Right to Health: International Legal Dimension in the Globalization Context

Aslan Khuseinovich Abashidze* and Anastasia Aleksandrovna Beloussova
Department of International Law, Peoples’ Friendship University of Russia, Moscow, Russia; Abashidze_akh@pfur.ru, nastena198686@mail.ru

Abstract

Objectives: The study analyzes the obligations of the States with regard to the right to health, the practice of international judicial and quasi-judicial remedies for human rights infringements, national judicial institutions and as the major doctrinal approaches. Methods: The methodological basis is formed by the general scientific methods: analysis, synthesis, logical method, generalization, as well as special legal method, comparative legal method. Findings: The study analysis the main approaches to the implementation by States of their obligations under international law with respect to the full realization of the right to health, the conceptual and normative content of the right to health, and the practice of the United Nations Committee on Economic, Social and Cultural Rights. The paper presents the ways of further strengthening of the right to health as a fundamental human right. Application/Improvements: The suggested conclusions and recommendations may be applied by the RF Federal Assembly to develop optimal models of legislation in the field of health care and by the Ministry of Health of Russia to develop effective public health programs.

Keywords: Human Rights, International Protection of Human Rights, International Covenant on Economic, Right to Health, Social and Cultural Rights, Social and Cultural Rights, UN Committee on Economic

1. Introduction

Full provision of the right to health depends on the measures taken by the government for positive change in society.

Adopted in September 2000 during a meeting of the Heads of State and Government in New York, the UN Millennium Declaration identified eight Millennium Development Goals (MDGs). Three of these eight goals, eight of the sixteen targets and eighteen of the forty-eight indicators stated in the Millennium Declaration were directly related to health care. The efforts to achieve the MDGs enabled to improve the global health care: States have achieved notable progress in reducing maternal and child mortality, as well as have improved access to sanitary services. However, the results still vary considerably among different countries.

In September 2015, the UN General Assembly adopted Resolution 70/1 “Transforming Our World: The 2030 Agenda for Sustainable Development” which enshrines 17 sustainable development goals (SDGs), including 169 goals. The international community as a whole and each Member State individually must continue to make every effort to achieve the Goal 3 of the new Agenda, includes 13 ambitious goals relating to healthy lifestyles leading to the well-being of every person on earth.

2. Literature Review

These issues are highly relevant for the Russian studies of international law. The theses on various aspects relating to the right to health to confirm this statement. These studies primarily include theses by E.V. Tarasyants, E.I. Karkischenko, D.G. Bartenev, V.G. Borisova-Zharova, R.A. Azkhodzhaeva, A.V. Belyakova, N.P. Silchenko, A.J. Terekhova and V.S. Malichenko. In addition to that, we would also like to mention the following international experts: Stephen P. Marks, Colleen M. Flood and Aeyal Gross, Bridget Toebes and Matt Hartley.
3. Methodology

In this study the authors actively used the method of comparative legal studies, which enabled going beyond the traditional Eurocentric approach to the history of the right to health. The research was widely used an interdisciplinary approach to historical events highlight the right to health among the fundamental human rights. The application of this complex methodology allowed the authors to study the evolution and content of the right to health.

4. Results and Discussion

The problem of complete coverage of the population medical care faces the UN and World Health Organization (WHO) for a long time. This goal implies full and free access to quality health care, without which any positive achievements in public health are impossible.

Referred to in the doctrine of “the right to health” has been translated into more than 135 national constitutions, as well as a sufficient number of agreements of universal and regional nature. The most significant are: the Universal Declaration of human rights of 1948, and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

The right to health needs to be considered in various aspects: as a fundamental human right, as a means of creating the public good, as an integral part of the society culture which encourages the promotion of progress and better living standards.

Statistical data on health care indicate that progress is possible, and it can be seen; however, where are still many challenges to be met: the international community managed to achieve great progress in ensuring the right to health, although it did not cover all people.14

In order to enable the complete and uniform implementation of Art. 12 of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) has stated its position on the various aspects of the implementation by States of their obligations under this article, put it in the general comments.

Committee revealed the essence of the concept of “progressive implementation”, which shares all the obligations under the ICESCR to “respect”, “protect” and “fulfill”. The Committee took into account the resource constraints at the state and isolated from these obligations are those that must be fulfilled without delay. Such obligations include: 1) to ensure this right without any discrimination (Art. 2.2); 2) to take specific measures (Art. 2.1).

