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The Right to Health in International Human Rights Law

with reflections from Thailand, South Africa, and the Philippines

Clara Van Gulik

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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MALARIA, MALNUTRITION, HIV/AIDS, SARS, TUBERCULOSIS: INCREASING GLOBAL HEALTH CHALLENGES DEMANDS THE NEED FOR PUBLIC HEALTH TO TAKE A HUMAN RIGHTS DIMENSION

AN ESSAY ON THE RIGHT TO HEALTH IN INTERNATIONAL HUMAN RIGHTS LAW WITH REFLECTIONS FROM THAILAND, SOUTH AFRICA AND THE PHILIPPINES

Children recovering from malnutrition in ACF/MSF Feeding program, Burundi 2005.

“The goal of linking health and human rights is to contribute to advancing human well-being beyond what could be achieved through an isolated health- or human rights-based approach.”

- Jonathan M. Mann

INTRODUCTION

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being. [1]

This is part of the preamble of the Constitution of the World Health Organisation (WHO) and is a marker of the link between health and human rights. The 'right to health' is an even stronger collaboration between health and human rights and has found a place in numerous international human rights treaties. Yet the relationship between health and human rights has only recently taken an interdependent approach.
The attempt to intersect the paths of public health and human rights has been challenging as the two have progressed and developed in separate ways. Jonathan Mann explains that although "health and human rights are both powerful, modern approaches to defining and advancing human well-being" it is attention to their intersection which "may help reorient thinking about major global health challenges, and may contribute to broadening human rights thinking and practice".[2]
The international community has demonstrated some progress in bringing health and human rights together, since the Alma-Ata Declaration of 1978[3], the post of Special Rapporteur on the Right to Health was created and the World Health Organisation has taken more interest in a rights-based approach. Half of the Millennium Development Goals are dedicated to health; including the reduction of child mortality, to improve maternal health, to combat HIV/AIDS, malaria and other diseases, and to provide sustainable access to safe drinking water and basic sanitation.[4] All these goals are aimed to be reached by 2015 to 2020. Some argue that the targets are too high and unrealistic, and in fact developments so far in all areas have not kept up to plan. Yet some critics feel that the targets of these goals are too small and insignificant. The 3-by-5 project[5] run by the WHO aims to ensure that 3 million people with HIV/AIDS receive antiretroviral treatment by 2005. With 40 million people at present with HIV/AIDS and the number increasing on a daily basis, this project may very soon need to be revised.

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[1] Preamble of the Constitution of WHO
[2] J. Mann, *Health and Human Rights*, J. Mann, et al.(ed), Chapter 1, p.7
[3] Declaration of Alma-Ata, former USSR, 1978 www.who.int/hpr/NPH/docs/declaration_almaata.pdf
[4] Millennium Development Goals, www.developmentgoals.org
[5] World Health Organisation www.whoint.org

The crusade to universalise human rights and participation to international human rights treaties have demonstrated its success when at the 1993 World Conference on Human Rights in Vienna, 171 states took part and some 7000 delegates observed the adoption of the Vienna Declaration to further promote, protect and fulfil all human rights as stated in the Universal Declaration of Human Rights. The Vienna Declaration also states, "All human rights are universal, indivisible and interdependent and interrelated."[6] This re-emphasised the need to urgently focus on the progress of economic, social and cultural rights which have been paid much less attention to, particularly by the Western states, than civil and political rights.

As there is an increasing drive by the international community for a rights-based approach to socio-economic development, the public health community needs to adopt complementary approaches whether it be in the formulation of health policies or in the implementation of health programmes.[7]

In the following chapters, right to health provisions will be demonstrated in the sphere of international human rights law and in national legislation. As many authors have often questioned the 'justiciability' of a social right[8] such as the right to health, case-law from three developing states will be observed to demonstrate the enforceability of the right to health.

[6] Vienna Declaration and Programme of Action, Part I, para 5, *The Committee on Economic, Social and Cultural Rights*, Fact sheet No. 16

[7] General Comment No.14 (2000), The Right to the Highest Attainable Health, Committee on Economic, Social and Cultural Rights, 22nd session, ECOSOC

[8] A. Eide, A. Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge', *Economic, Social and Cultural Rights*, 2nd edition, A. Eide et al

CHAPTER 1: INTERNATIONAL PROVISIONS OF THE RIGHT TO HEALTH

The Right to Health is often criticised to be too broad a term to cover the various perceptions of health.[9] It can be interpreted to cover the right to have access to health- and medical care, the right to living in a healthy environment, the right to physical and mental health, the right to be protected from sickness and injury. In fact with the numerous provisions that could be classified as the right to health in national, regional and international mandates, each form of this right can be found.

