



Conceptual Development of the Right to Health in International Instruments

ARTICLE INFO

ABSTRACT

Article Type

Original Research

Authors

Ebrahim Yaghouti (*1)

(1 Jurisprudence and Basics of Islamic Law, Faculty of Literature and Humanities, Central Tehran Branch, Islamic Azad University, Tehran, Iran.

Corresponding Author's Info

Tell: +982177512744

Email: Yaghouti2010@yahoo.com

ORCID: 0000-0003-2091-5374

Article History

Received: 02 Mar 2024

Revised: 10 Sep 2024

Accepted: 15 Nov 2024

Published Online: 01 Apr 2025

How to Cite this Article

Yaghouti E. Conceptual Development of the Right to Health in International Instruments. ILS. 2025; 1(2): 9-17.

Copyright

This is an open access article distributed under CC BY 4.0 License.

© 2025 The Authors.

Background

The international community accepts the right to health as a general principle. It provides the basis for a dynamic (rather than static) interpretation of the Covenant text. This article aims to examine the evolution of the concepts of the right to health in light of international instruments.

Materials and Methods

This research method is a descriptive-analytical one.

Ethical Considerations

Honesty and fidelity in writing the text have been observed.

Findings

Designing and adopting new norms is a time-consuming and erosive process. The first step is to do need assessment. In principle, the international law actors' needs and the circumstances of their relations are constantly changing with varying degrees of intensity and weakness.

Conclusion

should avoid focusing too much on using non-binding recommendations to develop examples and content of the right to health. Because of the declining international treaties and binding instruments related to the right to health, governments are encouraged to choose solutions that address their challenges and methods. This is the mechanism that happens in the Human Rights Council; Therefore, caution must be exercised about the new dimensions of the right to health.

Key words

International Instruments, Development, Concept, Right to Health.

INTRODUCTION

The subject of human rights and related concepts has a long history. Initially, in human rights documents and sources, fundamental rights such as the right to life, the right to freedom from torture and persecution, and the right to various aspects of liberty were emphasized. But as time went on and the guarantee of fundamental rights became self-evident, it was time to introduce new human rights examples [1].

Given the importance of answering this question, it should be noted that, until the late 1970s, various instances of human rights were discussed independently and separately. Since the early 1980s, a particular approach has emerged in human rights and international law literature. In this approach, different human rights instances were considered members of a single body due to the breadth and diversity of human rights cases. This, in turn, challenges the normative hierarchy of human rights. The meaning of normative hierarchy is that some norms of human rights have been recognized as fundamental rights and therefore have the description of "authority" in the field of international law. These examples are at the top of the pyramid of normative hierarchies. And other instances and norms of human rights and international law cannot conflict with them [2]. But other examples of human rights that are not fundamental do not have the description of "authoritarian" and, as a result, are lower in the normative hierarchy than fundamental rights [3].

MATERIALS AND METHODS

This research is a theoretical type; the research method is a descriptive-analytical one.

DISCUSSION

A. The Right to Health as a Universal Principle.

In 1948, the Universal Declaration of Human Rights was adopted by the United Nations General Assembly. The International Covenant text on Economic, Social, and Cultural Rights is very vague and general. This feature has led to various interpretations of the text of the Covenant. On the other hand, the Committee on Economic, Social and Cultural Rights, set up by the United Nations Economic and Social Council to monitor States Parties' reports on economic, social and cultural rights, also interprets the Covenant provisions its oversight functions [4]. After reviewing the Member States reports, the Committee shall make recommendations under the heading "Observations" [5]. The Committee prepares reports entitled "General Comment," which aims to clarify the meaning and content of some examples of economic, social, and cultural rights [6]. The findings and results of the Committee's work are, in turn, reflected in the revised guidelines for reporting on the status of economic, social, and cultural rights in the Member States [7]. The authors of this article have precisely included the phrase "possible" in the wording of Article 12 [8]. Over time, the level of development and expansion of facilities in different countries will change. As a result, the ability of

governments to ensure the right to human health will change. In other words, the maximum level of public health is subject to temporal and spatial requirements. Therefore Article 12 recognizes the best and highest health level achievable according to the conditions [9].