Besides, the CESCR clarified the concept of “progressive implementation”. By “progressive implementation” the CESCR understands a specific obligation on States to promptly and effectively to move toward full implementation of the Article. 12 of the Covenant. However, the Committee emphasized that it is unacceptable to retrogressive measures taken in relation to the right to health. If the regressive measure adopted by the State, it must prove that the measure is justified.

Referring to one of the key elements of the concept of “progressive implementation”, namely the obligation to “fulfill”, the CESCR also revealed the contents of the obligations of States to “ensure” “promote” and “stimulate”.

The Committee took into account the resource constraints at the state and isolated from these obligations are those that must be fulfilled without delay. Such obligations include: 1) ensuring this right without any discrimination (Article 2.2). 2) the adoption of specific measures (Art. 2.1).

CESCR revealed the meaning of the concept of “progressive realization” in the General Comment No. 14.

“Progressive realization” is a specific obligation on States to promptly and effectively to move toward full implementation of the Article. 12 of the Covenant. However, the Committee emphasized that it is unacceptable to retrogressive measures taken in relation to the right to health. If the regressive measure adopted by the State, it must prove that the measure is justified.

In order to fulfill the obligation to “exercise” the State party to the ICESCR must be given enough space to the right to health in its policy, and it is desirable that it was enshrined in law. The state should provide health care, immunization programs against the major infectious diseases, access to safe food and drinking water, decent housing and basic sanitation.

States must prepare physicians and other health care providers, to build a sufficient number of hospitals and other health institutions, support the creation of other medical institutions for mental health care and counseling services.

To state responsibilities include the establishment of an efficient, affordable, private or mixed, and the state health insurance system, to encourage and support research and education in the field of medicine. Just the government
should carry out information campaigns, such as HIV / AIDS, domestic violence, the harm of cigarettes, drugs and alcohol, and harmful traditional practices.

The element of “accessibility” implies that health facilities, goods and services must be accessible to everyone without any discrimination.

The element of “quality” means that health facilities, goods and health services, along with their cultural appropriateness, must be scientifically and medically appropriate and of good quality. For this purpose, it should have qualified medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe drinking water and adequate sanitation.

The element of “acceptability” means that health facilities, goods and services must comply with the principles of medical ethics and cultural characteristics of the population.

Having considered these basic elements, we can see that the state “availability” of adequate resources, infrastructure and a developed system of medical services act as the basic segment of any health system.

The necessary resources include: institutional, economic, human and administrative resources.

Maximum availability of all the resources required to “achieving progressively the full realization” of the rights contained in the Covenant.

General Comments CESCR №14 relate to obligations of States which, despite limited resources, are subject to immediate execution. Making comments on the reports of States - members of CESCR repeatedly returned to this position, in particular, encouraging States to raise the level of funding for public health programs, pay more attention to the problem of shortage of drinking water, to seek resources to improve the social well-being in the education and health of the population.

The Committee stressed its concern at the lack of specialized medical institutions, women, persons with mental disabilities, children, indigenous peoples, rural dwellers and other vulnerable groups.

CESCR noted that the fact that the States have the resources does not affect the performance of obligations by States to ensure the right to health, in spite of its importance. Therefore, the lack of resources is no excuse for inaction on the part of the state. Even in cases where the state has enough resources, it still has an obligation to maximize the use of available resources by citizens to exercise their rights.

In this regard, it is worth mentioning that the international human rights law does not prescribe the duty of reaching the same high level of medical care by all States. Conversely, differences in the amount of resources are taken into account, in this connection, the State applies a differentiated approach to the realization of the right to health.

The Committee stated, that the allocation of the right to health among other fundamental human rights does not mean that the state should direct all its resources to the commitments in the health sector. The obligation of States to ensure the right to health should be carried out in stages, based on the concept of “progressive realization”, which sets clear rules for the allocation of material resources. If the State can’t allocate sufficient funds to ensure the right to health, it is obliged to report on the reasons for such a situation to the society and the international monitoring human rights bodies.

The regulations that the State Parties for reasons of “protection of health of the population” can introduce restrictions on a right to health in exceptional cases are fixed in ICESCR.

The Committee expressed its position on the issue of respect for economic, social and cultural rights and the application of sanctions in General Comment №8.

CESCR gives States Parties ICESCR injunction to refrain from imposing the embargo, which is a means to limit the supply to the extent necessary medical equipment and medicines to other countries. Such restrictions should not be an instrument for economic or political pressure.

