

Global Health Justice and the Right to Health

Heather Widdows¹

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Abstract This paper reflects on Lawrence Gostin’s *Global Health Law*. In so doing seeks to contribute to the debate about how global health justice is best conceived and achieved. Gostin’s vision of global health is one which is communal and in which health is directly connected to other justice concerns. Hence the need for health-in-all policies, and the importance of focusing on basic and communal health goods rather than high-tech and individual ones. This paper asks whether this broadly communal vision of global health justice is best served by making the right to health central to the project. It explores a number of reasons why rights-talk might be problematic in the context of health justice; namely, structurally, rights are individual and state-centric and politically, they are oppositional and better suited to single-issue campaigns. The paper argues that stripping rights of their individualist assumptions is difficult, and perhaps impossible, and hence alternative approaches, such as those Gostin endorses based on global public goods and health security, might deliver much, perhaps most, global health goods, while avoiding the problems of rights-talk.

Keywords Rights · Health · Global public goods · Security · Individualism · Collective rights · Justice

Introduction

In *Global Health Law (GHL)* Professor Lawrence O. Gostin presents a vision of what global health should be. It is an optimistic and ambitious vision which argues that health, including health law and ethics, *must* be understood as global and, that

✉ Heather Widdows
H.Widdows@bham.ac.uk

¹ Centre for the Study of Global Ethics, Department of Philosophy, University of Birmingham, Birmingham B30 2TT, UK

health issues must be directly connected to other justice issues. Hence there is a need for health-in-all policies and the need to focus on basic and communal health goods rather than high-tech and individual ones. This is a vision which I largely share; therefore I do not challenge either the breadth of Gostin's vision, or its optimism, or its focus on communal and public mechanisms and interventions, but rather I question the means by which this vision can be achieved. In particular I ask whether Gostin's broadly communal vision of global health justice is well served by making the *right* to health so central to the project.

The paper explores a number of reasons why rights-talk might be problematic in the context of health justice. The paper argues that stripping rights of their individualist assumptions is difficult, and perhaps impossible. For these reasons I suggest that Gostin's use of the right to health is in some tension with his broader global vision, and as such it might be better for Gostin to abandon or play-down rights-talk and focus less on the 'right to health' and more on other approaches. Two alternative promising approaches which Gostin promotes in *GHL* are those of global public goods, and health security. These two could be foregrounded, in preference to the right to health. This would deliver many—and perhaps all—of the health goods which Gostin includes in his vision of global health and avoid many of the problems of rights-talk. To do this would change the form rather than the substance of Gostin's claims. It would not affect what individuals receive, or substantially change his construction of health. It would change the language from one of rights to one of goods. In addition it would remove a source of tension in Gostin's *GHL*, making his broadly communal vision of global health more robust.

To examine whether the language of rights is the best language and framework for Gostin's project I will: First and briefly, outline Gostin's communal understanding of global health and importantly, his conception of the right to health. Second, consider whether the language of rights does what Gostin wants and needs it to do given that rights are first, structurally, individual and state-centric, and second, politically, oppositional and unsuited to complex goods (including, health goods). Finally I will conclude that even though rights may fail to deliver quite what Gostin wants them to this does not matter for Gostin's broader project because the global public goods and health security approaches deliver significant elements of global health.

Gostin's Communal Understanding of Global Health Law and Justice

That Gostin's vision is broadly collective is a key feature of Gostin's work in general and a theme which is central to *GHL*. The collective understanding is shown in a number of the core aspects of Gostin's work: including, in the interpretation of the right to health as communal; in the emphasis on preventative, up-stream and population-level interventions; and, in the emphasis on building infrastructure and capacity. To claim that this is Gostin's understanding of what global health is, and more importantly should be, is not to say that individuals are unimportant in Gostin's vision. Ultimately it is individuals who benefit from health goods and improving the health of individuals is Gostin's aim. His goal is not better overall

health in societal terms, if this hides the suffering of some; but better health for all. Thus, he states “societies that achieve high levels of health and longevity for most, while the poorer and marginalised die young, do not comport with social justice” [5, p. 412–413]. However, while individuals matter, and matter profoundly, the communal frame emphasises that individuals are often best protected and served by granting communal rights and providing communal and public goods rather than focusing on what is due to individuals.¹

