the Supreme Court in its decision *Brown v Board of Education*, actively prompting de-segregation in a divided society[24].

De-juridification was a key issue also for the de-criminalization of same-sex relations: it is very unlikely that a social group will be inclusive with regard to behaviours which are defined as crimes, considering the stigmatization criminal liability carries with it. People may have a respectful attitude towards other people regardless of their sexual orientation, but if same-sex relationships are considered as criminal behaviour by the law, it is highly probable that discrimination and prejudice will follow. In these cases, de-juridification is needed for the (re)construction and normalization of social relations.

It is possible to identify an important turning point between juridification and de-juridification in the existence of a public interest, transcending the private or individual perspective.

In other words, juridification and de-juridification (promoting or endorsing social changes) often reflect a shifting balance between public and private, intensifying regulation when public interests are at stake and decreasing it when this perception changes. Intensification and decreasing of legal regulation are to be interpreted according to a qualitative rather than to a quantitative perspective, considering criminalization, for example, as increasing legal regulation, regardless of the amount of laws governing a certain issue.

---

[19] A. Kouroutakis, S. Ranchordas, 'Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies', *Minnesota Journal of Int'l Law* 25(1) (2016) 30-77.

[20] See *infra*.

[21] H. Greene, 'Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation', Yale Law & Policy Review 16(1) (1997) 169-194; R.A. Posner, K.B. Silbaugh, A Guide To America's Sex Laws (Chicago: University of Chicago Press, 1996) p. 98; C.R. Sunstein, 'What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage', The Supreme Court Review (2003) 27-74, doi: 10.1086/scr.2003.3536949: '(…) when constitutionally important interests are at stake, due process principles requiring fair notice, and banning arbitrary action, are violated when criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity'.

[22] R. Albert, 'Constitutional Amendment by Constitutional Desuetude', *American Journal of Comparative Law* 62(3) (2014) 641-686, p. 643.

[23] K.A. Appiah, *The Honor Code* (New York: W.W. Norton & Company, 2010).

[24] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

The shifting boundaries between private and public are often the result of historical, cultural and social perception of the interests at stake, which may vary by country.

One example is the protection of concepts like 'honour' and 'reputation' through the limitation of free speech, which is generally included in the legal realm, since crimes or civil wrongs generally depend on the context (civil or common law) and on the perception of the public interests at stake, for example public order and the civil coexistence of citizens.[25]

Both juridification and de-juridification have important consequences for the implementation and modification of human behaviours, and the boundary between the one and the other in many cases deals with the existence (or at least with the perception of the existence) of public or private spheres of action. In some cases, in fact, juridification occurs when it is believed that a public interest is at stake, thus regulation is needed; when this perception changes and behaviours are considered as being of purely private significance, than de-juridification takes place.

In many cases, the public dimension of personal choices is represented by the value of human dignity, which is invoked to limit individual freedom, with regard to behaviours which are assumed to represent human features. The well-known judicial cases such as the *lancer des nains* in France[26] or the *peep show* in Germany[27] seemed to imply this private/public perspective, opposing individual autonomy to human dignity and limiting individual freedom when it is exercised in a way that is perceived to involve public interest.[28]

Juridification is invoked in the name of dignity, when people making those choices are assumed to represent not only themselves, but also a 'group' they belong to (little people, women, , etc.), which is at risk of discrimination.

When de-juridification occurs, it often results in an expansion of individual freedom, as the public interests profiles are regarded and perceived in a different way, which leads the way to a different balancing with the private dimension at stake. Seen in this way, it is clear that there is a mutual relationship between juridification and social interaction, thus the importance of the relation between individuals and the construction of which issues should be considered by legal regulation comes out, affecting the understanding of society itself. In this definitional process is interesting to note that juridification interacts with medicalization, as both contribute to the construction of individual and societal identity.

For example, medicalization takes place after de-juridification has occurred: this was the case with abortion or contraception where regulated and permitted. In these cases, medicalization follows de-juridification: medicine will regulate procedures and contents, in a process, which goes from regulation to professionalization.

