



2013

Realizing the Right to Health Through a Framework Convention on Global Health?

Eric A. Friedman

Georgetown University Law Center, eaf74@law.georgetown.edu

Jashodhara Dasgupta

SAHAYOG

Alicia E. Yamin

Harvard University

Lawrence O. Gostin

Georgetown University Law Center, gostin@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 13-059


This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/1229>

<http://ssrn.com/abstract=2283313>

15 Health & Hum. Rts. 1-4 (2013)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Health Law and Policy Commons](#), [Health Policy Commons](#), [Human Rights Law Commons](#), [Public Health Commons](#), and the [Public Policy Commons](#)

Eric A. Friedman, JD, is the Project Leader of the Joint Action and Learning Initiative on National and Global Responsibilities for Health (JALI) at the O'Neill Institute for National and Global Health Law at the Georgetown University Law Center in Washington, DC, USA.

Jashodhara Dasgupta is Coordinator of SAHAYOG, an NGO promoting gender equality and women's health using a human rights framework based in Lucknow, Uttar Pradesh, India.

Alicia E. Yamin, JD, MPH, is Lecturer on Global Health and Director of the Program on Health Rights of Women and Children at the François-Xavier Bagnoud Center for Health and Human Rights at Harvard University in Cambridge, MA, USA, and Chair of the Board of the Center for Economic and Social Rights.

Lawrence O. Gostin, JD, is University Professor of Global Health Law and Faculty Director of the O'Neill Institute for National and Global Health Law at the Georgetown University Law Center in Washington, DC, USA, and Director of the World Health Organization Collaborating Center on Public Health Law and Human Rights.

Please address correspondence to the authors c/o Eric Friedman, O'Neill Institute for National and Global Health Law, Georgetown University Law Center, 600 New Jersey Avenue NW, Washington, DC 20001, USA. Email: eaf74@law.georgetown.edu.

Competing interests: None declared.

Copyright © 2013 Friedman, Dasgupta, Yamin, and Gostin. This is an open access article distributed under the terms of the Creative Commons Attribution Non-Commercial License (<http://creativecommons.org/licenses/by-nc/3.0/>), which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original author and source are credited.

REALIZING THE RIGHT TO HEALTH THROUGH A FRAMEWORK CONVENTION ON GLOBAL HEALTH? A HEALTH AND HUMAN RIGHTS SPECIAL ISSUE

Eric A. Friedman, Jashodhara Dasgupta, Alicia E. Yamin, Lawrence O. Gostin

Just as the world is focused on the post-2015 sustainable development agenda, and concerns have been raised over global governance for health and other aspects of development, this special issue of *Health and Human Rights* focuses on one potentially important contribution—a global treaty grounded in the right to health. The Framework Convention on Global Health (FCGH), first proposed in 2008, has seen growing momentum, perhaps most prominently from the United Nations Secretary-General and the Director of UNAIDS, and has the overarching aim of dramatically reducing health inequities within and among countries.¹

WHAT IS THE FCGH?

As a treaty with the right to health at its core, the FCGH would reaffirm existing right to health principles and obligations, and would codify newly expanded ones. For example, the FCGH would set out standards and a financing framework aimed at enabling universal achievement of the conditions required for good health—a broad range of public health services (including safe water, sanitation, vector abatement, tobacco control, and nutritious food) and an effective and equitable health system to deliver a comprehensive range of health care services—while addressing the broader social determinants of health. The financing framework would be based on principles of national and global solidarity, including shared global responsibility to ensure funding that is predictable, sustainable, and scalable to needs. Shared responsibility requires greater financial and other commitments, not only at the national but also at the international level, and recognition of the increasingly important role that non-governmental actors play in health financing. Equitable and progressive taxation would also help generate sufficient revenues to enable people to enjoy the right to health.

Under principles of equity and equal access to public goods, states parties to an FCGH would be required to ensure health systems meet the needs of marginalized populations and to significantly reduce health inequities, including by removing barriers to access to appropriate public health interventions and health goods and services. Such barriers that would be addressed in an FCGH include formal and informal economic obstacles to the multitude of physical, cultural, and other factors that prevent people from receiving timely quality care.

The FCGH, as envisioned, would focus not only on standards and

financing, but also on sound governance. Good governance includes good stewardship of resources, effective regulation and oversight of private actors, transparency, community participation, and accountability. The treaty would seek to ensure the engagement of affected populations—especially marginalized groups—in developing and monitoring health policies, while reiterating that the right to health should be judicially enforceable, and that mechanisms to hold states and other actors accountable in the event of compliance failures should be economically and physically accessible. It would seek to promote public education on human rights and civil society empowerment as well as to strengthen the capacities of government institutions whose mandates should include implementing the right to health. The FCGH envisions a robust regime of compliance, with rigorous reporting and monitoring, which would incorporate an innovative regime of incentives and sanctions for states parties.

Recognizing the effect of other international legal regimes (for example, trade, investment, and climate change) on the right to health, the FCGH would raise the priority that health impacts should be accorded in these regimes, and require assurances that other regimes do not undermine the right to health. Some advocates for an FCGH believe that the FCGH might similarly require human rights impact assessments to protect the right to health nationally. Both within and outside the field of health, an effective FCGH would need to address the immense impact of private actors, particularly for-profit entities, on health at national and global levels.