Simply put, the organization did not focus on legal activities, but since 1999, the organization's actions have changed, and its activities have shifted to the preparation of legal documents [11]. The Committee on Economic, Social and Cultural Rights lists three types of obligations to the government that has been emphasized in the practice of human rights committees and institutions, as well as in the literature of human rights writers, about the obligations under Article 12 of the Covenant on Economic and Social Rights and cultural [12].

Respecting the right to health means governments must not restrict all people's access, notwithstanding their gender, race, color, and political, social, and legal position, including prisoners, detained individuals, minorities, refugees, and even illegal migrants to preventive health services, medicine, and pain relievers [10].

The third obligation in Article 12 of the Covenant is the obligation to perform. Paragraphs 36 and 37 of General Comment No. 14 provide examples of commitment to implementation [13].

B. The Main Obligations

Most of the obligations mentioned in the previous section are generally heavy and challenging obligations for States Parties to the Covenant on Economic, Social, and Cultural Rights [14]. The main obligations are 1- Access to goods, services, and health facilities based on the principle of non-discrimination, especially vulnerable groups; 2- Access to the minimum necessary, sufficient, and useful food to get rid of hunger; 3- Access to the main shelter, housing, sanitation, and drinking water supply; 4- Preparation of essential medicines; 5- Ensuring a fair distribution of all facilities, goods and health services; Adoption and implementation of a national strategy and public health programs [10].

All States Parties must observe these core commitments relating to the right to health to the Covenant on Economic, Social and Cultural Rights and in the periodic reports submitted by States to the Economic, Social and Cultural Committee [15].

Many authors and jurists believe that these obligations are part of customary international law or even part of general legal principles; although some authors disagree with this approach; In their view, "being within the framework of the domestic legal system" should not be merely a customary criterion for considering such obligations. Because important aspects of the right to health may be omitted from governments' domestic practice for various reasons, and as a result, over time and overemphasis on the practical approach of governments, these obligations may be effectively abandoned [12].

C. Essential Medicines

General Comment Report No. 14 uses the World Health Organization model to list crucial medicines.

In this model, the World Health Organization has published a list of thirty essential drugs that are the most effective, safest, and most cost-effective medicines to meet the minimum drug requirements [16]. It should be noted that this list contains the minimum standards required in any health system, without which the right to health is not guaranteed in any way [17]. Making this list is now a costly step [18].

However, any State that has ratified the Covenant on Economic, Social and Cultural Rights is obliged, by paragraph 1 of Article 2, to provide this list of essential medicines as much as the facilities and resources at its disposal.

D. Existence

Existence does not mean that a government (even developed countries) should provide complete and adequate health services for all people in all remote, rural and urban areas, but this situation is only acceptable as a final horizon and goal [19].

E. Availability

Availability means the existence of four important elements, which are: 1- Non-discrimination; 2- Physical access; 3- Economic access or cost-effectiveness; 4- Access to information [20]. Non-discrimination is one of the fundamental criteria that the

Economic, Social and Cultural Committee has emphasized in interpreting many examples of economic, social, and cultural rights, especially in Article 2 of the Covenant on Economic, Social and Cultural Rights [21]. As a result, equal access for all or non-discrimination is the main task of governments. Secure physical access is another important aspect of "availability" [22]. Cost-effectiveness is another element of "availability." The purpose of access to information is the right to search and demand, to receive and transmit data and ideas related to health issues, taking into account the principle of confidentiality of personal health information [23].

F. Acceptability

According to this criterion, all health facilities and services must be respectful in terms of medical ethics and, at the same time, must be appropriate in terms of the culture of the target community [24].

G. Quality

Health facilities and services and being culturally acceptable must also be scientifically and medically appropriate [24].