Fixing of a right to health in the International Bill of Human Rights, international treaties on human rights of universal (e.g., Convention on the Rights of the Child 1989) and regional (e.g., African Charter on Human and Peoples’ Rights) nature certainly, led to recognition of its priority in policy of the States. Based on the standard settings of the existing international instruments on human rights, the right to health is considered just as an obligation of States Parties, which excludes the reduction of activity of the States to take any affirmative action in the sphere of ensuring the right to health.

However, it must be noted that although the right to health is widely accepted in the international legal level and within the framework of national legislation, has still not reached a common understanding with regard to the adoption of the necessary measures by States to ensure the full, uniform and universal realization of the right to health.

Adoption by States international legal obligations to ensure the right to health is not only good for the human
person, but also means taking into account the interests of the wider community. Thereby, it should be critical of some existing concepts and doctrines about the right to health. For example, in the libertarian doctrine is completely eliminated the obligation of States at the national level to take measures for the prevention of diseases. This doctrine focuses on charities and their role in providing health care, which makes impossible of individual claims in courts to the State if it doesn’t fulfill the liability on ensuring a right to health. Also there is a negative trend that is attracting excessive attention of States and international organizations to the issue of health care and health services, to the detriment of solving other serious problems of socio-economic nature which influence human health.

There are many examples of violations of the right to health, especially in the current situation of the global financial and economic crisis.

States shall take measures internally restrictive economic or other nature (adoption of the law runs counter to earlier commitments made at the international level on the right to health) that are regressive. By itself, the adoption of retrogressive measures contrary to Art. 12 of the ICESCR and is a violation of the right to health. The victims of such violations should have access to appropriate and effective remedies at all levels. The victims of violations also have the right to demand adequate compensation for the damage caused to them.

The analysis of practice of a number of the States confirms that the defenses more often right to health resort provided the person, rather than living in poverty, in this connection, it is necessary to develop measures to ensure that the judicial system for vulnerable groups.

In this regard, this analysis of the practices adopted in a number of countries confirms that the court remedy of the right to health is often demanded by quite well-to-do individuals, rather than those living in poverty. Therefore, it is necessary to develop measures to ensure that vulnerable groups can resort to legal remedies.

However, this trend has a downside: highlights judicial remedies in the States may overshadow the real causes of the violation of the right to health, which, ultimately, will not reduce the global mortality due to disease reduction. Based on court practice of the States on protection of a right to health, any claim which is submitted on violation of a right to health will have conditional character. That is, in one case the claim can be acceptable, but not in others. In recent years, increasing the number of complaints of violation of the right to health filed in national courts. Recently the number of the complaints to violation of the right to health filed in national courts grows. On the one hand it can be concluded that the judicial protection of the right to health are effective, and this is a positive point, but on the other hand a large number of complaints indicates that there are serious systemic problems in the health sector, which are not resolved by the States.

We would like to note that at the doctrinal level, there is a serious debate on the question of the validity of general comments adopted by the treaty bodies on human rights23.

And the recognition of the constitutional courts of States classification of obligations of States parties to the ICESCR on the right to health is a confirmation of the growing prestige of the human rights treaty bodies of the UN system.

It should be noted that the decisions of the constitutional courts of a number of countries (eg, Colombia, South Africa, Brazil, Argentina, India, and Uganda) significantly enrich the experience of the direct application of the provisions of the International Covenant on Economic, Social and Cultural Rights by the courts of general jurisdiction. The study of the practice of States to protect the right to health allows to establish a direct dependence of the list of medical services by the health insurance.

In this context, attention should be paid to the position of the constitutional courts of a number of States. Constitutional duty of States is to establish a single health insurance program, which means the recognition of the concept of “progressive realization” as a constitutional obligation on a par with the international legal obligations. Sometimes the decisions of the constitutional courts of these States on matters relating to the protection of the right to health contain provisions which have innovative character.

It concerns, first of all, the provisions of which are determined measures tracking subsequent action character of the state. In this case it is possible to speak about enrichment by means of practice of the States of the concept of “progressive implementation” new elements. Each State Party to the ICESCR should have a national strategy, plans and programs to ensure the right to health, the necessary guarantees for a fair compensation in the event that there has been a violation of the responsible persons and public authorities the right to health.

The theoretical rules of international law on the responsibility of the international human rights treaty
by the State party for the violation of the right to health medical institution, its staff and health insurance organizations significantly enriched the national jurisprudence.

This study can be applied to present scientifically based conclusions and proposals of the Federal Assembly of the Russian Federation when developing the optimal models of health care legislation by the Ministry of Health of the Russian federation aiming to achieve the full coverage of health services, as well as by the social ministries of Russia to develop effective government programs and health action plans and to improve the present conditions of health insurance.

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6. References