The FCGH is one attempt to meet major challenges in global governance for health, which are being debated currently by the world's leaders, including the need to better align global health funding with national systems and processes. Indeed, the FCGH will need to strike a careful balance between setting global mandates and engendering national ownership. For the FCGH to be empowering to the populations it purports to benefit and relevant across diverse national and sub-national contexts, there will need to be political and social mobilizations for health rights at grassroots and national levels, in addition to any intergovernmental negotiation that occurs.

HEALTH AND HUMAN RIGHTS: OUR FOCUS ON THE FCGH

In this issue, a distinguished group of scholars and civil society leaders provide reactions to the need for as well as the wisdom of an FCGH, and some offer creative ideas for inclusion in the FCGH, which stretch across several of the proposed treaty's main dimensions.

Accountability for realizing the right to health

One set of articles clusters around ideas for mechanisms to hold the government—and non-state actors—accountable for respecting, protecting, and fulfilling the right to health. Martín Hevia and Carlos Herrera Vacaflor propose a judicial mechanism to hold states accountable for fulfilling the right to health. Drawing on Latin American experience with the writ of *amparo*, they propose that FCGH parties agree to an expansive version of the writ, creating the pathways for individuals and groups to litigate against state (and even non-state) actors that fail to conform to treaty and other right to health obligations. Institutional mechanisms, such as a special ombudsperson, could help ensure access to the courts of the least advantaged. Given mixed evidence, the equity impacts of individual petitioners seeking to claim existing health care entitlements should be further explored, with attention to structuring the legal system to create broader precedents.

The idea of how the FCGH could harness existing human rights machinery is critically important. Lance Gable and Benjamin Meier discuss how human rights treaty bodies could be an entry point into holding states accountable to the FCGH, including by clarifying obligations that the treaty bodies already monitor. Gable and Meier also importantly remind us of the interdependent nature of all human rights, virtually all of which can affect people's ability to achieve the highest attainable standard of health. This raises a critical issue for further exploration: "health"—despite the WHO preamble's expansive definition—does not exhaust all elements of a life of dignity; given critiques of the already existing right to health norms as inappropriately "colonizing" other rights, what is the role of the FCGH in addressing rights beyond health, including a necessarily wide array of civil and political rights?

Firm obligations are central to establishing effective

accountability. Addressing a slice of the private sector critical to health, Suerie Moon proposes that the FCGH include norms for pharmaceutical companies to ensure affordable access to medicines. Drawing on the Guiding Principles on Businesses and Human Rights, which were spearheaded by UN Secretary-General special representative John Ruggie, Moon would give priority to those among the principles on the human rights responsibilities of the industry developed by Paul Hunt, the first UN special rapporteur on the right to health, that entail respecting the right to health. She argues that respect for human rights is a baseline responsibility of businesses and thus appropriate focus of the FCGH, while such an emphasis would also avoid shifting away from states the responsibility to protect and fulfill the right to health.

Examining right to health obligations with respect to traditional medicines, Emmanuel Kabengele Mpinga and colleagues broach a new content area that might potentially be included in an FCGH. They explore the application of the FCGH to the regulation of non-conventional medicines, recognizing their potential to advance or undermine the right to health.

Collectively, these ideas offer new routes to addressing one of the greatest challenges for another global legal treaty such as the FCGH: ensuring meaningful accountability. From building on national human rights accountability mechanisms to utilizing existing international human rights machinery, and by clarifying human rights obligations—illustrated here in the area of medicines—these articles engage in ongoing debates with respect to ways in which the FCGH would need to enhance the abilities of people to meaningfully claim entitlements with respect to health.

Global health funding and governance

One of the principal goals of an FCGH would be to raise sufficient funding for health, which although by all accounts dramatically increased under the MDGs did not do so equitably nor adequately to meet population needs. In this regard, Sophie Smyth and Anna Triponel propose a new model for global health funding. Rather than a single institution such as a Global Fund for Health, they recommend that a new treaty such as the FCGH establish an umbrella structure that develops common standards for all existing health financing mechanisms—such as multi-stakeholder participation, independent

advisory bodies, and a range of resource mobilization strategies—and new mechanisms required to fill health financing gaps, building on best practices and comparative advantages of various institutions.

Gaps in institutional global health funding structures abound, from non-communicable diseases, including mental health, to safe water, sanitation, and food security, and existing funding is often not allocated according to the best evidence or a robust situational analysis of population needs, let alone to the strengthening of health systems. There are many unanswered questions regarding funding and global governance: Are new funding organizations needed to fill these gaps, and what role would the FCGH have in relation to developing them? Would common approaches and standards sufficiently reduce transaction costs, while acknowledging institutional persistence? How does this approach compare to institutional consolidation and transitioning away from disease-specific global funds to one or several public health-oriented funds to build strong health systems and ensure underlying determinants of health? Here as elsewhere in this special issue, we hope that the proposals will stimulate further debate, ideas, and evidence.

