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**The right to healthcare in today's
challenging world:
- *is justiciability the answer to the
existing problems?***

First Runner Up

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LIST OF ABBREVIATIONS

art.	article
ACHR	American Convention of Human Rights
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
COROC	Convention on the Rights of Child
ESC	European Social Charter
GC	General Comment
IAC	Inter – American Committee
IACHR	Inter – American Court on Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGOs	Non – Governmental Organizations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCESCR	United Nations’ Committee on Economic, Social and Cultural Rights
WHO	World Health Organization

SUMMARY

I. Introduction: the distinction of human rights. II. The right to health in international law. III. The justiciability of the right to health and the consequences of such an acknowledgement IV. Conclusion.

I. Introduction: the distinction of human rights

In every well-governed state people are recognized as holders of rights and obligations. For the distinction of human rights, a term that indicates the indissoluble connection between those rights and human existence, there have been proposed many theories. On the basis of the status theory, which descends from the German constitutional positivism of the early 20th century, human rights can be divided, based on their legal nature, into three categories, civil, social and political rights. Civil rights can be defined as a person's claims against the state in order for the latter to abstain from interfering with a constitutionally consolidated sphere of private autonomy establishing in this way a status negativus. Contrary to civil rights, social rights establish the state's obligation to intervene through positive actions (status positivus). On the other hand, political rights have as a content the active participation of the citizens in the process of shaping the state will and the respective state's obligation to welcome that participation in its most crucial and vital functions founding thus a status activus¹.

In any case, the historical origin of the aforementioned rights is quite different, since political rights date back to ancient times, civil rights were first secured during the 18th century and social rights came to the front only after the end of World War I. Starting from this different "chronological appearance" of human rights it has also been proposed in theory their division into three generations. Civil and political rights constitute first generation rights, whereas social rights are considered as second generation rights. As for third generation rights, which are sometimes also called solidarity rights, here are located

¹ Χρυσόγονος Κώστας, *Ατομικά και Κοινωνικά Δικαιώματα*, Νομική Βιβλιοθήκη, 2006, σελίδες 30-32.

some rights that appeared the last decades of the 20th century, the most prominent examples of which are the right to peace, the right to development and the right to a clean environment².

One of the fundamental human rights recognized both in national and international level and generally accepted as a social or second generation right is the right to health. This is a right of paramount importance in the conscience of every human being regardless of gender, race, age or socio-economic background the protection of which is, at the same time, an everyday challenge for each state.

II. The right to health in international law

The definition of health can be found in the preamble to the 1946 Constitution of the WHO which conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. In this very Constitution it was first internationally articulated the right to health or, as it is named in the Constitution, the right to the enjoyment of the highest attainable standard of physical and mental health. In 1948 the UDHR also referred to health as part of the right to an adequate standard of living (art.25). Once again the right to health was recognized as a human right in the 1961 ESC (part I, point 11) and in the 1966 ICESCR (art.12). Since then, many other international human rights treaties, such as the 1979 CEDAW and the 1989 COROC, have recognized or just mentioned the right to health or elements of it, such as the right to medical care. Today, the right to health is recognized in at least 115 national constitutions³. Among all these documents the most eminent place belongs to the ICESCR which is also part of the International Bill of Rights.

Despite the fact that the right to health has been recognized on national level and by so many international treaties, it is still difficult to find a commonly accepted and clear definition that can help us specify what does this right entail. “One would be hard pressed to find a more controversial or nebulous human right” as one commentator says⁴. The

² Tomuschat Christian, *Human Rights Between Idealism and Realism*, Oxford University Press, 2008, page 54.

³ See Fact Sheet No.31 on the Right to Health by the Office of the UN High Commissioner for Human Rights and the WHO, pages 9-11.

definition of the right to health is important since it comes with consequences for a broad range of actors including, among others, states, international organizations, NGOs and health professionals.