The communal nature of Gostin’s picture of global health informs and defines how Gostin interprets and presents the right to health. Gostin, not surprisingly, emphasises the communal aspects of the right to health. This communal interpretation is ubiquitous in *GHL* and Gostin rejects narrow interpretations of a right to health at the outset. He argues that there are “three essential conditions that give everyone a fair opportunity for a healthy safe and productive life” [5, p. 22]. These are public health services, universal health systems, and addressing the socio-economic determinants of health [5, p. 22–25]. This broad, threefold understanding of what a ‘right to health’ entails, and the assumptions which underpin this understanding of the nature of rights, is unusual. Essentially, while Gostin uses the language of rights, what he means by it is not individual rights as they are usually understood, but something more shared and collective. This understanding is clearly illustrated in the following quote:

This picture of *what justice in global health looks like* entails a fundamental shift in our understanding of the right to health. The right to health must be conceived of primarily as a collective right, imposing obligations on governments, and in turn implicating all of society. There remains an important role for safeguarding individual rights and the rights of vulnerable groups, but the implementation of broader public health measures is a precondition for securing these more targeted rights. This is the population-based approach, which brings the benefits of improved health for all with an embedded form of social justice [5, p. 426].

This re-interpretation of the right to health fits well with Gostin’s collective vision. But, it is so far removed from normal individual assumptions embedded in rights that it is unlikely to succeed. Even if it does, and that is doubtful, it is confusing given standard assumptions about what rights mean, entail and grant. If this is correct and rights cannot be reinterpreted so easily then there is a danger that the collective and population elements of Gostin’s, vision which are central to social justice, may be subsumed and obscured. Accordingly, the communal understanding of health (and for Gostin the right to health) is in some tension with rights-talk as standardly conceived.

¹ Such a claim maps with my own claims about public goods. I have argued that not to focus on public and communal goods and to focus on individual goods alone can lead to individual’s actually suffering harm which they would not have suffered if public goods (particularly global public goods) had been protected [11–14].

Rights-Talk

Rights language is generally understood to be individual, and it is hard to strip rights of their individual connotations. This tension in some instances is relatively unimportant, and a matter of emphasis and language. Accordingly, this is not to critique human rights in general, or those who are engaged in the important struggle to further this agenda. The ultimate aim is the same and if rights were effective then the language used would be irrelevant. However, as yet too little has been delivered by rights in the health context and it is not clear that redefining rights, as Gostin has tried to do with the right to health, will be effective. If it is hard to redefine rights, then it we would do better to avoid such language and more clearly assert and affirm a vision of health as collective, up-stream and global. To illustrate, the structural and political features of rights will be considered in more detail.

Structural Critiques: Individual and State-Centric

First then, that human rights are individual is not contentious. Indeed part of why they are so ethically compelling and important is that each individual is entitled to these rights.² However, many social goods do not easily fit the model of individual rights—particularly shared and communal goods. Goods such as health goods which require collective action and the delivery of basic group goods (such as clean water, sanitation and a clean environment) are not best conceived of as individual. Accordingly rights language, which focuses on delivering distinct goods to distinct individuals rather than providing for the group, is not the best way to frame such goods, especially if they are to be prioritised over other goods. The individual nature of rights-talk makes it harder to see, respect and prioritise shared and public goods [14]. Furthermore, protecting health using individual rights is indirect. Global goods are only protected via the protection of individual goods which is problematic for prioritising such goods. Because the focus is on granting rights and goods to individuals rights-models tend to focus on individual preferences and these are prioritised over shared, public and global goods [14].

Second, in terms of application and practice human rights are not global, but state-centric. In nearly all human rights practice, and a significant amount of theory, human rights remain the responsibility of states, and citizens have different rights to non-citizens. For example, the lack of citizen status of refugees, illegal immigrants and the internally displaced profoundly affects the enjoyment of rights [7].

² In addition, to individual rights there are also group rights, which could be an alternative way of developing Gostin's position. However, as it stands Gostin does not argue for a group right to health, but a collective way of realising individual rights to health. Further, it would need significant argument to claim that the right to health could be conceived of as a 'corporate' group right rather than a 'collective' group right [8]. If the right to health is a collective rather than corporate group right, then the claim continues to rely on individual rights in order to attain the group right. Accordingly, collective group rights are just as vulnerable to the criticisms of rights (such as connotations of individualism and perhaps more importantly the oppositional nature), as individual rights are. Moreover, and more significantly the oppositional critique applies to all versions of group rights as much as it does to individual rights: in terms of group against group and group against an individual rights, and in terms of competition between the same rights or competing rights.