H. Original Concepts of the Right to Health in Recent Years

1- Sexual Rights. It includes the right to marry and the prevention of child marriage, issues related to the legality of abortion, and women's right to self-determination. These issues have been addressed in General Comment No. 22, and like General Comment No. 14, the

relationship between these issues and the principles of non-discrimination and equality has been emphasized. The Committee derives these new dimensions of the right to health directly from the Covenant text, so they cannot be regarded as new parameters for the right to health [25].

2- Mental Health. Since the 90s, it has been revealed in various researches that mental health institutions' situation in many countries is deplorable [26].

Treatment of mental illness usually included only primary health care, and specialized secondary treatment was usually rejected [27]. Some effective control mechanisms are also not provided to control decisions about placing patients in mental health institutions [28].

3- The Right to Health in Prisons. Another issue that has received increasing attention in recent years is the prisoners' situation regarding the right to health.

Until the early 1990s, prison matters were referred to the Human Rights Committee under Articles 9 and 10 of the International Covenant on Civil and Political Rights. Since the Vienna World Conference on Human Rights in 1993, prison conditions and human rights issues, the case of health care and food preparation is referred to all contracting authorities. It is generally believed that detainees and prisoners are subject to the criminal justice system [29].

4- The Right to Health in Armed Conflict. In recent years, the Committee on Economic, Social and Cultural Rights has presented the

human rights situation during armed conflict, and in particular post-conflict situations, such as issues related to access to health services during armed conflict. It has provided medical and psychological services to the vulnerable, especially women and children, after the armed conflict outbreak [30]. Issues related to sexual violence against women, children, and detainees during the armed conflict have also been addressed in government correspondence with the Committee on Economic, Social, and Cultural Rights [31]. Examples include reports on Afghanistan and issues related to child soldiers' employment and health problems caused by traumatic war-related disorders.

5- New Procedures of the Committee on Economic, Social and Cultural Rights.

However, in practice, if the government does not respond to these new issues and dimensions and does not provide information on its progress in achieving these aspects, the Committee may list the Prioritize and set a specific time for that government to begin negotiations. This committee procedure puts a lot of pressure on the government in terms of General Comment. In practice, almost all the states that have addressed this Committee's policy have not refused to start negotiations and take the proposed measures [32].

I. The Need for New Health Rights

So far, efforts have been made to demonstrate the normative content of the Covenant's provisions on Economic, Social, and Cultural Rights concerning the right to health. The comments made by the Committee on

Economic, Social and Cultural Rights on new issues concerning the right to health, such as the right to health in prisons, armed conflict, etc., provide the basis for a dynamic (rather than static) interpretation of The text of the Covenant is provided. Designing and adopting new norms is a time-consuming and erosive process. The first step is to do a need assessment. In principle, the international law actors' needs and the circumstances of their relations are constantly changing (with varying degrees of intensity and weakness). On the other hand, governments are aware that international rules generally do not operate in an absolute and unlimited way [34], [33]. On the other hand, the Economic, Social, and Cultural Rights Committee reports are a non-binding legal process or soft law.

The non-binding reports of the Committee have very important functions [35].

Non-binding statements can also play a role in formulating existing international customary rules by providing more explicitness through written texts, or even forming a tendency toward a particular norm or paving the way for a change in existing customs. These documents and reports can also shape part of the subsequent government practice that is useful for interpreting treaties [36].

CONCLUSION

The study found no urgent need to create new human rights laws regarding the right to health. Existing legislation provides ample room for an evolutionary interpretation of Article 12 of the Covenant on Economic, Social and Cultural

Rights. It enables interpreters (international treaty bodies, States Parties, NGOs, and other stakeholders) to address areas of lesser concern in the past. Such issues as sexual rights, reproduction, sexual orientation, health issues in prisons, and armed conflict have become increasingly important.