In this private/public relation, it is thus interesting to see how juridification confronts medicalization.

## 3 Medicalization and de-medicalization

To define medicalization is not an easy task either, since – as has already been noted with regard to juridification – it is open to different interpretations. In very general terms, when medicalization occurs, certain issues are defined in medical terms and approached at health institutional level. Medical language and definitions are used, drawing the line between health and illness and thus

---

[25] See for example J.Q. Whitman, 'Enforcing Civility and Respect: Three Societies', *The Yale Law Journa*l 109 (6) (2000) 1279-1398, doi: 10.2307/797466.

[26] *Conseild'État* [1995] n. 136727 and n. 143578; *Wackenheim v France*, communication n. 854/1999, in *Selected Decisions Of The Human Rights Committee Under The Optional Protocol, July 2002-July 2005*, vol. 8, New York-Geneve, 2007.

[27] *BVerwGE* 64, 274 decision 15th December 1981.

[28] See for example C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *EJIL* 19(4) (2008) 655-724, doi: 10.1093/ejil/chn043; A. Barak, *Human Dignity* (Cambridge: Cambridge University Press, 2015) p. 123; C. Dupré, *The Age of Dignity* (United Kingdom: Bloomsbury, 2015).

defining who has to be regarded as 'a patient'.[29] Medical definitions are based on scientific knowledge, following their own rules which transcend national boundaries and sharing steps and procedures, which are internationally recognized and accepted.

Medicalization may include the appearance of new diseases (as in the case of the spread of HIV during the 80s), or the reappearance of diseases which were thought to have been eradicated; it may develop through the setting of threshold values, which shift over time, 'making' people healthy or ill (e.g. diabetes or hypercholesterolemia) as shown/and degenerating/developing by the phenomenon such as over-diagnosis and over-treatment, which have been stigmatized by movements like 'slow medicine', 'choosing wisely', or 'less is more'.[30]

The (mutual) definition of health and illness is challenged by scientific advancement as well, which makes it difficult to distinguish the treatment of illness from improving conditions, for example with regard to enhancement, which seems to separate the two concepts of 'therapy' and 'pathological conditions'.[31]

Like juridification and de-juridification, in fact, medicalization and de-medicalization affect people's identity, especially with regard to the 'freedom' of defining oneself as healthy or ill, as health and illness are in a state of continuous evolution, so far as their mutual relationship is concerned, which changes over time.

In many cases, the definition of illness is clearly determined by medical standards: it may be difficult to feel healthy, while ignoring a diagnosis of diabetes, and what affects the definition of disease more is the shifting of blood glucose threshold values, which may change over time. Nevertheless, people may react differently to genetic testing proving a predisposition towards developing certain diseases, experiencing anxiety and fear of developing that disease, or taking the opportunity to adopt a healthier lifestyle.

It has to be noted that the process of medicalization is not irreversible or incapable of modification since, like juridification, it can vary and the same 'behaviour' or 'condition' may be medicalized or de-medicalized over time. When de-medicalization occurs, a problem or behaviour which used to be defined in terms of illness or disorder is no longer deemed a medical issue. It has been argued that it is unlikely that a complete medicalization or, even more, completely de-medicalization takes place and that both these phenomenon should be described in terms of process rather than of categories.[32]

Both medicalization and de-medicalization, in other words (as well as juridification and de-juridification) are usually increasing and decreasing processes, to be described in terms of transition rather than in terms of thresholds.[33]

The conceptualization of illness deals only in part with medicalization, being rather at the convergence of subjective experience as well as objective criteria. The construction of the concept of illness deals also with disciplines other than medicine, such as psychology or sociology and provides an insight into social changes, especially considering social expectations regarding 'normality' and 'deviance'; it deals thus also with social control.[34]

---

[29] P. Conrad, 'Medicalization and Social Control', *Annual Review of Sociology*, 18(1) (2003) 209-232, doi: 10.1146/annurev.so.18.080192.001233; P. Conrad, *The Medicalization of Society: On the Transformation of Human Conditions into Treatable Disorders* (Baltimore: The John Jopkins University Press, 2007).

