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The right to health: from citizen's right to human right (and back)

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ABSTRACT

If health is a human right and if human rights are ‘rights held by individuals simply because they are part of the human species’, then all people, wherever they live, should be entitled to the same collective efforts that can protect or improve their health. In reality, not all people on the planet have access to the same set of health-related entitlements. There are huge disparities between the entitlements one can claim when living in a high-income country and the entitlements one can claim when living in a low-income country. Even within each country, there are disparities. The health-related entitlements people really have seem to be dependent on their belonging to a nation, family, or household.

In this article, we explore and critically analyze two trends from a right-to-health perspective: the stagnation or even decrease of international assistance for health services in low- and middle-income countries and the increasing exclusion of undocumented migrants from health care in high-income countries. We argue that both trends constitute violations of the right to health; we posit an explanation for why they are occurring in countries that express support for human rights by expanding on the supposition that human rights are evolving from what were citizen's rights; and we discuss the role of individual human right supporters in an age of nationalism.

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Introduction

If health is a human right and if human rights are ‘rights held by individuals simply because they are part of the human

species’,¹ then all people, wherever they live, should be entitled to the same collective efforts that can protect or improve their health. To be clear, the right to health is not a right to be healthy, but a legitimate claim to a set of health-related

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entitlements; health care; and also education, water, nutrition, housing, and other services that impact on health and that societies can collectively provide to everyone. Every human life ends with death (the end of being healthy), and not all deaths are violations of the right to health. But, deaths that occur because people have not benefitted from the collective provision of health care, water, nutrition, or others, are – at least in principle – potential human rights violations.

Even when understood as a legitimate claim to a set of health-related services, not all people on the planet have access to the same set of health-related entitlements. There are huge disparities between the entitlements one can claim when living in a high-income country, such as Belgium, and the entitlements one can claim when living in a low-income country, such as Malawi. Furthermore, even within each country, there are disparities: people belonging to the lowest income bracket in Malawi do not use healthcare services as frequently as people belonging to the highest income bracket,² whereas in Belgium, inequality in access is characterized by the exclusion of specific groups of people, such as undocumented migrants,³ rather than tied to socio-economic status.⁴

It appears that peoples' health-related entitlements are not strongly related to their belonging to humanity; in reality, they seem to be dependent on their belonging to a nation, family, or household. What is the point then to say (or pretend) that health is a human right? We believe that asserting that health is a human right is a powerful moral statement, and importantly, it has a legal basis in human rights law. In the following sections, we explore the implications of this assertion by focusing on the power of and limits and challenges to this claim after having made some preliminary remarks.

First, there is an important distinction between having a right and enjoying that right, i.e., having it respected. To put it bluntly, even if one is a slave in a country that condones slavery, one still has a right to freedom, in the sense of a legitimate human rights claim; it remains important to affirm the legitimacy of that claim, especially in countries where slavery is condoned.

Second, if people do not enjoy a human right, they may nonetheless have a human rights claim. That claim may be grounded in national law or international law or be a moral human rights claim. Not all human rights, in the moral or philosophical sense, have been codified in international human rights law (and some will argue that some claims have been codified in international human rights law while they are not human rights in the philosophical sense); not all human rights that are acknowledged as such in international law have been translated into national law; and not all human rights that are acknowledged in national law have resulted in policies ensuring their enjoyment by all people.

Third, human rights are not cast in stone. The philosophical debate about human rights is far from settled. International human rights law changes: new treaties are proposed and ratified by many countries (the Convention on the Rights of Persons with Disabilities⁵ is only 10 years old); elements of the older treaties are subject to regular reinterpretation. At the national level, law is regularly amended. And, when it comes to policies, they change constantly. As

human rights play an important role in societies, exploring, debating, affirming, claiming human rights, and acting in accordance with them is everyone's business. Therefore, understanding the basic parameters and limits of human rights is also everyone's business.

