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Book review: *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*

Anniek de Ruijter

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*Reviewed by Edward S. Dove**



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In 2020, the world fell into chaos. The Covid-19 pandemic affected over 200 countries and territories around the world – essentially, every country and territory from all corners of the earth (Antarctica notably excepted) – and particularly devastated Europe. At the time of writing this book review, millions of people have contracted the virus, and hundreds of thousands have died. In the midst of this global health catastrophe, the likes of which have not been experienced for one century (not since the 1918-20 flu pandemic), it is an opportune time as any to take stock of the legal and policy powers made available to governments and to assess them in light of fundamental rights and values. To this end, *EU Health Law & Policy*, written by University of Amsterdam law professor Anniek de Ruijter, is a particularly valuable contribution to the EU health law literature.

This book explores the growth and extent of EU powers in health and the impact of these powers on the fundamental rights of Europeans in the area of human health. De Ruijter deploys two case studies to evidence this growth and analyse the extent of these powers: the EU's response to the outbreak of swine flu in 2009-10 and the declaration of a global pandemic; and cross-border healthcare in the EU (public health) and the adoption of the Patients Right Directive (health care) in 2011. Undoubtedly, were a future edition of this book to be written, Covid-19 would make for a particularly interesting case study. I would be interested to know de Ruijter's views, for example, on the demonstrable expansion of EU power through discussions by the 27 EU Member State leaders by way of *virtual* summits on the EU's response to the virus and the roadblocks facing progress. Such roadblocks include – ironically on the 25th anniversary of the Schengen Area coming into force – nearly all countries in Europe enforcing some border controls (thus working against the principle of ever closer Union and a smoothly functioning internal market), and Member State disagreements about how best to act macroeconomically (with divergent

economic and public health lenses), with some countries calling for joint “coronabonds” to revive European economies and others urging financial restraint.¹

Based on de Ruijter’s PhD thesis at the University of Amsterdam, *EU Health Law & Policy* is a deeply researched book with an impressive marshalling of the literature; interestingly, de Ruijter couples her doctrinal legal analysis with qualitative research data relating the accounts of civil servants working on health policy in the EU institutional context, which makes for a richer account of her findings.

The book is divided into seven substantive chapters. In Chapter 1 (“The Silent Revolution in EU Health Law and Policy”), de Ruijter introduces her case that the EU is involving itself increasingly in health policy, notwithstanding its limited legislative competence. Part of the legal basis for this increasing involvement is found in the somewhat woolly language found in Article 168 of the Treaty on the Functioning of the European Union, and in particular Article 168(1):

A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, *which shall complement national policies*, shall be directed towards improving public health, preventing physical and mental illness

¹ See CNBC, “Nine European countries say it is time for ‘corona bonds’ as virus death toll rises”, available at <https://www.cnbc.com/2020/03/25/nine-eu-countries-say-its-time-for-corona-bonds-as-virus-deaths-rise.html> (accessed 28 July 2020). See also European Commission, “Coronavirus response”, available at https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en (accessed 28 July 2020).

and diseases, and obviating sources of danger to physical and mental health.

[...]²

As de Ruijter observes, much EU health activity is either non-legislative, in that relatively few Directives or Regulations are passed to achieve health aims, or it takes place somewhat surreptitiously under a different policy heading, such as agriculture or economic policy. Why this growth in health policy, then, given the EU was not supposed to have a central, much less primary, role in human health issues? De Ruijter argues this growth was caused by “different pressures and constraints and as a result of continuous reconciliations of market aspirations with health concerns” (p. 6), a claim that is substantiated further in Chapter 3. Because of this non-legislative, or surreptitious backdoor, legislative activity, de Ruijter advocates a health “policymaking” perspective, rather than a more strictly “lawmaking” one through the formal legislative process; in her view, more is going on with respect to EU health policy than can be explained by the legislative competence in Article 168 TFEU alone.