In this quest a helpful source of guidance is the GC No.14 on art.12 of the ICESCR, issued in 2000 by the UNCESCR. According to this Committee, the right to health is the right “to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of living”. This means that the right to health is not confined to the right to health care. On the contrary, the right to health is an inclusive right that extends further and includes a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. These factors, also called “the underlying determinants of health” by the Committee, include, inter alia, adequate nutrition and housing, safe drinking water and adequate sanitation, healthy working and environmental conditions and health-related education and information.

The right to health in all its forms is based on four elements. The first element is availability which means that health care facilities, goods, services and programmes have to be available in sufficient quantity within the state. Moreover, they have to be accessible to everyone within the jurisdiction of the state without any discrimination. To be more precise accessibility means not only non-discrimination, but physical accessibility, information accessibility and affordability as well. In addition to this, health facilities, goods and services need also to have the characteristic of acceptability meaning that they must be respectful of medical ethics and culturally appropriate. Last but by no means least, the fourth element is quality that requires, among others, skilled medical personnel and scientifically approved drugs.

However, the UNCESCR in this GC makes a remarkable observation. More specifically, the Committee underlines that the availability of health care facilities, goods and services will vary depending on numerous factors, including the state’s level of development. And of course it would be absurd to demand from a state to adopt measures for the protection of the right to health when it has no resources to do so. But under these circumstances,

⁴ Tobin John, Seeking to persuade: a constructive approach to human rights treaty interpretation, Harvard Human Rights Journal, 2010 (accessible at Westlaw).

when a state fails to meet its obligations in this field inevitably raises the question: Can the right to health be vindicated before courts?

III. The justiciability of the right to health and the consequences of such an acknowledgement

Before answering to that question it is of absolute necessity to explore the legal nature of the right to health. The characteristics of the right to health as a result of its legal nature will make it easier to determine whether it is a justiciable right or not. As it has already been mentioned the right to health is generally recognized as a social right. This admission automatically means that the right to health is deeply connected with state benefits. In other words, a state is required to take measures, to act in a positive way in order for the right to health to be protected. And these state obligations are proportionate to the state's welfare. This ambiguity, this lack of preciseness, which is one of the characteristics most acute with respect to economic, social and cultural rights, is one of the arguments of those supporting the superiority of civil and political rights.

Closely related to the acceptance of the superiority of civil and political rights is also the admission that these rights establish immediate binding obligations, whereas the language of economic, social and cultural rights represents undertakings of a progressive nature⁵. This distinction between two sets of rights (civil and political rights on one hand and economic, social and cultural rights on the other) does not correspond with the reality that has been formed especially through the last decades. In a society where relations of dependence and inequality are a commonplace it would be incongruous to insist on the separation of human rights. The role of a human being is not only private or only political or only social, but is a combination of all these features. The human being is a whole and so are its different roles in the society.

This interdependence and interrelationship of civil and political rights and social, economic and cultural rights are recognized by the 1993 Vienna Declaration and Programme of Action according to which "the international community must treat human rights globally

⁵ Rehman Javaid, *International Human Rights Law, A practical approach*, Pearson Education, 2003, page 106.

in a fair and equal manner, on the same footing, and with the same emphasis". The same ascertainment can be found in the 1998 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights and in other international documents.

The indivisibility of human rights might still be topic of theoretical debate among academics, but it has already been proven by reality itself. Everyday life and in particular the situation in poor countries with long history of political violence is a typical example of the impossibility of dividing human rights⁶ based on criteria such as their legal nature or the time they first came to the fore.

Furthermore, as for the right to health in particular its interdependence with other human rights is indicative of the aforementioned. The right to health and the other human rights are connected in many ways. The failure to protect human rights may have consequences for health, when at the meantime activities in the field of health may either violate or promote other human rights⁷. For instance, the violation of the right to health may impair the enjoyment of the right to education and the violation of the prohibition of torture affects the health of the victims of this illegal behavior.