Before you put this article aside, thinking that we are taking you on an intellectual freewheeling tour, rest assured that this article is grounded. We will discuss (and challenge) two undeniable trends, using a right-to-health perspective:

- First, the stagnation or even decrease of international assistance for health services in low- and middle-income countries;⁶
- Second, the increasing exclusion of undocumented migrants from health care in high-income countries.^{3,7,8}

Both trends are caused, directly, by the decisions of high-income countries and their politicians and constituencies: the same countries that pride themselves on being human rights champions.⁹

In the following sections, we will

- Argue that both trends constitute violations of the right to health;
- Posit an explanation for why they are occurring in countries that express support for human rights by expanding on the supposition that human rights are evolving from what were citizen's rights; and
- Discuss the role of individual human right supporters in an age of nationalism.

The right to health in international human rights law, international assistance for health, and access to health care for undocumented migrants

In a famous comment on the drafting of the Universal Declaration of Human Rights (UDHR), the French philosopher Jacques Maritain reports how one of the committees agreed on the list of human rights to be included, on the condition that 'no one asks us why'.¹⁰ That was but an episode in the long-running debate between philosophers and lawyers, as to whether a convincing ethical foundation for human rights is essential. The proponents on one side argue that there will never be a consensus on any ethical foundation for human rights and therefore trying to find one will merely cause disagreement about 'real' human rights and 'questionable' human rights: so we had better stick to the legal texts.¹¹ The proponents on the other side argue that the legal texts are not clear enough and will often require interpretation and a strong ethical foundation is required to formulate convincing interpretations.¹²

This examination of the right to health flows from the legal basis of the right as enshrined in the International Covenant on Economic, Social and Cultural Rights (Covenant)¹³ and expanded upon in General Comment¹⁴ issued by the UN Committee on Economic, Social and Cultural Rights (Committee).¹⁴ As mentioned previously, the right to health is not a right to be healthy but a legitimate claim to certain freedoms and entitlements,¹⁵ such as the entitlements to water, food, housing, and health care. These entitlements are not

unlimited: article 2 (1) of the Covenant prescribes that all State Parties – i.e., states that ratified the Covenant – must ‘take steps, ..., to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant’ which means that poorer countries are allowed to take smaller steps than wealthier countries. However, the same article prescribes that all State Parties must ‘take steps, individually and through international assistance and cooperation, ...’ which means that wealthier countries are obliged to assist poorer countries. Legal scholars continue to debate the precise nature of the obligation to seek assistance and the obligation to provide assistance. For our purposes, it is sufficient to recognize that an entire global aid architecture exists to monitor and disburse international assistance that helps to advance rights.¹⁶

The Committee was created to monitor State Parties’ compliance with the Covenant and to draft ‘general comments’ to clarify particular issues or rights. In General Comment 3, the Committee had developed the concepts of ‘minimum essential levels’ and corresponding ‘core obligations’ as follows:¹⁷

‘On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining State Parties’ reports, the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals are deprived of essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education, is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.’

In General Comment 14, the Committee applied these concepts to the right to health concluding that the minimum essential level of the right to health includes access to health facilities, goods, and services on a non-discriminatory basis; access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; access to basic shelter, housing, and sanitation, an adequate supply of safe and potable water; and access to essential drugs and other services. Knowing that the poorest countries were unable to provide this minimum essential level, the Committee added “For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfill their core and other obligations”.¹⁴

Therefore, from an international law perspective, there is an obligation to provide assistance, from wealthier to poorer countries, for the realization of the right to health, but it is not so clear where it begins and where it ends. Where does it begin: at what point can low- and middle-income countries argue that they have allocated the maximum of their available

resources and are still unable to satisfy their core obligations? If the non-realization for some groups of people is due to unwillingness rather than inability, should other countries then assist the excluded people? At what point can we say that the minimum essential level has been reached – and does that mean that international assistance is no longer required?

These are difficult questions, and we will not answer them here. But, one point is clear: if the General Assembly of the United Nations adopts a resolution that mentions in the preamble ‘We are determined to mobilize the means required to implement this Agenda through a revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people’,¹⁸ and then clarifies with a fair degree of precision what that means for health, that gives at least a rough idea of where the international responsibility begins and ends. If an expert World Health Organization (WHO) team projects the resource needs for reaching the health-related Sustainable Development Goal (SDG) in 67 low- and middle-income countries and concludes that ‘an additional [US]\$371 billion will be needed per year for low-income and middle-income countries to reach the health-related SDG targets’,¹⁹ it is obvious that it is not yet time to decrease international assistance for health.

