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Health Law, International Health Law, Comparative Health Law, Health Policy, Health Cases, Medical and Biomedical Law

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VOLUME 1 - Nº 01 – 2023

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Editorial – Volume 1 – nº 01- 2023

It is our great pleasure to introduce the inaugural issue of the **Global Health Law Journal-GHLJ**. Through an important initiative of the Master's Program in Health Law of the Santa Cecilia University, in Santos, São Paulo, Brazil, the Journal seeks to ensure an international publication spot among the world's leading academic forums concerned with Health Law.

The **Global Health Law Journal-GHLJ** is a biannual production, an open access, peer reviewed, and the outcome of a collaborative, widespread, and international effort.

The **GHLJ** strives to offer an opportunity for interdisciplinary discussion on topics in health law, international health law, comparative health law, health policy, health cases, medical, and biomedical law.

The Journal targets a broad and diverse audience of academicians, professionals, and students in Law, Medicine, Biomedicine, as well as policy makers, law operators, and legislators in health care.

Articles must be related to health law, international health law, comparative health law, health policy, health cases, medical and biomedical law, Medicine, and Biomedicine.

Articles can be submitted in English, Spanish, French, Italian or Portuguese.

Submissions to the Global Health Law Journal are peer-reviewed by our distinguished Editorial Board and reviewers, consisting of internationally recognized experts.

In short, the Global Health Law Journal is looking to become a dynamic and engaging forum for comparative and interdisciplinary research and commentary.

It has been created and raised in an innovative, cooperative and participatory spirit, and will always continue its commitment to these values.

We hope you will enjoy the Global Health Law Journal, and that you can contribute to future issues.

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GLOBAL HEALTH LAW AND HUMAN RIGHTS[1]

Abbas Poorhashemi[2]

Abstract

The international community recognizes the right to health as a human right. The 1948 Universal Declaration of Human Rights affirms the right to health. This right includes timely access to satisfactory quality and affordable health care. As a result, realizing the right to health might appear at first sight as the main objective of international health cooperation. Several international legal instruments, including non-binding tools such as the 2015 Sustainable Development, recognized this right in international law.

Like all human rights, the right to health oblige States to respect, protect and fulfil it. The obligation to respect obligates States to refrain from directly or indirectly impeding its exercise. In contrast, the commitment to protect it also requires that states

[1] **How to cite:**
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prevent third parties from interfering with the guarantees. The obligation to implement the right to health presupposes that the State adopts appropriate legislative, administrative, budgetary, judicial, incentive or other measures to ensure full implementation. Moreover, the right to health is an integral part of human rights. The right to enjoy the highest possible physical and mental health is a fundamental right recognized by the international community. However, the implementation of this right is facing many challenges and limitations.

This article aims to review the relationship between global health and human rights in the context of the development of international law. It discusses that good governance is crucial for implementing multilateral treaties on global health issues.

The result of this research shows that understanding the relationship between international health law and human rights can better address global health challenges.

Keywords: Global Health, Human Rights, International Law, Global Governance, Right to Health

Introduction

The evolution of international health law as a new branch of international law arose from several legal instruments and the creation of the World Health Organization (WHO) in 1946. According to the WHO, “health” is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every

human being without distinction of race, religion, political belief, economic or social condition[3].

With the establishment of the WHO, the right to health was recognized internationally for the first time. The WHO Constitution affirms that possession of the highest standard of health is one of the fundamental rights of every human being, whatever his race, religion, political opinions, economic or social condition. Over time, this recognition has been reiterated in a wide variety of formulations in various international and regional human rights legal instruments.

The recognition of the "right to health" as a human right can be traced through the binding and non-binding instruments such as the United Nations Declarations, the Charter of the World Health Organization and international conventions.

With health inequalities rising in a globalizing world, human rights face new challenges and limitations. In this context, the 1993 World Conference on Human Rights formed a new global consensus that all human rights are universal, indivisible, interdependent, and interrelated [4]. Moreover, the current preoccupations went beyond preventive and curative health

[3] Constitution of the World Health Organization. https://www.who.int/about/governance/constitution

[4] Report, "Belgium: EU Adopts Conclusions on EU Priorities at United Nations Human Rights Fora in 2018." MENA Report, Albawaba (London) Ltd., Feb. 2018.

care to address underlying determinants of health beyond the health sector, including food, housing, work, education, non-discrimination, and equality[5].