In Chapter 2 (“European Union Rights and Values in Human Health”), de Ruijter provides a thorough discussion of the “generations” of health rights and health policy, beginning with the development of ethics and human rights instruments since World War II and tracing them through the founding of the EU; the most important instrument for the EU, of course, is the Charter of Fundamental Rights of the European Union. As she argues, “EU fundamental rights are a benchmark in determining the legitimacy of the EU political system and consequentially also for determining its policies” (p. 27), and as such, can also be deployed to identify and assess possible tensions caused by EU health policy. That is, by looking at EU health policy in light of fundamental rights, we

² Emphasis added.

can see how “highly sensitive national policy issues may be affected by the Member States’ participation in EU policymaking activities” (p. 51).

In Chapter 3 (“EU ‘Public Health’ and ‘Health-care’ Law and Policy”), de Ruijter expands on the nature of the EU in the field of human health and, through a tracing of the historical development of the EU in health, explores what the concept of “EU health law and policy” means in practice today. She argues that “...there is no single evident EU concept of health” (p. 57). Instead, the concept of “health” in the EU policy context “can either refer to ‘public health’ or ‘individual health’, and the distinction is found in the context in which the term is used, either as addressing the health (protection) of the population at large, or in terms of (access to) individual health (care)” (p. 58).

Here, then, we can see the ways in which the EU capitalises on Article 168 TFEU to inject itself into policymaking in human health. Returning to her discussion of the causes of the EU’s growth in this area, de Ruijter argues that policymaking came to be an important way by which barriers to free trade were removed to *enable* public health through, for example, the circulation of pharmaceuticals across the EU (though it must be said that public health is much more than readily available access to pharmaceuticals). Nonetheless, tensions can remain between the EU’s internal market and public health and health care objectives, such as when the EU’s involvement in health can impact possible welfare redistributions of the Member States.

In Chapter 4 (“Institutional Build-up of EU Health Actors”), de Ruijter traces the evolution and growing presence of EU institutional actors in human health; this includes actors within both the European Commission and the European Parliament. Foremost, and perhaps most well-known, is the Commission’s Directorate-General for Health and Food Safety (DG SANTE). De Ruijter describes it as politically weak, but even so, it still “has become more than an entrepreneur with respect to policy as such, [it] is also an entrepreneur with

regard to policymaking mechanisms” (p. 99). Other actors discussed include the Commission’s Health Security Committee, where high-level Member State representatives coordinate on public health emergencies, and the Parliament’s Committee on Environment, Public Health and Food Safety (ENVI Committee). De Ruijter convincingly argues that these actors, which can be divided between more independent “scientific committees” and committees with a more-or-less political role, are crucial for the development of European health policy. Moreover, this chapter illustrates that health in the EU has become more the responsibility of centralised, specialised actors in health rather than generalists, and that this development has gone hand-in-hand with expanding powers and increased policy activity relating to the field of health.

On this point, it is interesting to note that during the Covid-19 pandemic, the European Commission expressed that it wanted “to avoid Member States taking uncoordinated or even contradictory measures that ultimately undermine common efforts to fight the outbreak. Coordination and recommendations are therefore necessary in the areas of public health, but also transport, border control, internal markets and trade.”³ To this end, the Commission activated its crisis coordination mechanism and established a Crisis Coordination Committee, chaired by the European Emergency Response Coordinator, that met regularly to synergise the action of all the relevant departments and services of the Commission and of the EU agencies. And, interestingly, the Commission also established a coordinating response team at the *political level*, composed of the commissioners responsible for the most affected policies,⁴ including those in charge of the internal market and macroeconomic aspects.

³ See European Commission (n 1).

⁴ *Ibid.*

In Chapter 5 (“EU Public Health: Countermeasures to Swine Flu”), de Ruijter provides a case study of the EU’s response to a public health emergency in the form of countermeasures, namely the involvement of the EU in the response to the outbreak of swine flu (influenza A H1N1) in 2009-10. This study illustrates how EU health policymaking was strengthened through intertwining with more formal (legal) rules. In particular, she documents how the regulatory power for medicines intertwined with the coordination of communicable disease control in various informal ways to enable Member States to work together at the EU level. This said, de Ruijter does not overplay her hand here; she rightly notes that “Although the EU has a role in the surveillance and early warning of public health events, the management and containment of public health emergencies through countermeasures is largely still a matter for Member States” (p. 122). During the swine flu, the main countermeasures taken at the EU level were the market authorisation of vaccines and antivirals, contact tracing or information exchange on specific patients, passenger screening, defining priority groups for first access to medicine, and creating guidelines on school closures and on communicating with the public (pp. 130-131) – similar measures that we see playing out (but also at an expanded level) in 2020 during the Covid-19 pandemic.