Firstly, Article 25 of the 1948 Universal Declaration of Human Rights states 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.[10]

An 'adequate standard of living' is rather vague and does not project an image of progressive development. The right to the 'highest attainable standard of health' has been adopted from the WHO Constitution to form the basis for other international treaties. The Constitution also provides a definition for health as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[11] This definition of health resonates well in a political sense, but is completely unrealistic from a public health point of view.

The 1966 International Covenant on Economic, Social and Cultural Rights recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' in Article 12 (1).[12] The second part of the article notes to realise this right the state needs to take steps to provide for the reduction of still-birth rate and infant mortality, the healthy development of the child; to improve environmental and industrial hygiene; to prevent, treat and control epidemic, endemic, occupational and other diseases; to assure medical service and medical attention in event of sickness.

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[9] V. Leary, 'The Right to Health in International Human Rights Law', 1 *Health and Human Rights: An International Journal* 1994

[10] Universal Declaration of Human Rights 1948, Article 25

[11] World Health Organisation Constitution 1946, Preamble

[12] P.R. Gandhi, *International Human Rights Documents,* 3rd edition, p. 84

There are right to health provisions with similar contexts in the Convention of the Rights of the Child (CRC)[13] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[14]

As limited resources are one of the main obstacles to the fulfilment of socio-economic rights, the 'highest attainable standard' permits variability in the standard of health between nations. This emphasises the necessity for basic standards to be set by international organisations such as the WHO in order to ensure available resources are being adequately distributed. The fact that the United States does not provide the 'highest attainable' standard of healthcare to those who can not afford it,[15] is a very different matter to the inability to provide that care in, for example, Malawi.

All three established regional human rights systems have also included the right to health in their conventions. The African Charter on Human and People's Rights ensures the realisation of the "best attainable state of physical and mental health"[16] in Article 16, and the American Declaration of the Rights and Duties of Man provides the right under Article 11 as well as in Article 10 of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[17] The European Social Charter of 1961 provides differing aspects of the right to health in Articles 2, 11 and 13.[18]

The international provisions for the right to health is thus plentiful and although printed in various contexts, they include the words "right" and "health".[19] The vast array of terminology and vagueness of many of the articles probably just reflects on the wide-ranging complexity, technicality and relativity that surround the field of health and health care. To people of varied cultural, geographic, economic and social backgrounds the 'right to health' will have many differing personal interpretations. The concept varies from the right to be treated with the most modern medical technology to the right to have access to clean water to avoid water-borne infectious

[13] Ibid., Article 24, p. 125
[14] Ibid, Article 12, p.99
[15] R. Dworkin, 'What are Human Rights?', www.law.nyu.edu/clppt/program2003/readings/index.html
[16] P.R. Gandhi, *International Human Rights Documents*, 3rd edition, p.369
[17] Ibid., Article 10, 11, p. 349
[18] European Social Charter 1961, P.R. Gandhi, *International Human Rights Documents*, 3rd edition
[19] V. Leary, 'The Right to Health in International Human Rights Law', 1 *Health and Human Rights: An International Journal* 1994

diseases. It varies from the access to medicines despite the high costs imposed by multi-national pharmaceutical companies to the right to live in an environment free from harmful toxic products. The right to health is an issue that touches every person on this planet at some time in their life whether they live in the richest or poorest, democratic or non-democratic nations. It is considered a fundamental right of an individual as well as a duty of a state to protect individuals and communities.
The value of the right to health as a duty of a state to promote, provide and protect are not only provided for as a fundamental right in international human rights law, but also further legitimised by its increasing inclusion into national constitutions which will be described in the next chapter.

CHAPTER 2: CONSTITUTIONAL PROVISIONS OF THE RIGHT TO HEALTH

At the 59th Session of the Commission on Human Rights in April 2003, the Special Rapporteur on the Right to Health presented a survey by the World Health Organisation on the right to health provisions of national constitutions. This survey showed that the right to health or right to healthcare was included in over 60 constitutions.[20] In view of recent highlighted case-law from developing states, this chapter will look at the human rights provisions of the constitutions of Thailand, South Africa and the Philippines.