The United Nations General Assembly adopted by its Resolution 53/54 of 09 December 1998, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect[6] the Rights of universally recognized human rights and fundamental freedoms which is crucial to establish human rights in the world. It has become an essential pillar of developing the right to health and of efforts to integrate human rights into public health policies, programs and actions.

Furthermore, several national and international regulations recognized the rights to health and access to care as human rights.

1. Recognition of the right to health in international law

[5] Lawrence O Gostin, Benjamin M Meier, Rebekah Thomas, Veronica Magar, Tedros A Ghebreyesus, “70 years of human rights in global health: drawing on a contentious past to secure a hopeful future”, VIEWPOINT, VOLUME 392, ISSUE 10165, P2731-2735, DECEMBER 22, 2018, DOI: https://doi.org/10.1016/S0140-6736(18)32997-0

[6] Declaration on human rights defenders, OHCHR, https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders

The 1948 Universal Declaration of Human Rights, in its article 25, affirms that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control (…)[7].”

International treaties such as conventions, protocols and covenants as binding instruments set regulations to develop global health law. From this perspective, Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights [8] affirms that the States Parties to this Covenant recognize the right of every person to an adequate standard of living for himself and his family, including adequate food, clothing and shelter, and to continual improvement of living conditions. Recognizing the essential importance of international cooperation based on free consent, States Parties shall take appropriate measures to ensure the realization of this

[7] Universal Declaration of Human Rights (UDHR), United Nations, 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights

[8] International Covenant on Economic, Social and Cultural Rights, United Nations, 16 December 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

right. In addition, according to this document, the States should guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or another opinion, national or social origin, property, birth or another status[9].

Another crucial legal instrument to recognize the right to health in human rights is the 1966 International Covenant on Civil and Political Rights. According to Article 6: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 1.2 also states, “All peoples may, for their own ends, freely dispose of their natural wealth and resources. ... In no case may a people be deprived of its own means of subsistence”.[10]

Article 8 of the 1986 Declaration on the Right to Development[11] recognizes that States shall uphold the right to development, including ensuring equal opportunity for all in access to primary resources, education, health care, food,

[9] Article 2.2 of the International Covenant on Economic, Social and Cultural Rights, United Nations, 16 December 1966.

[10] International Covenant on Civil and Political Rights, United Nations, General Assembly resolution 2200A (XXI), 16 December 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[11] Declaration on the Right to Development, United, General Assembly resolution 41/128, 04 December 1986, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development

housing, etc. According to this article, all necessary measures should be taken at the national level to achieve equitable employment and income distribution.

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination[12] further affirms the right to health, including the notions of racial and ethnic discrimination. According to article 5, States Parties condemn racial discrimination and undertake to pursue it by all appropriate means. States are obligated to eliminate all forms of racial discrimination and promote understanding among all races. The Convention provides that each individual is bound to have the right to health, medical care, social security and social services.

The 1979 Convention on the Elimination of all Forms of Discrimination against Women12 acknowledges the right to health in article[13]. According to this article, States shall take all appropriate measures to eliminate discrimination against women in the healthcare field to provide them, based on equality between men and women, with access to medical services, including those relating to family planning.

[12] International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Office of the United Nations High Commissioner for Human Rights. https://www.ohchr.org/Documents/Publications/Factsheet31.pdf

[13] Convention on the Elimination of all Forms of Discrimination against Women, 1979, Office of the United Nations High Commissioner for Human Rights. https://www.ohchr.org/Documents/Publications/Factsheet31.pdf

Furthermore, notwithstanding paragraph 1 above, States Parties shall provide women during pregnancy, childbirth and after childbirth with appropriate services and, where necessary, free of charge, as well as adequate nutrition during pregnancy.

Another international instrument to recognize the right to health is the 1993 Vienna Declaration and Programme of Action. According to Article 31, States have an obligation to refrain from any unilateral action contrary to international law and the Charter of the United Nations. The Universal Declaration of Human Rights and other international human rights instruments recognize the right of everyone to a standard of living adequate for health and well-being, including food and medical care, shelter and essential social services. The World Conference on Human Rights recognizes that illegal dumping of toxic and hazardous materials and wastes can seriously threaten all human rights to life and health[14]. In addition, the Declaration supports the relationship between the right to development and health. It states that it should be realized to

[14] Vienna Declaration and Programme of Action, OHCHR, 25 June 1993, https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action

meet current and future generations development and environmental needs[15].

