



Role Of Human Rights In Advancement Of Right To Health In International Law

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Abstract

The right to health has inherent characteristics and qualities. It is crucial to the pursuit of justice and is a prerequisite for the realization of other rights. The first objective of the paper is to have a historical and theoretical overview of understanding and contemporary concepts of health and the right to health. The second objective of the paper is to track the shifting place of the international right to health and human rights-based approaches to health in the scholarly literature and United Nations.

Key Words: Health, human rights, international law, right to health.

Introduction

Humans have always been struggling for a healthy and quality life. Most developed societies recognize the right to health or health care access. For example, the Convention on Human Rights and Biomedicine, Council of Europe, 1997 recognizes the right to health care access. Art.3 of the Convention states that "Parties, taking into account health needs and available resource, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality."

The right to health is crucial to the pursuit of justice and equality. Diseases, deficiencies and disabilities are hurdles in the realization of other rights, thereby restricting the opportunities. Thus, all human beings should have access to adequate and appropriate social goods, including good health, to develop their talents and capabilities and enable them to exercise their full potential at the individual and community level.²

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² N. Daniels, "Just health care. Studies in philosophy and health policy." Cambridge University Press, 1985.

The social contract theory's core values are equal opportunity, individual freedom, and equal access to primary social goods.³ These values are the main instrument determining the social, economic and political policies of an ideal democratic, egalitarian setup. It means that the right to health should be interpreted in the light of egalitarian theories- namely equality, equity and fairness. The main objective of this paper is to explore the conceptual foundation of the right to health. The second objective is to trace the evolution of the right to health', how this right is interpreted and articulated in the human rights law.

Health- A Dynamic Concept

In ancient India, the perception of health emphasized the balance between a person and the environment, the unity of soul and body, and the natural origin of disease.⁴ In the 5th century BC, Pinder defined health as the "harmonious functioning of organs." However, for Plato, "a healthy mind in a healthy body could be achieved by harmonizing physical and social environment", highlighting the importance of health's social dimension. Aristotle emphasized the regulation of society for the preservation of health. But the Hippocrates, the father of modern medicine and creator of the concept of "positive health," explained health in connection with the human constitution, environmental factors and lifestyle. In the middle ages, specifically in Europe, health perception was radically influenced by religion. However, during the Industrial Revolution era, economic development and reason-based ideology catalyzed the scientific temperament and associated health with economy and productivity. The meaning of health was tied with the Darwinian understanding of strength and being the fittest, where the meaning of life was tied to physical survival.

Modern Concepts of Health

All modern concepts of health helped to move health thinking beyond the physical dimension of health. The modern concept of health flows from different disciplines like medicine and public health, focusing on distinct target groups and health dimensions with specific approaches. The discipline of medicine is concerned with the physical and mental dimensions of health. It emphasizes remedial measures limited to diagnosis and treatment of disease, illness and disability at the individual level. In contrast, the public health discipline is concerned with the conditions in which people can be healthy, i.e., social, emotional, vocational and spiritual dimensions of health and the underlying determinants of health; emphasize preventive measures at the group/community level. The advancement of medical science and technology broadened the horizon of health definition. All modern concepts of health helped to move health thinking beyond the physical dimension of health. The contemporary thinkers in the field consider health a relative state in which one can function well to express the full range of one's unique potentialities. World Health Organization (WHO) defines health as "health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity"⁵ and declares, "The enjoyment of the highest attainable standard of health is one of the fundamental

³ J. Rawls, "A theory of justice", Harvard University Press, 1971.

⁴ Donev D. Human health – definition, concept and content. How the disease occurs and the natural course of disease. Modern concept and definition of healthcare [In Macedonian]. In: Nikodijevic B, editor. Contemporary diagnostics and therapy in medicine. Skopje: Faculty of Medicine; 2000. p. 5-19.

⁵ World Health Organization. About World Health Organization. Constitution. Available at: <http://www.who.int/governance/eb/constitution/en/>.

rights of every human being"(WHO, 1996). The same definition of health was reiterated in the Declaration of Alma-Ata (WHO, 1978).

Right to Health-A Shorthand Expression

In the 20th century, backed by the "Social Contract Theory" and the concept of "Welfare State," human-rights-based rights have gained more priority. A rights-based approach transforms the power dynamic that underlies public health.

