An Internationally Justiciable Right

Author : Christina Ho

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Lisa Forman, *Can Minimum Core Obligations Survive a Reasonableness Standard of Review Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?*, 47 **Ottawa L. Rev.** (forthcoming), available at SSRN.

The U.S. legal discourse on health rights is impoverished, neglected, and underinformed. The right to health is reflexively dismissed as one of the affirmative rights that our tradition of negative liberties renders irrelevant. And there (I exaggerate only slightly) conversation stops. But when we inspect this conversation-stopper, it is based on overgeneralization. The truth is more fact-dependent. Lisa Forman, in Can Minimum Core Obligations Survive a Reasonableness Standard of Review Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights? (forthcoming in the Ottawa Law Review), gives us a window into the granular.

Managing to adjudicate an “unwieldy” health right

Although the right to health, as a right of the economic, social, and cultural variety, is often thought to be a right to some affirmative state provision rather than a negative liberty from state action, this assumption is belied by laws in the U.S. that can function as negative rights to health. For instance, some laws protect private use of plant varieties relating to essential foodstuffs against enforcement of government-granted monopolies, or provide procedural rights for a health impact assessment prior to government action that harms health. Those examples reveal statutes or regulations that restrict governmental power to infringe on individuals’ right to health. Nevertheless, once labeled as “positive rights,” health rights frequently assume a reputation as unmanageable. Forman voices this conventional wisdom succinctly: the realization of the right to health, under this skeptical view, “requir[es] extensive state action and resources, so that judicial enforcement would reallocate budgets and alter social policy, breaching the appropriate democratic separation of powers and wreck[ing] budgets.” And yet, jurisdictions outside the U.S. manage to adjudicate such rights day in and day out, handling them just as the legal system treats all kinds of other unmanageable questions, by generating thick, fact-rich jurisprudence.

Forman is among my trusted voices in the argument for a right to health with “bite.” Indeed, she is looking at the shape of the serration. The right to health operates in other contexts, justiciable in jurisdictions such as South Africa, Colombia, and Israel, but also within a body of international law binding on the global community. All countries are subject to human rights obligations under the United Nations Charter. The Universal Declaration of Human Rights (UDHR), which all U.N. members unanimously adopted in 1948, is not itself a treaty, but the common authoritative elaboration of the human rights obligations imposed by the Charter, including rights relating to health and medical care. The International Covenant on Economic, Social and Cultural Rights (ICESCR), now ratified by roughly two-thirds of countries (not including the U.S.), is a more detailed specification of the economic, social, and cultural human rights provisions of the UDHR.

In this article, Forman alerts us to a rather striking development. The Committee on Economic, Social and Cultural Rights (CESCR)—which is the UN Committee charged with overseeing the realization of the ICESCR rights—has issued an optional protocol governing individual claims that can be filed with the Committee over violations of the rights. *This development makes the right to health, as Forman says, “an internationally justiciable right.”* This protocol came into force in 2013, and Forman updates us on the specific questions that loom large for the practical implementation of a right to health.

Forman, in a number of contexts before, has expressed her view that giving content to a right to health should involve delineation of a minimum core. Debate continues to surround whether that core would or should be non-derogable, even in the face of resource limitations, or the "progressive" process of realizing the right. Alternatively, some view the core within a hierarchy of health interests that should be prioritized in the progressive realization of the right to health.

But Forman here flags that the optional protocol sidesteps commitment to the strongest conception of a minimum core right to health. Article 8(4) of the protocol establishes that any State's policies will be judged not by fidelity to the minimum core, but by their adherence to a "reasonableness" standard.

Does this formulation have bite? Does it provide a manageable standard for justiciability? Forman says, "The threat of rejecting core obligations in favour of reasonableness is that as long as a state establishes that it is acting reasonably to progressively realize rights within resources, almost any extent of deprivation could be permitted." But Forman's tone is less that of hostile foe than friendly critic. She is vocal in holding institutions accountable against the potential weaknesses of such an approach, while hopeful that the approach can push our understanding and practice forward. Reasonableness in the health rights discourse is at least as manageable as the standard for courts' substantive oversight of agency action, as observed before by Cass Sunstein.

It may be that this right, without more, cannot, "respond to…neoliberalism's obliteration of the ceiling on inequality," as suggested by Samuel Moyn. But that is not the same as saying the right cannot achieve normative significance. The right will bite if there is a body of jurisprudence specifying it further, and, with this protocol in effect, this jurisprudence will develop further; we will be able to see the conception taking shape, we can reference it, and we will crystallize our expectations around it.

We already see this process in other jurisdictions, where other jurisprudences are doing just that, and indeed they are borrowing from one another. Forman writes of how the final drafting of Article 8(4) of the optional protocol involves a direct quote from the South African Constitutional Court decision *Government of the Republic of South Africa v. Grootboom*, after an NGO representative looked up the language on her laptop.

Lessons for U.S.

What of the U.S. legal discourse? Our willful blindness and neglect of health rights discourse means we break faith with one of the first principles of lawyering: the primacy and richness of facts. Health rights don't always come up in the manner we suppose (Christina Ho, *Are We Suffering from an Undiagnosed Right to Health*, **Am. J. L. & Med.** (forthcoming 2016)), and thus we underestimate how the facts can guide us by constituting case law and a jurisprudence that provides shared parameters and understandings. For now, we can see that these arguments and conceptions are in the process of being fleshed out and will be available for the conversation we may yet have one day in the U.S.

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