On the other hand, we must not forget that the protection level of the right to health depends on each state's developmental level. Yet, the right to health must not be seen as only a programmatic goal to be attained in the long term. As outlined by the UNCESCR in its GC No.14 each state must make every possible effort, within, of course, available resources, to take steps in the realization of this right without any delay. This means that no state can justify its failure to respect these obligations because of lack of resources. Such a claim is unacceptable. Even if the state's available resources are tight, the right to health must be guaranteed to the maximum of these resources.

For that reason the UNCESCR in its GC No.3 confirms that states are obliged "to ensure the satisfaction of, at the very least, minimum essential level of each of the rights enunciated in the Covenant". Consequently, there is a core in every right that must be

⁶ Laplante J. Lisa, On the indivisibility of rights: truth commissions, reparations and the right to development, Yale Human Rights and Development Law Journal, 2007 (accessible at Westlaw).

⁷ Marks Susan and Clapham Andrew, International Human Rights Lexicon, Oxford University Press, 2005, pages 198-199.

protected in any case. This is another element that stands up for the universality of human rights. For the right to health these core obligations include, for instance, the equitable distribution of all health care facilities, goods and services and the non-discriminatory access to them. And if a state is not able to fulfil even these core obligations, then the other states and perhaps other actors have the duty, according to the Committee, “to provide international assistance and cooperation, especially economic and technical”.

Besides, the argument that only civil and political rights establish legal obligations isn't as cogent as it might seem in first place. Certainly, these rights have a more precise nature. But the intention of the ICESCR is to impose on states clear obligations some of which are of immediate effect. For example, in relation to the right to health such an obligation of immediate effect is the guarantee that the right will be exercised without discrimination of any kind. As pointed out by the Committee on GC No.3 “the realization of economic, social and cultural rights is an obligation of all States”. Human rights protection is not a simple announcement, is an obligation the infringement of which carries legal consequences.

At this point it is important to distinguish between justiciability and self-executing norms. When a matter is justiciable it means that it can be resolved appropriately by courts of justice. On the contrary, when a norm is considered self-executing then the court can take it into account without being necessary to have previously been embodied in national law. While making this distinction the UNCESCR in its GC No.9 also confirms that “there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions”.

All the aforementioned point to the acceptance of the justiciability of social rights such as the right to health. But many states are still reluctant to recognize a characteristic like this one to social rights. So, why this reluctance still exists? The answer to this question is linked to the results that follow such an acceptance.

In any democratic state governed by law it is the government's task to define the economic and social policy. In this context the protection of health is connected with the economic and social policy, as it demands for measures to be taken. So, in case that this right is violated and we accept that it can be vindicated before a court that clearly means that the Judicature has the right to interfere and define, even partially, the state's economic and

social policy. Consequently, an action like that means violation of the principle of separation of powers.

The issue is very important and giving an answer is not an easy thing to do. The concerns that have been expressed have reasonable and strong grounds. On the other hand, nowadays judicial decisions have an influence on not only economic but also political matters. Since they are recognized such a role, the acknowledgement of the justiciability of social rights seems like the next step.

To go even further, the violation of the right to health inevitably has a more serious impact on the deprived and generally the most disadvantaged groups of the society. These groups can and must be protected by courts when society fails to do so. As David Beetham observes “expressing basic economic and social requirements in the language of human rights does more than emphasize the obligations of governments or international agencies and their respective publics...; it also offers an internationally authorized discourse to the deprived, to legitimate their own struggles for their realization”⁸.

It seems quite surprising but it’s true that in Latin American countries social rights have been made justiciable in many ways thanks to international judicial and quasi-judicial action. Even though in these countries there is a long history of gross violations of the democratic principle, both the IACHR and the IAC connect the interpretation and application of the ACHR with the function of democratic institutions. “The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions” according to the Court⁹.

The practice of the IACHR clearly shows that the best way to protect human rights is to look at them in an integrated manner by taking into account that all rights are interrelated and indivisible. In order to be in compliance with this principle the Court in the cases that are brought in front of it uses as a guideline not only the relevant conventions, but also other treaties that don’t seem, at least at first place, to be related to human rights such as

⁸ Beetham David, *What Future for Economic and Social Rights* (1995), in *Human Rights, The International Library of Essays in law and legal theory*, 2003, page 234.