[30] J. Treadwell, M. McCartney, 'Overdiagnosis and overtreatment: generalists — it's time for a grassroots revolution', *Br J Gen Pract.* 66(644) 2016 116-7, doi: 10.3399/bjgp16X683881.

[31] A. Maturo, 'The Shifting Borders of Medicalization: Perspectives and Dilemmas of Human Enhancement', *Salute e Società* (2009) 13-30, doi: 10.3280/SES2009-EN2003.

[32] D. Halfmann, 'Recognizing medicalization and demedicalization: Discourses, practices, and identities', *Health London* 16(2) (2012) 186-207, doi: 10.1177/1363459311403947.

[33] See for example C. Wai-Loon Ho, *Juridification in Bioethics: Governance of Human Pluripotent Cell Research* (London: Imperial College Press, 2016) considering that 'juridifcation is not an all-or-nothing proposition, but more a question of degree', p. 18.

[34] *Ibid.* See also M. Henaghanm, 'The Normal Order of Family Law', *Oxf J Leg Stud* 28 (1) (2008) 165-182,doi: https://doi.org/10.1093/ojls/gqm026, discussing the medicalization of child abuse; M. Cardona-Morrell, J. Kim , R.M. Turner, M. Anstey, I.A. Mitchell, K. Hillman, 'Non-beneficial treatments in hospital at the end of life: a systematic

It is interesting to note how juridification often encroaches upon medicalization and that, in many cases, the result of their interaction provides a definition of the sphere of individual freedom, according to the shifting perceptions of the public and private interests at stake.[35]

Homosexuality is one of the rare examples of behaviour which has been completely de-juridified through de-criminalization and also de-medicalized (in the majority of countries, although not all over the world), considering it as purely private matter to be forced out of the public arena, as well as the realm of medicine.

Where it took place, de-juridification of homosexuality was the result of a 'transnational dialogue' between Courts adjudicating upon fundamental rights, starting with the European Court of Human Rights' decision in *Dudgeon v. United Kingdom* (1981, evoking concepts such as 'our Western civilization')[36] and continuing with *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (South Africa Constitutional Court, 1998),[37] *Toonen v. Australia* (United Nations Human Rights Committee, 1994),[38] to *Lawrence v. Texas* (US 2003),[39] this latter prompting a huge debate about the use made of comparison by the Supreme Court in the United States[40].

Even the High Court of Delhi (*Naz Foundation v. Government*),[41] which in 2009 stated that the anti-sodomy law was unconstitutional, made extensive use of comparative legal argument, quoting similar decisions of other Supreme courts; although this judgment was subsequently overruled by the Indian Supreme Court in 2013 (Civil Appellate Jurisdiction, Appeal, n. 10972 of 2013).

These decisions reveal a joint effort towards a cultural transition, to return intimate and personal behaviour, with no relevance in the public sphere, to the private sphere. If we consider the US landmark case, *Lawrence v Texas*, for example, it is interesting to note that the adjective 'private' comes out a number of times. Overruling its previous decision, namely *Bowers v. Hardwick* (1986),[42] where the Court itself had deemed that the right of homosexuals 'to engage in sodomy' [*sic*] was not rooted in the Constitution, in 2003 the Supreme Court stated that criminalization of homosexual relations had 'more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home'. Criminalization, according to the Court, was 'consistent with a general condemnation of non-procreative sex as it is with an established tradition of prosecuting acts because of their homosexual character' although 'now the issues is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law'. It is interesting to note that similar arguments had come out in the dissenting opinion delivered by J. Blackmun in *Bowers v. Hardwick* who, although recognizing that 'some private behaviour can affect the fabric of society as a whole', stressed that there was 'evidence for believing that people will not abandon

---

review on extent of the problem', *Int J Qual Health Care* 28 (4) (2016) 456-469, doi: https://doi.org/10.1093/intqhc/mzw060; E. Lee, *Abortion, Motherhood, and Mental Health: Medicalizing Reproduction in the United States*, (New York: de Gruyter, 2003).