In addition, many non-binding instruments such as the 1948 Universal Declaration of Human Rights, the 1978 Declaration of Alma-Ata, the International Conference on Primary Health Care, the 1991 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, the 1997 Universal Declaration on the Human Genome and Human Rights and the 1993 Declaration on the Elimination of Violence against Women are insisting the right to health in international law.

Furthermore, several regional instruments also recognize the right to health as a human right, such as the American Declaration of the Rights and Duties of Man[16] (art.33), the European Social Charter (art. 11), and the African Charter on Human and Peoples' Rights (art. 16). However, the question is whether multilateral global health treaties or non-binding instruments require good governance to address the global

[15] Poorhashemi, A., (2020). Emergence of "International Environmental Law": as a new branch of International Public Law.". CIFILE Journal of International Law, 1(2), 33-39. DOI: 10.30489/cifj.2020.218985.1013

[16] MENA Report, "Colombia: The Inter-American Commission on Human Rights Will Hold Its 167th Special Session in Bogota.", Albawaba (London) Ltd., Feb. 2018.

health crisis. Multilateral treaties can be crucial in addressing global health challenges by creating a framework for cooperation and coordination among nations.

2. States' obligations to implement the right to health

To implement the right to health, all States have obligations in three significant commitments: respect, protect and fulfil. The first obligation requires States not to interfere with the practice of the right to health." According to this obligation, States should not limit the essential elements of the right to health, as well as the services or goods that healthcare institutions provide to individuals, regardless of who they are.

Secondly, the obligation to protect requires States to ensure that a third party, a non-State entity or even specific groups do not interfere with the enjoyment of the right to health.

Finally, States must protect their citizens and be capable of activating the necessary reforms to implement this right, mainly through positive actions such as passing legislation or building specific aid programs[17].

States have the duty to realize the right to health, which is recognized as a fundamental human right in international law.

[17] Victoria Liégeois, Le droit à la santé, droit fondamental de l'homme, Revue des Questions Scienti&ques, (2016), 187 (4): 651-678.

This right includes, but is not limited to, access to health services, safe and healthy working conditions, clean water and sanitation, and access to essential medicines and vaccines.

As mentioned above, the right to health is stipulated in several international treaties and States that have ratified these conventions are obliged to respect, protect and fulfill the right to health of their citizens and other persons under their jurisdiction.

In this perspective, States are primarily responsible for implementing multilateral treaties related to the right to health. In addition, intergovernmental and non-governmental organizations also have a crucial role to play in realizing the right to health. However, States, as principal actors in international law, remain responsible for policymaking, controlling and offering health services, equitable and without any discrimination, accessible to all people.

3. Good Governance in Global Health Crisis

Outbreaks of global health crises such as the COVID-19 pandemic have caused and are causing global health problems and economic, political and social conditions worldwide. These challenges and conflicts are forcing the international community to reassess global governance. But unfortunately, the

international community has failed to adequately and timely anticipate, prevent, recognize and control this pandemic.

While human rights law has evolved to guide governments to implement human rights in public health emergencies, the COVID-19 pandemic challenges human rights fundamentals in global health governance. The global health response to the pandemic has undermined the international human rights obligations of realizing the right to health and life. In addition, States should review their global health laws. New opportunities arise to reconcile them with human rights and strengthen rights-based governance to meet future threats[18].

Today, the international community embraces the need for good governance as a new approach to global management based on national responsibility to the domestic and international community. Despite differences in government systems, good governance implies a government's obligation to respect human rights and fundamental freedoms as defined in Human Rights for Different Generations. Good governance can be a new approach to meeting people's needs and ensuring

[18] De Mesquita, J., Kapilashrami, A., & Meier, B. (2021). Strengthening Human Rights in Global Health Law: Lessons from the COVID-19 Response. Journal of Law, Medicine & Ethics, 49(2), 328-331. doi:10.1017/jme.2021.47 https://www.cambridge.org/core/journals/journal-of-law-medicine-and-ethics/article/abs/strengthening-human-rights-in-global-health-law-lessons-from-the-covid19-response/33DF375D8D8BDF38D2C7EDFCCA11625A

human rights and collective demands at national and international levels.