⁹ Σισιλιάνος Αλέξανδρος – Λίνος, *Η ανθρωπινή διάσταση του διεθνούς δικαίου*, Νομική Βιβλιοθήκη, 2010, σελίδα 218.

the 1969 Vienna Convention on the Law of Treaties (especially art.31 according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...” and art.32 for the supplementary means of interpretation). In addition to this, the Court also addresses the consequences of the violations of the State Responsibility Doctrine when a social right is violated¹⁰.

Based on such an acknowledgement the protection of the right to health becomes more complete. The fact that civil and political rights were seen as superior had as a result that in case of conflict between one of these rights and a social, or economic, or cultural right the latter was always the one to be breached in favor of the former. On the contrary, accepting that a social right such as the right to health can be decided by a court of justice means that this right is also practically equal to a civil or social right. Of course all rights are equal. But theory often does not translate into practice. And in practice we can say that civil and political rights were the only protagonists in the human rights field.

First of all, this acknowledgement will influence the protection of the right to health on a preventive stage. Knowing that the violation of this right could raise claims in front of courts each state will try to adopt a national health strategy, based on its legal obligations and the general principles of international law, that ensures to all the enjoyment of the right to health.

Undoubtedly, prevention is better than cure, as Hippocrates first said. In an ideal world there is no need for cure. But violations of human rights are a daily phenomenon in the real world. In this sense, the justiciability of the right to health can be the opportunity for the reforming of every element that is inconsistent with the content of the right to health. This repressive protection on the right to health seems to be the most important.

IV. Conclusion

Since 1945, when the UN was founded, human rights are in the spotlight. Their distinction into categories or generations might not correspond with today's reality, but it hasn't lost

¹⁰ Tinta Monica Feria, Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions, Human Rights Quarterly, Vol.29, No.2, May 2007, pages 431-459.

totally its importance. In opposition to civil and political rights and also third generation rights¹¹, the scope of social rights is the realization of de facto equality. They exist in order to blunt the conflicts so that every human being can live a life in dignity.

Therefore, this must be the target during the formulation of every national health care strategy consistent with international law. The preservation and the constant improvement of the appropriate health care services are elements indicative of the existence of a welfare state. The protection of the citizens means at the same time development and prosperity for the state itself. After all a state exists for its citizens and not vice versa.

¹¹ Civil rights exist for the protection of freedom, political rights aim at the realization of political freedom and political equality and third generation rights are rights based on the idea of solidarity.

LIST OF REFERENCES

Beetham David, What Future for Economic and Social Rights (1995), in Human Rights, The International Library of Essays in law and legal theory, 2003.

Fact Sheet No.31 on the Right to Health by the Office of the UN High Commissioner for Human Rights and the WHO.

Laplante J. Lisa, On the indivisibility of rights: truth commissions, reparations and the right to development, Yale Human Rights and Development Law Journal, 2007 (accessible at Westlaw).

Marks Susan and Clapham Andrew, International Human Rights Lexicon, Oxford University Press, 2005.

Rehman Javaid, International Human Rights Law, A practical approach, Pearson Education, 2003.

Tinta Monica Feria, Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions, Human Rights Quarterly, Vol.29, No.2, May 2007, pages 431-459.

Tobin John, Seeking to persuade: a constructive approach to human rights treaty interpretation, Harvard Human Rights Journal, 2010 (accessible at Westlaw).

Tomuschat Christian, Human Rights Between Idealism and Realism, Oxford University Press, 2008.

Σισιλιάνος Αλέξανδρος – Λίνος, Η ανθρώπινη διάσταση του διεθνούς δικαίου, Νομική Βιβλιοθήκη, 2010.

Χρυσόγονος Κώστας, Ατομικά και Κοινωνικά Δικαιώματα, Νομική Βιβλιοθήκη, 2006.