International law is quite clear about the rights and entitlements that undocumented migrants can claim. According to article 2 (3) of the Covenant, ‘Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’

Similar to many other scholars, we have reservations about this section because it seems to undermine the very idea of human rights as ‘rights held by individuals simply because they are part of the human species’.¹ This section explicitly allows governments of ‘developing’ countries to discriminate against non-nationals, which we find questionable on ethical grounds, especially in situations when governments question the nationality of people living under their jurisdictions for decades and generations. But, it removes all reasonable doubts about the rights and entitlements of undocumented migrants in so-called ‘developed’ countries: they fall under article 2 (2) of the Covenant, according to which ‘States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

A brief history of human rights: from citizen's rights to human rights

If both trends (the stagnation or even decrease of international assistance for health services in low- and middle-income countries and the increasing exclusion of undocumented migrants from health care in high-income countries) violate international human rights obligations, why do constituencies in high-income countries appear to condone these

trends? Of course, not everyone condones these trends. But, not enough people seem to be embarrassed by these human rights violations to make their politicians reverse policies. In the following sections, we will seek a plausible explanation for this behavior in the history of human rights.

Although it is now taken for granted that human rights are rights held by all people simply because they are part of humanity, that was not the idea when the expression 'human rights' gained currency. The French Declaration of the Rights of Man and of the Citizen of 1789 was, as the title suggests, a declaration about the rights of the citizens of France. It triggered the French Revolution of 1789, and 'in 1791, the French revolutionary government granted equal rights to Jews; in 1792, even men without property were enfranchised; and in 1794, the French government officially abolished slavery'.²⁰ Women were not enfranchised, as they were not (yet) considered full-fledged citizens. The French National Assembly made a distinction between active and passive citizens; women, servants, and foreigners were passive citizens. Furthermore, the French did not take it upon themselves to spread human rights to the inhabitants of other countries. The 1776 Unanimous Declaration of the Thirteen United States of America, better known as the Declaration of Independence, may mention that 'all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness',²¹ but many of the signatories saw no contradiction in signing and slaveholding. These were declarations of citizen's rights, and the corresponding obligations rested upon governments, deriving their authority from consent of the governed.

The World Wars of the 20th Century, and World War 2 (WWII) in particular, urged a revision of the concept. If human rights were actually citizen's rights, then the rights of German citizens under Nazi rule may have been only those recognized by Hitler's government. This was untenable. The 1948 UDHR refers to the atrocities of WWII, and – in its preamble, at least – places the corresponding obligations upon humanity: 'Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms'. But, the nature of these obligations remains vague. The UDHR calls itself 'a common standard of achievement for all peoples and all nations'. And perhaps, it was not intended to be more than a standard by which states could hold each other accountable. The only international obligation was to name and shame other states that did not live up to the standard. Vague statements abound 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'

The UDHR was 'translated', in 1966, into two legally binding International Covenants, one on civil and political rights, the other on economic, social, and cultural rights. The International Covenant on Civil and Political Rights contains no international obligations, except that 'subject to its jurisdiction' also referred to people of occupied (colonized) countries.²² The Covenant (on economic, social, and cultural Rights) does include some international obligations, as mentioned previously.