The General Comment Report, approved and published by the Committee on Economic, Social and Cultural Rights, focuses primarily on the mandatory norms of the right to health. However, they should avoid focusing too much on using non-binding recommendations to develop examples and content of the right to health. Because of the declining international treaties and binding instruments related to the right to health, governments are encouraged to choose solutions that address their challenges and methods. This is the mechanism that happens in the Human Rights Council; The Human Rights Council emphasizes the explicit obligations of States Parties to the Covenant on Human Rights, and non-binding norms and recommendations are purely ancillary and interpretive. Therefore, caution must be exercised about the new dimensions of the right to health.

ETHICAL CONSIDERATION

Authenticity of the texts, honesty and fidelity has been observed.

AUTHOR CONTRIBUTIONS

Planning and writing of the manuscript was done solely by the author.

ACKNOWLEDGMENTS

None.

CONFLICT OF INTEREST

No conflict of interest was reported by the author.

FUNDING

This Research received no external funding.

REFERENCES

- [1] Hogan L. Keeping Faith with Human Rights. Washington: Georgetown University Press; 2015. p.171-175.
- [2] Beyranvand F. Jus Cogens and Erga Omnes Obligations in International Law. MA Dissertation. Tehran: Islamic Azad University; 2013. p.100. [Persian]
- [3] Beyranvand F. The procedure of national courts in confronting international soft law with emphasis on international humanitarian law. Ph.D. Dissertation. Tehran: Islamic Azad University; 2020. p.325. [Persian]
- [4] Alston P. Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights. *Human Rights Quarterly* 1987; 9(1): 332-381.
- [5] Riedel E. New Bearings to the State Reporting Procedure: Practical Ways to Operationalize ESC- Rights - the Example of the Right to Health. In: Schorlemer S. *Praxishandbuch UNO*. Berlin: Springer; 2002. p.346.
- [6] Pinto M, Sigal M. Influence of the ICESCR in the Americas. In: Moeckli D, Keller H. *The Human Rights Covenants at 50: Their Past, Present and Future*. Oxford: Oxford University Press; 2018. p.172.
- [7] Alston P. Out of the abyss: the challenges confronting the new un committee on economic, social and cultural rights. *Hum. Rts. Q.* 1987;9:332.
- [8] Garfield E. The history and meaning of the journal impact factor. *jama*. 2006 Jan 4;295(1):90-3.
- [9] Albuquerque A. The Brazilian Human Rights Indicators System: The Case of the Right to Health. In: Toebes B, Ferguson R, Markovic M, Nnamuchi O. *The Right to Health: A Multi-Country Study of Law, Policy and Practice*. London: Springer; 2015. p.261-262.
- [10] General Comment No.14: The Right to the Highest Attainable Standard of Health (Art.12 ICESCR). UN Doc.E/C.12/2000/. 2000. p.4, 34, 43.
- [11] Dresler C. Human Rights-Based Approach to Tobacco Control. In: Grodin M. *Health and Human Rights in a Changing World*. New York: Routledge; 2013. p.472.
- [12] Riedel E, Giacca G, Golay C. The Development of Economic, Social and Cultural Rights in International Law. In: Riedel E, Giacca G, Golay C. *Economic, Social and Cultural Rights in International Law*:

Contemporary Challenges. Oxford: Oxford University Press; 2014. p.18, 20-23.

[13] Meier B, Cronk R, Luh J, Bartram J, Ibuquerque C. Monitoring the Progressive Realization of the Human Rights to Water and Sanitation: Frontier Analysis as a Basis to Enhance Human Rights Accountability. In: Conca K, Weinthal E. *The Oxford Handbook of Water Politics and Policy*. Oxford: Oxford University Press; 2018. p.103.

[14] Elvira B. Global Health and Aid Effectiveness: The MDGs and the Paris Declaration. In: Elvira B. *Improving Aid Effectiveness in Global Health*. London: Springer; 2015. p.9.

[15] Maus S. *United Nations Peace Operations and Human Rights: Normativity and Compliance*. London: Brill; 2020. p.289-290.