Right to health is not a general connotation as it is gradually being accepted in national and international perspectives with many variables. Thus the familiarity of this term is uneven to the national legal health regime along with public health and field of medicine. Notwithstanding the reference of the expression 'right to health' is found in some philosophical literature dealing with health, it attracts variations in its application so far as the meaning of this term as interpreted philosophically in various human rights treaties and other international instruments. This phrase has loosely raised a common presumption among the layman that the governments and international organizations must promise a person's good health; however, none of the international human rights instruments confer such an interpretation to the term 'right to health'. The wide inclusive phrase 'right to health' is vague and without promised certainty; what are its defined attributes that have given rise to many interpretations with respect to human rights law. The term right to health has always been interpreted from human rights perspective in light of international human rights documents based on the principle of inherent and inalienable human rights. The phrase "right to health" has not been used and explained in most international health related instruments. Still, it is commonly used as a shorthand expression to refer to the different rights directly or indirectly related to health. Professor Theo C. Van Boven uses the term "right to health" to refer to international human rights law provisions, including the UDHR and ICESCR. Van Boven wrote, "Three aspects of the right to health have been enshrined in the international instruments on human rights: the declaration of the right to health as a basic human right; the prescription of standards aimed at meeting the health needs of specific groups of persons; and the prescription of ways and means for implementing the right to health."⁶ The use of this phrase encompasses the common concept of human rights, civil rights, and fundamental rights wherever the term 'right to health' is used. Earlier the meaning was not self-persuasive; it has achieved its legal meaning through the legislative and judicial process of law-making and juristic writings prevalent in respective countries. According to Virginia A. Leary, "At first through judicial, legislative and scholarly use in many countries, they have acquired a generally recognized meaning".⁷

The use of the phrase "right to health" not free from controversy. Furthermore, the use of the phrase right to health is more inclusive and dependent on various other determinants, which has been the subject of criticism due to its lack of specificity. Some authors prefer to use the phrase 'right to health care, which is relatively

⁶ Presentations at the Workshop were subsequently published: Rene-Jean Dupuy, ed. *The Right to Health as a Human Right*, Workshop, The Hague Academy of International Law and the United Nations University (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands) 1979. P. 54-55.

⁷ Leary, V. A. (1994). *The right to health in international human rights law. Health and human rights*, 24-56.

more specific, but this phrase is also not beyond the domain of criticism. Therefore both the phrase has been criticized for one reason or the other, and there is no consensus on using either of these two phrases. For example, a paper entitled *The right to health care* Scholars have opposing observations where some favour the concept of the right to health care as an apt phrase to be used in related issues; however, it has received opposing rhetoric with the allegation that it lacks specificity and creates diversification from real medical care jargon, thereby creating confusion.⁸ As in the publication mentioned above, some contributors negated the concept of the right to health care on the ideological notion based on "coercive redistribution of individual resources."⁹ But some of the contributors who favour the phrase right to health care have based their argument based on the use of the word rights language, considering equity and fairness with the attainment of medical care provisions.¹⁰ Further, some American authors have expressed their hesitation and observed that the phrase right to health might be incomplete and conceptually misleading, and suggest for using a more correct phraseology would be a right to health protection including two components a, right to health care and a right to healthy conditions.

If we go by the logic of explanation, both phrases bear the same meaning as the right to health automatically signifies the inclusion of the right to health care. Both the phrase 'right to health' and 'right to health care', as per the pragmatic international norms, the earlier is apt for later. The same is true for Indian practice. It considers right-based jurisprudence emphasizing the right to health as interpreted by the Supreme Court through judicial precedent extending the scope of the right to life mentioning in the Indian constitution. In India, the common notion of the right to health is that it includes the right to health care and the right to a healthy condition. As a whole, be it right to health or right to health care, the jurisprudence is based on human rights approach which serves the interest of human dignity with inclusion to enjoy wholesome life with wellbeing which is not possible without respecting the different dimensions of health and ensuring the underlying determinants of health.

Human-Rights Based Approach to Health

The modern idea of Human Rights originated soon after the Second World War, has been elaborated through a series of covenants and treaties within the United Nations system. Health systems are part of the fabric of social and civic life.¹¹ While the need for including the right to health within the overall framework of human rights was felt from the beginning of the articulation of rights, an understanding of how this could be practically done has emerged much later. A human rights-based approach is defined as "A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights ... the application of a human rights-based approach alters the way that programs are designed, implemented,

⁸ Bole III, T. J., & Bondeson, W. B. (Eds.). (1991). *Rights to health care* (Vol. 38). Springer Science & Business Media.