[35] P.P. Guzzo, 'Guzzo Medicalization and Juridification inTardian Inter-mental Socio Psychology', *Salute e Società* (2009) 265-269.

[36] *Dudgeon v. United Kingdom* 7525/76 [1981] ECHR 5.

[37] *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6.

[38] *Toonen v. Australia*, Communication n. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[39] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[40] See for example the debate between Justice Antonin Scalia and Justice Stephen Breyer about the use of foreign law in American constitutional judgments: N. Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer', *Int'l J. Const. L.*, 3 (4) (2005) 519-541, doi**:** https://doi.org/10.1093/icon/moi032.

[41] *Naz Foundation v. Government*, WP(C) No. 7455/2001.

[42] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law'. This argumentation is quite interesting, because it focuses on the inexistence of public interest to be protected through the prohibition and criminalization of this behaviour, rather than on the inexistence of a constitutional 'right to' engage in that conduct.

It has been argued that juridification and medicalization of homosexuality go hand in hand, as in some countries the latter was a reaction to the perceived injustice of the former; but even medicalization proved to be repressive, when it attempted 'conversion' into heterosexual orientation.[43] De-medicalization contributed than to bringing this behaviour back to «intimate life» choices (using the phrasing of the US Supreme Court in *Lawrence v. Texas*), in other words to liberty.

On several occasions, concerns have been expressed with regard to re-medicalization of homosexuality and the risks of discrimination, for example with regard to the spreading of HIV, or to recent debates about 'conversion therapy bills', which ban efforts to change sexual orientation and have been endorsed by the former US President, Barack Obama.[44] Even the search for the supposed genetic roots of sexual orientation, beyond the debates regarding their scientific soundness, have been regarded with suspicion, on the grounds of a re-medicalization perspective.[45] The relation between juridification and medicalization is often marked by the shifting perception of private and public features of individual choices and the result of their interaction is the definition and re-definition of individual freedom.

Even in the case of abortion, medicalization followed de-juridification in countries where this practice had been previously criminalized and then regulated by the law through the definition of some basic principles (e.g. time-frame), than devolved to the doctor-patient relationship. In this respect abortion was widely de-juridified and the following medicalization put procreative choices in the hands of women, in dialogue with medical professionals.

Something similar occurred in many countries with regard to contraception: de-juridification took place through de-criminalization or through the abolition of its prohibition and even this intimate aspect of people's life was devolved to the realm of medicine or even to the private sphere *tout court*, when medical advice was not deemed necessary. For example, this was the case of the Italian legal system, criminalizing public incitement or propaganda of contraception till the 70s, when the Constitutional court stated that this provision was unconstitutional.[46] The US Supreme court made similar statements in the well-known case *Griswold v. Connecticut* (1965),[47] defining marriage as 'an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects' thus dealing with the right to privacy.

In many of these decisions, Court made another remarkable statement, with regard to the ethical sensitivity of the issue at stake, in *Roe v. Wade*, for example, the Court acknowledged the '(…) the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking

[43] P. Conrad, A. Angell, 'Homosexuality And Remedicalization' [2004] Society 32.
[44] See for example A. Puluka, 'Parent Versus State: Protecting Intersex Children From Cosmetic Genital Surgery', 2015 *Mich. St. L. Rev.* (2015), 2095-2141.
[45] G. Hart, K. Wellings, 'Sexual behaviour and its medicalisation: in sickness and in health', *BMJ* Apr 13 (2002), 896–900.
[46] D. Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought', *Law Critique* 25(2) (2014) 92-139, doi: 10.1007/s10978-014-9136-6.
[47] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

and conclusions about abortion. (…)' and that the Court's task was 'to resolve the issue by constitutional measurement, free of emotion and of predilection'.[48]

This is an issue of our time, as people enjoy the possibility of making many different choices, due to the softening of social constraints and, especially in the field of biomedicine, to scientific advances, which enable many different options to be chosen regarding the human body and intimate choices. States regulate ethical controversial issues differently and, if a more liberal approach is generally adopted towards issues such as contraception, this is not true when other choices come into play affecting, for example, the idea of what constitutes 'a family' or end of life decisions. As the European Court of Human Rights has stated, there is no European consensus with regards to these issues.[49]

It is not easy to understand how the public and private interests are construed by Courts and Parliaments and, when it comes to the relationship between juridification and medicalization, it seems that the less public interest is involved, the more individual freedom is protected; leaving both law and medicine in the background. This was the case in the examples offered, namely: the abolition of the crime of 'sodomy' and the legalization of contraception and abortion.