In Chapter 6 (“EU Health Care: Access to Medical Care”), de Ruijter turns to her second case – focusing on the processes and the involvement of different EU institutional actors and policy mechanisms in the adoption of the Directive on patients’ rights in cross-border health care. As some of her interviewees noted, the Patients’ Rights Directive is politically delicate because it touches on an area which is mainly in the Member States’, rather than EU’s, competence. What this chapter illustrates is that even if some Member States have tried to obstruct the Patients’ Rights Directive (viewing it as encroachment on their legislative competence), EU power in health care has expanded precisely because this piece

of legislation was passed. The adoption of the Directive strengthened EU health care policy capabilities and created a number of what de Ruijter calls “policy fora”, i.e. committees and networks, which enable the authoritative role of the EU to grow even further – again evidenced most recently and clearly in the Covid-19 pandemic.

In the final Chapter 7 (“The EU Constitutional Constraints on the Intrinsic Relationship of Values, Rights, and Human Health”), de Ruijter reiterates the two threads running through her book: (1) the ongoing “silent” expansion of EU public authority with regard to health policy and law, through policymaking rather than explicit legislative objectives to create health law (though many might question how “silent” this expansion really has been); and (2) the “revolution” of the impact of this policy with regard to the guiding fundamental rights and values that Member States share, in the protection, provision, and promotion of public health and health care. De Ruijter argues deftly that while the EU’s power in public health and health care is indeed expanding, the current constitutional doctrines for *constraining* EU power in the field of human health are not designed specifically with human health in mind and therefore are not capable of safeguarding the values and rights that are intrinsically related to human health law and policy. As she writes: “This begs the question of whether there is legal room and common ground between the shared values and rights of the Member States to alleviate the current tensions” (p. 176).

As de Ruijter observes, in health law, values and human rights often are the centrepiece of human health-related legal instruments. By contrast, EU health law appears to have developed as a side issue of internal market law; values and human rights have *not*, by and large, been the cornerstone. Thus, we come to see the overtly political issues at play; the “expansion of EU power in the field of human health goes to the heart of questions on the legitimacy of the EU political system as a whole” (p. 190). De Ruijter’s response to this is that “fundamental

rights and values in the EU, beyond their legal power, provide a normative language that explicates the legitimacy of the EU's efforts to promote and protect human health" (p. 190). True, but this seems an inadequate response to the profound question of legitimacy, which is at the heart of the EU project.

De Ruijter's book aims to link the growth of EU health policy with the EU's fundamental rights, bioethics, and values. On the whole, she accomplishes this aim well. However, connected to the open-ended question above about the legitimacy of the EU political system as a whole, I was surprised to see relatively little discussion and analysis of the importance of *discontent* of Member States' citizens with the EU and its expansion of power, both *en masse* and in the specific context of public health and health care, given the very real concerns about illegitimate legal and policy expansion that can grate with perceived *national* power and socio-cultural and political values. To take the example of Brexit, while we might say the vote to leave the EU was mostly about immigration, it was also partially, and more abstractly, a vote expressing concern about a sense of loss of control over time, particularly away from (Westminster) England (less so Scotland, Wales and Northern Ireland) and towards Brussels. So, yes, de Ruijter's book confirms that at least in one area, and no doubt in many others, EU power is indeed increasing, at times surreptitiously through the backdoor of "policy". Given these concerns about political legitimacy, what should the EU *and* the 27 Member States do, if anything? This question is left hanging.

This critique aside, *EU Health Law & Policy* is an excellently crafted monograph deserving of a wide-ranging audience. If de Ruijter's thesis is that EU power is expanding through law and policy, in both public health and health care – and it is hard to argue contrarily after reading this book – we may well come to see the ramifications of this not so much in the Brexit aftermath, but rather in the particularly troubling – and in our lifetimes – unprecedented time of a biologically, socially, politically, and economically catastrophic pandemic.