[16] Bakker P. Essential Medicines for Immediate Care in Refugee Camps. In: Morrone A, Hay R, Naafs B. *Skin Disorders in Migrants*. London: Springer; 2020. p.233-240.

[17] Guise M, Novaes A. Balancing Health and Wealth: The Case of Patents and Access to Medicines in Brazil. In: Dreyfuss R, Garavito C. *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America*. Oxford: Oxford University Press; 2014. p.93-94.

[18] Davies S. Reproductive Health as a Human Right: A Matter of Access or Provision. In: Grodin M, Tarantola D, Annas G, Gruskin S. *Health and Human Rights in a Changing*

World. New York: Routledge; 2013. p.391-393.

[19] Linz JJ, Stepan AC. Toward consolidated democracies. *Journal of democracy*. 1996;7(2):14-33.

[20] Asher J. *The Right to Health: A Resource Manual for NGOs*. Boston: Martinus Nijhoff Publishers; 2010. p.61-62.

[21] CESCR, General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (Art.2(2) ICESCR), UN Doc.E/C.12/GC/20, annex VI. 2009.

[22] Riedel E. *The Human Right to Health: Conceptual Foundations*. In: Clapham A, Robinson M. *Realizing the Right to Health*. Zurich: Rüffer & Rub; 2009. p.29.

[23] Weinstein MC, Russell LB, Gold MR, Siegel JE. *Cost-effectiveness in health and medicine*. Oxford university press; 1996 Jul 18.

[24] CESCR, General Comment No.21: The Right of Everyone to Take Part in Cultural Life (Art.15(1)(a) ICESCR), UN Doc.E/C.12/GC/21. 2009.

[25] Look P, Heggenhougen K, Quah S. *Sexual and Reproductive Health: A Public Health Perspective*. London: Elsevier; 2011. p.311-312.

[26] Getahun A. Ensuring the Realization of the Right to Health through the African Union (AU) System: A Review of Its Normative, Policy and Institutional Frameworks. In: Toebes B, Ferguson R, Markovic M, Nnamuchi

O. The Right to Health: A Multi-Country Study of Law, Policy and Practice. London: Springer; 2014. p.77.

[27] Jones R. Oxford Textbook of Primary Medical Care. Oxford: Oxford University Press; 2005. Vol.2 p.276.

[28] Riedel E. The Right to Health under the ICESCR. In: Arnault A, Decken K, Susi M. The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric. Cambridge: Cambridge University Press; 2020. p.107-123.

[29] Schutter O. International Human Rights Law: Cases, Materials, Commentary. Cambridge: Cambridge University Press; 2010. p.795.

[30] Malley B. Education under Attack: A Global Study on Targeted Political and Military Violence against Education Staff, Students, Teachers, Union and Government Officials, Aid Workers and Institutions. Paris: UNESCO; 2010. p.65-93.

[31] Riedel E. Economic, Social and Cultural Rights in Armed Conflict. In: Clapham A, Gaeta P. Oxford Handbook of International Law in Armed Conflict. Oxford: Oxford University Press; 2014. p.447.

[32] Grover L. UN Human Rights Treaty Bodies: Law and Legitimacy. Cambridge: Cambridge University Press; 2012. p.30.

[33] Meyer T. Soft Law as Delegation. Fordham International Law Journal 2009; 32(1): 888-942.

[34] Koremenos B. Contracting Around International Uncertainty. American Political Science Review 2005; 99(1): 549-565.

[35] Zemanek K. The legal foundations of the international system: General course on public international law. London: Nijhoff; 1997. p.141.

[36] Shelton D. Soft Law. The George Washington University Law School, Public and Legal Theory Work Paper 2008; 322(1): 8-9.

COPYRIGHTS

© 2025 The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution (CC BY 4.0), which permits unrestricted use, distribution and reproduction in any medium, as long as the original authors and source are cited. No permission is required from the authors or the publishers.