However, when controversial ethical issues are at stake, the relationship between public and private interests can be ambiguous and when individual choices impinge on basic values, they are often perceived as being inherently 'representative'. In this perspective, juridification is invoked by those thinking that if fundamental values are at stake, that choices made by others might be limited, even if they do not tangibly encroach upon their life.

Ethically controversial issues seem to intensify the perception of the 'public interests' at stake, prompting the need for juridification in the domain of biomedicine as well as in fields such as the family or human reproduction, which are perceived to go beyond the private sphere, concerning individual behaviours, which are deemed relevant for the construction of society as a whole. It is the perception of the public horizons at stake that, on many occasions, leads to the prohibition or the restriction of some choices regarding one's own body, in fields such as contraception, abortion, procreative issues and end-of-life decisions, dealing with basic values, which are considered as expressions not only of the person, but of mankind itself.

These perceptions change over time: for example if a more liberal attitude today is shown towards contraception, which is generally less juridified and less medicalized, there are different approaches towards end of life decisions, which is a quite divisive issue, and legal regulation ranges from criminalization of assisted suicide or euthanasia, or through the prohibition of refusal of life-saving treatments to the legalization of one or both, as we see in the Netherlands, some US States, Belgium or Switzerland.[50]

Shifting definitions of the private/public interests at stake are often marked by the modification of the relation between juridification and medicalization: both contribute to the understanding of the relationship between individual behaviours and society, affecting personal freedom.

Although the interactions between these two processes – juridification and medicalization – depend on the specific topic considered (euthanasia, abortion, etc.), it is possible to identify some basic features, regulating the boundaries between them.

---

[48] *Roe v. Wade,* 410 U.S. 113 (1973).

[49] HELP (Human Rights Education for Legal Professionals), *Interpretative mechanisms of ECHR case-law: the concept of European consensus*, http://www.echr.coe.int/Documents/FS_Euthanasia_ENG.pdf accessed 20 February 2017.

[50] See for example J. Griffiths, H. Weyers, M. Adams, *Euthanasia and Law in Europe* (Oxford: Hart, 2008); E.J. Emanuel, B.D. Onwuteaka-Philipsen, J.W. Urwin, J. Cohen, 'Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe', *JAMA* 316(1) 2016 79-90, doi:10.1001/jama.2016.8499.

## 5 A question of boundaries: the private/public perspective

When a condition is defined as an 'illness', it falls within the realm of medicine and will be treated as such: the person affected by the disease becomes 'a patient'. This realm is based on professionalization and the definition of what is to be considered as illness, how it is to be treated and determining when the patient is to be considered as recovering and healed is based on medical knowledge. These definitions come from the jurisdiction of medicine, but what is to be considered as 'medicine' is defined by legal regulation. The relationship between juridification and medicalization can be seen as a dialogue between jurisdictions. They take place respectively in the realm of law and medicine, which are based on different premises: legal regulation is generally based on State law, science follows international rules; law responds to political actors, medicine is based on technical knowledge; law depends on political choice, while medical changes depend basically on scientific advancements.