THAILAND

Thailand is one of the few developing nations of the southern hemisphere and the only nation in Southeast Asia that did not fall under colonial rule.[21] The constitutional history of Thailand is quite remarkable. Although there had been talks from the previous Kings of Thailand for Constitutional reforms to base the Constitution on the people, it did not happen until a revolution by the People's Party in 1932 seized the sovereign power from King Rama VII who had ruled as an absolute monarchy. The new regime drafted the first people's constitution and replaced the throne with a young nephew of the previous King. This event marked the beginning of repeated

[20] P. Hunt, Special Rapporteur on the Right to Health, 59th Session, Commission of Human Rights, Geneva
[21] T. Khoman, 'ASEAN: Conception and Evolution', *The ASEAN Reader*, Sandhu, et al.

series of military coups overthrowing the government in power and replacing the old constitution with a new one.[22] From 1932 to 1997 there were 16 military coups, 16 Constitutions and 54 Governments in Thailand.

The most recent and, so far, the longest established, new Thai Constitution is called the Constitution of the Kingdom of Thailand 1997, and due to its large public participation in its drafting has also been called the 'Popular Constitution'. This national Charter has 39 articles dedicated to the protection of the fundamental rights of the Thai people. Section 52 of Chapter III of the Constitution states:[23]

> A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from public health centres… State shall prevent and eradicate harmful contagious diseases…

Within Southeast Asia, Thailand has made concerted efforts to improve their healthcare system. It has nearly one million people infected with HIV and has recognised the HIV/AIDS epidemic as a national problem much more openly and readily than its other Southeast Asian neighbours.[24] The attitude of both the government and the people of Thailand towards HIV and AIDS have been more educated, more positive and less prejudiced than many other developing states suffering from the pandemic. This has significantly strengthened the battle being fought by both government and non-government organisations against the spread of the virus and accessibility to necessary medication.

AIDS Access Foundation, Mrs Wanida C and Mr Hurn R v Bristol-Myers Squibb company and the Department of Intellectual Property

In October 2002, AIDS Access Foundation[25] and two patients with HIV won a legal case against the big US pharmaceutical corporation Bristol-Myers Squibb (BMS) concerning access to medicines.[26,27] BMS manufactures and holds the patent on an

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[22] Pinai Nanakorn, 'Re-making of the Constitution of Thailand', 6 *Singapore Journal of International & Comparative Law* (2002)
[23] 1997 Constitution of the Kingdom of Thailand www.kpi.ac.th/en/con_th.asp
[24] www.whosea.org World Health Organisation South East Asia
[25] A Thai foundation that provides social support to people with HIV/AIDS
[26] AIDS Access Foundation, Mrs Wanida C and Mr Hurn R v Bristol-Myers Squibb company and the Department of Intellectual Property. The Central Intellectual Property and International Trade Court, 2002 (10)

anti-retroviral drug called didanosine (DDI). As the cost of didanosine was excessive, the Thai Government Pharmaceutical Organisation (GPO) requested a compulsory license on didanosine from the Thai Intellectual Property Department. After fiddling from BMS to change its dose restricted patent to cover all doses of DDI and the threat of trade sanctions from the US government, the Thai Intellectual Property Department decided not to grant the compulsory license which would allow the GPO to produce its own cheaper generic form of the antiretroviral. Although this case did not go to the Constitutional Court it is a remarkable triumph for the right to health of people who need access to medicines that are being excessively priced by large transnational corporations. This case went to the Thai Central Intellectual Property and International Trade Court where the final verdict of the court stated, "Medicine is one of the fundamental factors necessary for human beings, as distinct from other products or other inventions that consumers may or may not choose for consumption" and that "lack of access to medicines due to high price prejudices the human rights of patients to proper medical treatment."[28] The court also used the Doha Declaration to assert the primacy of human life over trade agreements reminding that at Doha it was internationally recognised "that TRIPS be interpreted and implemented so as to promote the rights of members to protect public health, especially the promotion and support of access to medicines".[29] While the pharmaceutical companies will continue to push for increased patent protection, hopefully the efforts of the Thai people and its government to fight for the right to access to medicines and health will be a positive example.