Whatever the financing model chosen, there are further questions related to the human rights standards and institutional architecture that should be established. Two of us (Friedman and Gostin), joined by Kent Buse, propose a set of standards for restructuring global health organizations to advance the right to health—ranging from their governance and policies through to their grantmaking and norm-setting functions. Further, we see a critical role for global health organizations, whether or not they are funding agencies, in building right to health capacities at the national and international levels, within and beyond the health sector (for example, food, trade, and migration).

Together, these articles highlight several key questions about the roles of the international organizations in the context of a global treaty such as the FCGH: To what extent might the FCGH be able to strengthen the existing human rights obligation for states to utilize the maximum available resources towards fulfilling health and other economic and social rights? In what ways might such a treaty be able to foster right to health capacities, and increase governmental concern with meeting the health rights and needs of marginalized populations? Implicit in these questions is a further daunting challenge requiring critical investigation: How best can a single international legal

instrument, such as the proposed FCGH, change the operations of international organizations and even whole legal regimes governed by their own set of rules? Beyond the legal norms and mechanisms, what are the social and political dynamics that will be required to pave the way for institutional acceptance of, and even support for, changes, which are fundamentally shifts in deep structures of power?

Civil society and social mobilization; choice of a treaty

The proposed FCGH would be a legal treaty, which would require an inter-governmental negotiation process. However, advocates for the FCGH view social mobilization as critically important in developing, securing, and implementing the treaty. The engagement of social movements is not only an inherent good, but also necessary to create a strong treaty to fulfill the health rights for everyone, with particular attention to marginalized communities. A proposed FCGH envisions including provisions that might facilitate popular mobilization around the right to health to promote the accountability of governmental and other actors with respect to health as a matter of social justice.

Several articles focus on social mobilization in relation to FCGH rights. Ella Scheepers compares the potential value of an FCGH to HIV/AIDS mobilization in two very different contexts, Senegal and South Africa, concluding that despite the differences particularly in terms of national emphasis on human rights, the FCGH could add considerable value in both countries.

Another article drawing on the HIV/AIDS experience by Kent Buse and colleagues at UNAIDS reminds of us the centrality of social movements in progress in the context of that disease. The authors offer recommendations for the FCGH that build on the advances of the HIV/AIDS movement while mitigating threats to continued progress, such as enforcement mechanisms to ensure the pre-eminence of health over competing regimes, particularly trade, and a clear articulation of measures to improve women's access to health goods and services.

Leigh Haynes and colleagues from the People's Health Movement also discuss the importance of social mobilization but from a perspective more critical of the current proposal for an FCGH. They emphasize the critical importance of facilitating popular mobilization around the right to health, ensuring that the ends of achieving an FCGH do not obscure the vital importance of how it is achieved. Channeling broad social demands into legal claims, through an inter-governmental process, poses risks to which advocates for an FCGH need to be sensitive. Among other things, Haynes and colleagues urge

that a movement for an FCGH be situated within the broader set of existing right to health campaigns, and offer specific ways that the FCGH could gain support of campaigners, such as by responding to contemporary and often Southern-driven right to health advocacy priorities.

Steven Hoffman and John-Arne Røttingen do not focus as much on political mobilization. However, while recognizing the potential significance of an FCGH, they also challenge the wisdom of the treaty route, arguing among other things that the benefits of such a treaty may not be supported by the evidence, while the opportunity costs of this arduous effort, and the risk of inadvertently undermining the WHO, are too high to warrant this course of action.

We believe that these critiques of the benefits and risks of the FCGH that these authors raise merit further examination. Moreover, future debates on an FCGH will need to address remaining pressing topics in global health, beyond the arenas touched upon in this issue. Current debates in the context of the future development agenda around climate change, family planning, and women's reproductive rights—or issues around gender, religious conservatism, and sexual and reproductive health rights—cannot be disregarded, nor can the complexities of achieving meaningful empowerment of women over their bodies and lives through international law in the current global context.

Health and Human Rights welcomes these robust and intelligent debates around the FCGH. This special issue promotes ongoing global conversation, research, and action around the FCGH. If it is to be successful, the process for developing the content of a treaty must be widely owned, giving voice to the marginalized populations who suffer most from health inequities.

REFERENCE

1. L. O. Gostin, "Meeting Basic Survival Needs of The World's Least Healthy People: Toward a Framework Convention on Global Health," *Georgetown Law Journal* 96/2 (2008), pp. 331-392. Available at <http://georgetownlawjournal.org/files/pdf/96-2/Gostin-Article.PDF>. UN Secretary-General, *Implementation of the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS—Uniting for universal access: Towards zero new HIV infections, zero discrimination and zero AIDS-related deaths: Report of the Secretary-General*, U.N. Doc. A/65/797, March 28, 2011. K. Buse and M. Sidibé, "A Framework Convention on Global Health: A catalyst for justice," *Bulletin of the World Health Organization* 90/12 (2012), pp. 870-870A. Available at <http://who.int/bulletin/volumes/90/12/12-114371.pdf>.