Legal systems respect the realm of medicine and the definition of illness and health is devolved to the field of medicine. Law does not interfere with medical definitions, entrusting these to science and medicine themselves, but it has to be considered that the boundaries of what is to be treated as 'medicine' are drawn up by the law, defining which kind of 'medical knowledge' is suitable to determine which 'medicines' or 'treatments' are to be prescribed and dispensed to patients, or reimbursed by health systems and which subjects should be taught in medical schools. Medicalization occurs in the territory of medicine, which sets and follows its own rules and is respected by the law, which does not come into it. Legal systems define the borders: if medicine is sovereign in its realm, its boundaries are set by the law. In other words: medicalization is provided by medical realm, but its jurisdiction is the result of juridification.[51]

This juridification has an apparently paradoxically consequence, because what is inside the borders must be respected by the law itself. Parliaments cannot outlaw treatments, when they are deemed harmful or useless and this decision is supported by medical professionals on the basis of scientific knowledge.

In this sense, medical borders are juridified because a public interest is deemed to be at stake. It should be underlined that the public interest here is not to be interpreted as a 'duty to be healthy', or a duty to treat ill people, but the idea that public resources are dedicated to proven effective treatments, based on the biomedical paradigm. 'Resources' here are to be given a wide significance, not only in economic terms of health expenditure, but also in terms of the education and training provided to health professionals, or the kind of medicine is which is based on the same assumption, that patients will receive scientifically proven treatment.

This kind of interaction between juridification and medicalization might seem almost irrelevant, since citizens generally share the assumption that healthcare systems are based on the 'western biomedical tradition'. This expectation should not be taken for granted, since in many occasions it has been challenged, in the name of 'therapy freedom', by patients as well as by practitioners; being the result of a precise choice, made by legal system, through different patterns.

The definition of 'alternative', 'integrative' or 'complementary' treatments changes from country to country, even if legal systems generally share the same assumption: that medicine is mainly based on the 'biomedical paradigm'. In some cases, borders proved to be flexible and treatments which used to be considered as 'alternative' or 'complementary' to biomedical therapies were than included in the realm of medicine, on condition that they are provided only by licensed professionals. For example, this was the case of osteopaths and chiropractors in the UK, which were regulated by Parliament with the *Osteopaths Act* in 1993[52] and the *Chiropractors Act* in 1994.[53] In

---

[51] C. Piciocchi, 'À chacun son métier: l'actio finium regundorum entre pouvoirs et territoires "a-juridiques"', www.researchgate.net/publication/282947389_A_chacun_son_metier_l'actio_finium_regundorum_entre_pouvoirs_et_territoires_a-juridiques (accessed 20 February 2017).

[52] The Osteopaths Act 1993 (c. 21).

[53] The Chiropractors Act 1994 (c. 17).

Italy, in 2002 the National medical board decided to 'medicalize' some 'complementary medicine' treatments, such as acupuncture, homeopathy or Ayurveda: licensed physicians can incorporate these treatments in their practice, if they are not harmful and do not divert patients from effective therapies.

In some other cases, there is no transition and treatments which are deemed unproven are defined as 'quackery' and thus excluded from the field of medicine: these choices are controversial and lawsuits may follow, invoking 'freedom of therapy' as a constitutional right of both practitioners and patients. Different cases recur over time, especially with regard to unproven cancer treatments: from 'Laetrile' in the United States of America,[54] to 'Stamina' in Italy[55] and, recently, the 'pilula do cancer' in Brazil.[56]

In these cases juridification is claimed in the name of liberty, assuming that these treatments should be included by healthcare systems, so they can be freely chosen by (and reimbursed to) patients and health providers. When these controversies arise, the interactions between law and medicine define the spaces of liberty with regard to what is to be considered as 'medicine' and, even if this definition may differ slightly from country to country, juridification and medicalization turn out to be crucial for the construction of medical systems, both contributing to the setting and the social perception of what is illness, what is health and to the shifting borders between these definitions, through this endorsement/exclusion processes.[57]

Patients question and challenge the borders of health systems for many different reasons and it is sometime surprising to realize that some patients ask for treatments, which are deemed useless or harmful by medical professionals. Anguish and distress provoked by a poor diagnosis may contribute to this phenomenon, in the search for hope, which has been excluded by medicine. At other times, the choice of complementary or alternative treatments is an expression of identity, which is not motivated by desperation, but by the commitment to a philosophy, which dictates also the choice of 'health treatments'. A similar phenomenon has been observed with regard to the possibility of accessing 'health information' by surfing the web, experiencing what has been defined as 'cyber-medicine' and 'cyber-patient'.[58]

As a consequence, a process of layfication is taking place in the realm of medicine, at least in patients' perceptions, which mistrust science and prefer to decide on their own what are to be considered as 'treatments' and their effectiveness.