⁹ Thomas J. Bole and William A. Bondeson, *Rights to Health Care*, (Dordrecht: Kluwer Academic Publishers), 1991.

¹⁰ Beauchamp, T. L. (1991). The right to health care in a capitalistic democracy. In *Rights to health care* (pp. 118-131). Dordrecht: Springer Netherlands.

¹¹ Freedman, L. P. (2005). Achieving the MDGs: health systems as core social institutions. *Development*, 48(1), 19-24.

monitored and evaluated".¹² A rights-based approach mobilizes the power dynamic that underlies public health. Individuals are recognized as rights-holders, with human rights imposing corresponding obligations on governmental duty-bearers. This approach aims to realize the right to the highest attainable standard of health (or "right to health and other health-related rights. It underscores that the right to health includes timely and appropriate health care and the underlying determinants of health, such as safe and potable water, health related information, and gender equality. A human rights-based approach is based on seven key principles: availability, accessibility, acceptability, and quality of facilities and services, participation, equality and non-discrimination, and accountability. The approach is not only about achieving certain goals or outcomes; it is about achieving them through a participatory, inclusive, transparent and responsive process".¹³

Right to Health in International Law

The core values of human rights are now considered to be the foundation of health policies, programs, and practices. International human rights standards have played a key role in integrating core principles of human rights into policy debates and facilitating accountability for realizing the highest attainable standard of health.¹⁴

The Universal Declaration of Human Rights (UDHR), though not a treaty, is now considered as constituting customary international law applies to all State affirms that the concept and respect of human rights is the basis for freedom, justice and peace in the world. The UDHR declares everyone's right to health and embracing within it a set of interrelated economic and social rights, including health.

In developing human rights law for health, the World Health Organization (WHO) Constitution conceptualized that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being," and defines health positively to include "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity".¹⁵ Health is seen as a second generation of human rights or positive rights. What it means in real terms is that the achievement of the right to health requires the State to take some positive actions and make provisions so that a person can enjoy these rights.

WHO cast an obligation on States, "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures"... Universal health coverage and adoption of international health regulation, 2005, gave thinking out of the box for the first time. Today's definition of health includes the right to health care which is again very broad and includes each constituent ranging from diagnosis to medication to rehabilitation. Further right to health also focuses on health promotion based on social and economic determinants of health as put forth by Declaration of Alma Ata, 1978, has emphasized health as a social goal. Thus modern human rights instruments have aptly addressed the requirement of health definition. However, lack of resources and constraints though has not established the

¹² Bustreo F., Hunt P., Gruskin S., et al. *Women's and children's health: Evidence of impact of human rights*. Geneva: WHO; 2013. p. 20.

¹³. Id.

¹⁴ Yamin A., Cantor R. "Between insurrectional discourse and operational guidance: Challenges and dilemmas in implementing human rights-based approaches to health," *Journal of Human Rights Practice*. 2014;6(3):453.

¹⁵ Constitution of the World Health Organization, 1946.

state responsibility concerning the right to health promise under social contract ideology. That is why the still right to health has not been taken seriously, although it is a fundamental human right whose absence can destroy all human rights. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the recognition of everyone's right to the enjoyment of the highest attainable standard by the member States and categorically mentions the steps to be taken to achieve the full realization of this right (ICESCR, 1966). The nature of the right to the highest attainable standard of health was, however, not clearly explained till 2000 when the General Comment 14 was issued. The declaration advocated for community participation and inter-sectoral action in order to achieve the end. Extending these human rights advancements, the UNCESCR categorically laid down the State obligations regarding the right to health, as the right to health depends on a wide variety of interdependent and interrelated human rights through public health systems—including both preventive and curative health care and encompassing underlying social, political, and economic determinants of health.

Conclusion

The concept and the theory mentioned above helped to evolve the relationship between human rights and the right to health. Human rights have increasingly brought the world together in unprecedented public health cooperation over the past 70 years. Fundamental principles and best practices provided under various international human rights instruments emphasize core standards and norms that provide the basis for recognizing health rights. These instruments interpreted better coherence between determinants of health to implement the concept of right-based approach in medical health care to establish sound decision-making and evidence-based result-oriented planning to improve health rights status.