SOUTH AFRICA

In the 1996 Constitution of the Republic of South Africa, Section 27 of the Bill of Rights sets the right to 'healthcare, food, water and social security'. Two recent cases have reached the Constitutional Court regarding the breach of the right to health; one regarding an individual case of access to emergency medical treatment and the other

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[27] N. Ford, D. Wilson, O. Bunjomnong, T. von Schoen Angerer, *Medecins Sans Frontieres* 'The Role of Civil Society in Protecting Public Health over Commercial Interests: Lessons from Thailand' *The Lancet* 2004; 363:560-63

[28] AIDS Access Foundation, Mrs Wanida C and Mr Hurn R vs Bristol-Myers Squibb company and the Department of Intellectual Property. The Central Intellectual Property and International Trade Court, 2002 (10)

[29] AIDS Access Foundation, Mrs Wanida C and Mr Hurn R vs Bristol-Myers Squibb company and the Department of Intellectual Property. The Central Intellectual Property and International Trade Court, 2002 (10)

regarding a public health programme for mother-to-child-transmission (MTCT) of HIV[30].

In Soobramoney v Minister of Health the appellant was a patient suffering from chronic renal failure who did not qualify for long-term dialysis treatment.[31] The appeal was called by virtue of the appellant's right to health under section 27(3) of the Constitution under which, 'No one may be refused emergency treatment.' His appeal was dismissed as his condition was chronic and the treatment not an emergency.

Like all healthcare systems, the state can only provide care 'within its available resources' as stated in section 27(1) and (2) of the South African Constitution. This appeal was dismissed on all sections of the right to health, but exemplifies how a social right could be 'justiciable'.

Minister of Health and others v Treatment Action Campaign and others

The Nevirapine case[32] that was heard in May 2002 at the Constitutional Court in South Africa is considered a small victory which hopefully is a large step forwards for the right to health of millions of people suffering from AIDS around the world. The Treatment Action Campaign (TAC) is a coalition of AIDS-related organisations in South Africa which promotes affordable treatment for people with HIV/AIDS. When the South African government decided to endorse a compulsory license and purchase generic forms of antiretrovirals, 39 pharmaceutical companies in unison filed a lawsuit against the South African Ministry of Health in order to enforce their patents on their antiretroviral drugs. After campaigning by the TAC and other organisations, global disapproval and pressure from many other governments caused the 39 multinational 'big pharmas' to drop their lawsuit in 2001. At around the same time, the TAC with other organisations filed a complaint against the South African Ministry of Health itself regarding the restrictions put on the availability of nevirapine. The Minister of Health and others v Treatment Action Campaign and others [33] reached the Constitutional Court in May 2002 as an appeal to reverse the decision made in the High Court in Pretoria. Availability of nevirapine was limited to two public sector

[30] Human Immunodeficiency Virus, a retrovirus that attacks the human immune system and causes Acquired Immunodeficiency Syndrome (AIDS)

[31] Soobramoney v Minister of Health, KwaZulu-Natal (1998) 2 LRC 524 (South Africa)

[32] A. Tsai, 'The Right to Health and the Nevirapine Case in South Africa', *New England Journal of Medicine* vol 348:750-754, February 2003

[33] Minister of Health and others v Treatment Action Campaign and others, Constitutional Court of South Africa, August 2002 www.concourt.gov.za

hospitals per region as part of a pilot study despite the drug being made available free of charge by its manufacturers. Nevirapine is an anti-retroviral that is used as a single perinatal oral suspension for the mother and another single postnatal oral suspension for the baby in order to significantly reduce the transmission of HIV from mother to child during labour and delivery. Thus the restrictions on availability of this drug and the failure to have a reasonable plan to make the drug widely available was contested as a breach of the right to health of the HIV-positive mother and her baby. The Court looked at the rights expressed in sections 27 and 28 :[34]

27 (1) Everyone has the right to have access to-
health care services, including reproductive health care
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

28 (1) Every child has the right-
(c) to basic nutrition, shelter, basic health care services and social services.

The Court found that the government had not reasonably addressed the need to reduce the risk of mother to child transmission of HIV at birth. The Court's judgement found that the "government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available on the public health sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV."[35] The decision by the Court was not only based on the obligation to meet the right to health under the national Constitution but also in accordance to the legal rights provided in the international human rights treaties.

The nevirapine case is but the start of the implementation of the right to health through a court –based approach. The right to health being used as a legal right under the constitution to win cases has its advantage in seeking remedial changes, but has its disadvantage in that its deals with specific aspects of the right to health, whether it's medical intervention for chronic renal failure or the use of nevirapine therapy.