The so-called 'responsibility to protect' (RtoP) doctrine, embraced by some countries and reluctantly tolerated by others,²³ can be seen as the first explicit articulation of a responsibility of humanity for the realization of (or respect for) some human rights. The RtoP doctrine is summarized by Bellamy as resting 'on three equally weighted and nonsequential pillars: (1) the primary responsibility of states to protect their own populations from the four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from their incitement; (2) the international community's responsibility to assist a state to fulfill its RtoP; and (3) the international community's responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the state has manifestly failed to protect its population from one or more of the four crimes.'²³

When it comes to health, we would argue that only the global response to HIV/AIDS can (or could, until recently) claim to be based on the responsibility of humanity for the health of all people.²⁴

The shift from citizen's rights to human rights – with corresponding obligations falling on humanity – has not been completed yet. This has consequences, abroad and at home. Abroad, wealthier countries are backtracking on the legal commitments enshrined in human rights treaties and the political commitments they made to 'leave no one behind' when committing to advancing the SDGs. At home, they consider undocumented migrants as non-citizens, people who cannot claim their citizen's right to health. This trend needs to be challenged because, as argued previously, it violates international legal commitments, and importantly, it is wrong from a moral perspective.

The role of individuals in an age of nationalism

The fact that the idea of true human rights is in its infancy is one reason why humanity struggles to embrace the implications of moving beyond citizen's rights. However, at the end of the day, constituencies – people – determine whether their politicians realize or violate human rights.

Why do citizens of wealthy democracies support politicians whose policies and arguments run counter to human rights? Limited resources are often cited as the reason for denying access to health services for all or cutting international development assistance. Citizens are told that providing services to foreigners leads to cuts in services to citizens. We understand and agree that national governments are legally obliged to prioritize providing services for their citizens. However, it is not true that respecting the rights of undocumented migrants and the long-standing international legal commitment to provide international assistance must lead to cutting services for citizens. Both obligations are compatible.

For health workers, if the national laws in your country of employment prevent you from providing treatment to undocumented migrants, inform yourself as to the country's international legal commitments. Under international human rights law, discrimination on the grounds of migration status is prohibited. You can see which treaties your country of

employment is bound by and use this as an argument for providing care and informing colleagues. You can check the ratification status for your country online²⁷. You may not be able to change the law on your own, but you can push to ensure that the medical institution (e.g., clinic, hospital) where you work has a humane policy regarding providing treatment to migrants. This may include implementing administrative tools (e.g., vouchers) to ensure all people have timely access to an initial consultation. Increasing access to health services domestically and internationally has financial implications. Ensuring access for all should not result in cuts to services, which could result in further hostility to migrants. Countering the nationalist wave that tries to deny our common humanity requires challenging the limited resources argument, which has an impact both at home and abroad. For example, many wealthy states have not chosen to maximize tax revenue, which means they are not able to meet their national and international human rights commitments. The Organization for Economic Cooperation and Development has estimated that globally countries lose \$100 to 240 billion annually through corporate tax avoidance.²⁵ Cracking down on tax avoidance is a political choice that individuals can support, or challenge, through voting or political action. This choice has a direct impact on the financial ability of a country to meet its national and international human rights obligations. This choice also has an impact on the lives of millions who have the misfortune to be born in a war-torn or low-income country. It has an impact on our shared humanity.

As noted previously, experts project that in 2030, it will cost an additional \$371 billion per year to deliver the SDG 3.8 commitment of universal health coverage (UHC) for all, which is in line with the right to health obligation.¹⁹ The bulk of this money is forecast to come from domestic resources in low- and middle-income countries. The shortfall, estimated at \$54 billion, could come from international development assistance. This requires an ongoing commitment to the obligation to provide international development assistance. If high-income countries fail to collect sufficient taxes, both corporate and personal, this leads to national austerity and insufficient international development assistance to realize the SDGs. This is a political choice.

Citizens can push for their national healthcare budget to take account of the financial cost of providing access to health services for all. This requires engaging with the policies political parties support. As companies race to join Apple in the trillion-dollar valuation club, citizens should question the myriad consequences of policies that allow corporate tax cuts and tax avoidance. Apple itself has engaged in numerous legal tax schemes that allow it to grow shareholder value.²⁶ Citizens should ask whether maximizing the holdings of corporate shareholders is more important than increasing tax revenue that funds government services for all. As citizens, they can choose which politicians/parties to support.

The international legal order that countries have constructed since the end of WWII has its flaws, but it also has the power to act as a moral compass in this era of resurgent nationalism. It clearly shows that standing up for human rights requires that citizens of wealthy countries challenge the austerity narrative and elect governments that prioritize human rights.

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