This phenomenon of 'layfication' also affects the interactions between juridification and medicalization, which are based on the assumption that professionalism shapes the realm of medicine.[59]

Even the expansion of medicalization, especially through over-diagnosis and over-treatment, might be based on a reciprocal distrust of patients and doctors: the former attempting to interfering with diagnosis and treatment and the latter entrenching themselves in 'defensive medicine', fearing

---

[54] S. Milazzo, E. Ernst, S. Lejeune, K. Boehm, M. Horneber, 'Laetrile treatment for cancer', *Cochrane Database Syst Rev.* 2011 Nov 9(11), doi: 10.1002/14651858.CD005476.pub3; B. Wilson, 'The Rise and Fall of Laetrile' www.quackwatch.org/01QuackeryRelatedTopics/Cancer/laetrile.html (20 February 2017).

[55] A. Abbott, 'Italian stem-cell trial based on flawed data', Nature 2 July 2013, www.nature.com/news/italian-stem-cell-trial-based-on-flawed-data-1.13329.

[56] R.S. Kuchenbecker, D.M. Mota, 'Miracle drug: Brazil approves never-tested cancer medicine', *J Oncol Pharm Practice* 1 (2016), doi: 10.1177/1078155216665246.

[57] J.E. Davis, 'How Medicalization Lost its Way', Society 43(6) (2006) *51-56 · September 2006*, doi: 10.1007/BF02698486.

[58] See n 4.

[59] See for example O. Ortashi, J. Virdee, R. Hassan, T. Mutrynowski and F. Abu-Zidan, 'The practice of defensive medicine among hospital doctors in the United Kingdom', *BMC Med Ethics* (2013) 14-42 Published online 2013 Oct 29, doi: 10.1186/1472-6939-14-42 PMCID: PMC3874772.

the legal consequences of their 'customers'' dissatisfaction more than adopting behaviours dictated by their professional sense.[60]

All these phenomenon are analyzed by scholars, in sociological as well as in legal literature, and show how difficult is to identify the private/public interests at stake: maybe this is a consequence or even the price of an ever-more complex society, which is more and more difficult to interpret and understand.

## 6 Conclusion

Juridification and medicalization are affected by different factors, but the private/public interest analysis gives an important key to interpreting their mutual interactions and to the understanding of their influence on the rights and liberties at stake. Both impinge on individual freedom, contributing to shaping the definition of health and illness and their public understanding.

Many factors affect juridification and medicalization and also their interactions, such as social changes, scientific advancement and all the other circumstances which influence and change the perception of the existence of public interests, transcending individuality and giving rise to the idea that juridification is required. When this perception changes, a process of de-juridification may occur and in some cases an interaction with medicalization takes place. Some issues are devolved to medicine, when regulation is not needed any more, but the behaviour at stake is considered to fall within the notion of 'illness'. When this is not the case, de-juridification keeps pace with de-medicalization and both bear traces of the social changes that have occurred.

The identification of the public or private interest, which is behind the shifting relationship between these two processes, is not always an easy task and it may be controversial, especially when ethically controversial issues are at stake. Nevertheless, this is a key issue in the understanding of the interactions between juridification and medicalization and to the identification of the boundary lines between these two processes, especially when they are questioned in the name of liberty.

When these two concepts are at stake, health and illness mutually define each other, affecting the definition of personal freedom in the light of the social context in which people live.

[60] See for example T.C. Hoffmann, C. Del Mar, 'Patients' Expectations of the Benefits and Harms of Treatments, Screening, and Tests A Systematic Review', *JAMA Intern Med.* 175(2)(2015) 274-286 doi:10.1001/jamainternmed.2014 discussing the 'e appetite that people have for medical interventions' (p. 284).