[34] Section 27, Bill of Rights, 1996 Constitution of the Republic of South Africa, http://www.gov.za/constitution/1996/96cons2.htm#27
[35] Case CCT 8/02 judgement para. 2

Although the court-based approach is vital to rights implementation, there also is a need for a policy-based approach to promoting and implementing all aspects of the right to health.[36] The HIV epidemic can pretty much be called a crisis now in sub-Saharan Africa, and to tackle this crisis the government needs to urgently command a comprehensive strategy of treatment, follow-up care and prevention, including education, adequate nutrition, sterile water and non-discrimination.[37] Unfortunately the political stance in the South African Government still is denial of the emergency status of the HIV epidemic in its country. Despite the Constitutional Court's decision in the nevirapine case, without concerted effort from the top to tackle the HIV epidemic specifically and provide the right to health generally, the health of the people of South Africa and its future generations will be bleaker than it is today.

THE PHILIPPINES

After nine years of martial law under President Ferdinand Marcos, President Corazon Aquino promised to bring the Philippines back to a state of democracy with a rule of law that respects and protects human rights. The 1987 Constitution has a 22-section Bill of Rights protecting civil and political liberties and economic, social and cultural rights in Article XIII: Social Justice and Human Rights. Section 11 of Article XIII commences with, "The State shall protect and promote the right to health."[38] This section and the next three are dedicated to health development; to make health and social services available to everyone at affordable cost; prioritisation of the underprivileged and the most vulnerable; protection of women for 'healthful working conditions'; 'effective food and drug regulatory system'; and a section for services for the disabled. Aquino ensured that the Constitution established the creation of a Human Rights Commission, and the Constitutional Commissioner set up a 'Task Force People's Health' to develop the context of the right to health provisions in the Constitution. The Aquino government called on the educational institutions to develop 'health consciousness' and medical schools to teach human rights as part of medical ethics.[39]

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[36] P. Hunt, Special Rapporteur on the Right to Health, Commission on Human Rights, 59th Session, 2003

[37] A. Tsai, 'The Right to Health and the Nevirapine Case in South Africa', *New England Journal of Medicine* vol 348:750-754, February 2003

[38] 1987 Constitution of the Republic of the Philippines www.supremecourt.gov.ph/Constitution.1987

[39] R. P. Claude, 'The Right to Health: Transnational Support for the Philippines', *Human Rights and Development: International Reviews,* Forsythe (ed)

Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR)

In July 1993, a judgment at the Supreme Court of the Philippines focussed on the 'right to a balanced and healthful ecology' provided explicitly in section 16 of Article II of the 1987 Constitution. The Court found that this right is a fundamental right "solemnly incorporated into fundamental law" and "unites with the right to health" provided for in section 15 of the same Article.[40,41] In the Minors Oposa case[42] the appellants were children and their unborn children being represented by their parents to protect the environment and stop further deforestation to protect their rights to an ecology compatible with a healthy life.

These four cases illustrate the various dimensions of the interpretation of the right to health. The issues around the cases though can probably affect any person at any point in their lives. Whether it is the denial of access to costly treatment due to limited resource availability, a discriminatory public health policy, the inaccessibility to medicines due to excessive pricing by multinational corporations or the prevention of the destruction of an environment compatible with a healthy life.

CONCLUSION

Public health has had its triumphs such as the eradication of small pox, the introduction of vaccines and development of antibiotics, but despite significant advances in healthcare and medicines, global health challenges are getting tougher. The recent SARS epidemic demonstrated how with globalisation outbreaks can no longer be contained, making those living in developed nations just as vulnerable to communicable diseases originating from the lesser developed states. With 40 million people infected with HIV and 5 million children dying every year due to the lack of clean water, public health officials have a phenomenal challenge on their hands.

[40] Judgement Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR), 33 ILM 173 (1994)
[41] Section 15, Art II: The State shall protect and promote the right to health of the people and instill health consciousness among them.
[42] Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR), 33 ILM 173 (1994)

As the quote from Jonathan Mann at the start of this essay emphasises, the only way forward to successfully tackle these global health issues is by the concerted and united efforts between the public health community and the human rights community. Public health workers need to promote and protect health as a human right, and human rights workers need to aid governments and organisations to ensure that health policies are implemented as a right of the people.

The case-law from Thailand, South Africa and the Philippines should be an encouragement that the right to health can be enforceable by law. With plenty of international and national legislation on the right to health, health policies, programmes and resource distribution should be directed to achieve 'the highest attainable standard' of health for every human being.

Hopefully it will become more apparent that effective implementation of public health policies and advances in healthcare requires the approach that health is a fundamental right both morally and legally, and that this right is vital to the exercise of other rights.

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