According to the Organisation for Economic Cooperation and Development (OECD)[19], good governance contributes to strengthening human rights and democracy, promoting economic prosperity and social cohesion, reducing poverty, improving environmental protection and sustainable use of natural resources and building confidence in government and public administration. Some crucial elements of good governance are transparency, legitimacy, fairness, justice, efficiency and accountability. Therefore, there is a close link between sustainable development and good governance. Moreover, sustainable development and security could be linked to the situation of the global health crisis. In this regard, a health security strategy may be considered a new approach to good governance[20].

The global management of infectious disease outbreaks illustrates the challenges faced by all governments in developed

[19] OECD (2014), "Good governance and well-being: What are the linkages?, 49th Session of the Public Governance Committee, OECD, Paris. Available at: https://www.oecd.org/governance/ministerial/the-governance-of-inclusive-growth.pdf

[20] Poorhashemi A., Good Governance in Global Health Crisis (In the shadow of the COVID-19 pandemic), Our Legal World, https://www.ourlegalworld.com/good-governance-in-global-health-crisiscovid-19

and developing countries. To respond to this crisis, all governments should take necessary measures to identify and detect possible outbreaks and control and restore the situation without discrimination.

Good governance in a global health crisis such as COVID-19 shows how transparency, accountability and public participation could have a crucial role in implementing the objective of good management.

The current global health crisis has confirmed the gaps and uncertainty in national and international crisis management. It accentuates the importance of good governance in the globalized and interconnected world. Furthermore, the COVID-19 pandemic demonstrates that the current approach to global health governance has failed, and worldwide management and national governance are not cooperative. In contrast, it necessitates further international cooperation and coordination in a global crisis.

The pandemic proves that health issue has no borders, and international health has become “global health.” Based on this fact, countries and international institutions can no longer view health as a border issue, as they often did in the past pandemic. The rapid development of communication across national borders through travel and trade has facilitated the transmission

of diseases from country to country. In this context, can we expect the emergence and development of International Health Law as a new branch of international law?[21]

Conclusion

The international community recognizes the right to health as a fundamental human right. In this context, everyone has the right to enjoy the highest attainable standard of health, enabling them to live in dignity. The realization and implementation of the right to health should be guaranteed by law at the national and international levels.

The global human rights impact of the COVID-19 pandemic, which has already caused unimaginable devastation and hardship for people worldwide, is prompting the international community to re-evaluate and reconsider domestic and international law.

The outbreak has had and will continue to have severe and lasting social, economic, health and political consequences in all parts of the world. This global threat requires international

[21] Poorhashemi A., Good Governance in Global Health Crisis (In the shadow of the COVID-19 pandemic), Our Legal World, https://www.ourlegalworld.com/good-governance-in-global-health-crisiscovid-19

cooperation and a global response based on good governance and human rights principles.

The fulfillment of States' obligations to protect and promote the "right to health" is crucial in developing international health law. Moreover, the international mechanisms for monitoring the implementation of international human rights conventions could use such results in addition to the reports and information provided by the States parties to assess the progress made and the shortcomings observed in this regard.

At the national level, the right to health was gradually incorporated into many national constitutions in the world. Some States have included the right to health in their constitutions which the governments have the imperative obligation to guarantee the right to life and health as human rights.

States should adopt measures to ensure the systematic and programmatic implementation of the right to health in their national sovereignty. States have a legal obligation to realize the right to health and take positive steps to ensure that all people have access to the health services, information and resources they need to achieve the highest possible physical and mental health. Fulfilling this commitment requires prioritizing health as a fundamental human right, allocating

adequate resources to ensure universal access to health services and resources, and addressing the social and economic determinants of health that contribute to health inequalities and poor health outcomes.

Finally, the multilateral treaties for global health matters require to be accepted as a customary international law for combating global diseases by the international community. Adopting multilateral agreements on global health issues as customary international law is critical to combating global diseases and creating a legal framework to address global health crises. This would ensure that States are legally bound to implement the provisions of the multilateral treaties and provide a basis for holding states accountable for their actions or inactions concerning global health. Therefore, States should continue to promote and implement these treaties and be encouraged to recognize and accept them as consistent with the principles and norms of customary international law.

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