Recognising the state-centred and state dependent nature of rights, particularly human rights, is not original or controversial. That this is so is clear in Gostin's work, he fully recognises the problems which attempting to do something global with state-limited rights presents. He begins with state-centred rights, suggesting that we seek "a global agreement on the minimum domestic effort necessary to uphold the right to health" [5, p. 26], arguing that, a "state should fairly and efficiently distribute health services for its entire population" [5, p. 27]. However moving from here to something global is not easy. As Gostin says, "this is a particularly vexing problem because enunciating sound principles demonstrating that State A has specific duties to State B is exceedingly difficult" [5, p. 27].

How one moves from local, domestic justice to duties beyond states—let alone to global duties—is a persistent challenge, and perhaps *the* problem of global ethics and global justice.³ However, moving from the domestic to the global, despite the rhetoric, is particularly hard for rights. If one adopts rights then one has no option but to rely primarily on states and in so far as Gostin relies on rights this is exactly what he does. Thus, he states that "the assumption throughout this book has been that national governments bear primary responsibility for the health of their domestic populations, drawing on the support and assistance of the global community" [5, p. 431]. But it is exactly here where rights fail, and to date we have seen very little to suggest that relying on states will deliver global health justice. Thus, despite the global rhetoric, rights are profoundly limited: they attach to individuals and they are delivered by states.

That this is the case is uncomfortable, and in many ways ironic, given the impetus behind the human rights agenda to provide rights for all. The rhetoric of rights is profoundly global and many who work in global justice turn to human rights, to deliver all kinds of global goods. For example, in a parallel debate Simon Caney makes arguments for climate justice and the delivery of environmental goods on the grounds of human rights [3, 4]. Caney argues that climate change threatens rights to life, health and subsistence, and that these human rights are threshold rights for all, and thus climate change must be addressed. Gostin makes a similar move to Caney in taking human rights as a starting point, from which he argues that health goods should be delivered. As Gostin states "human rights are universally accepted. Virtually all states have ratified one or both foundational human rights treaties" [5, p. 243] and "all countries have ratified at least one treaty recognising the right to health" [5, p. 244]. Moreover, "human rights law's potential to improve health derives from its world-wide recognition, with near-universal adoption of its principal treaties, together with declarations, principles, and other nonbinding instruments" [5, p. 247]. It is this global standing of human rights which motivates Gostin's use of them. Like Caney and other global justice thinkers the apparent global acceptance of human rights is used as a starting point to ground shared global justice claims. But, while states have signed up to treaties and instruments which include some commitment to respecting the right to health, often all this means is health goods are part of the basket of goods which all human beings should ideally

³ Contemporary global ethicists try to move to the global in a number of ways, for instance, Simon Caney takes a human rights approach and Darrel Moellendorf adopts a broadly Rawlsian view [2, 9].

have access too. Understood in this way a commitment to such rights is regarded as aspirational rather than requiring concrete delivery. Broad rights, like the right to health, are not regarded, by the states who actually grant rights, as things which *have* to be granted to each and every citizen—like the right to vote is—and again there is nothing for non-citizens.⁴

Given the global rhetoric one understands why Gostin begins by asking “what are the essential services and goods guaranteed under the right to health?” [5, p. 18]. But, taken together, the individual nature of rights and the problems of moving from the domestic sphere, where rights are granted by states, to global conceptions speaks against using rights as a default language when making global justice claims. Further, while clearly there are intuitive advantages to using rights, particularly the global endorsement, this might be less of an advantage than it first appears, and this might be particularly the case when it comes to complex goods like health.

Political Critiques: Oppositional and Unsited to Complex Goods

Second, the way that rights function politically provides further reasons for questioning whether rights-talk is likely to result in buy-in from across sectors and jurisdictions which is needed if global health justice is to be a shared and prioritised goal. The two identified here are first that rights are oppositional and confrontational and second that they are more suited to single-issue politics than to delivering complex goods.

The first point, that rights are oppositional is particularly pertinent in an age of austerity when people are more reluctant to give goods to others, especially distant others, if they think this will leave them with less. This can be seen in the global rise of xenophobia and the demonising of migrants and the reduction of duties to non-citizens. To give some examples the changing Italian policy of *Mare Nostrum* (a humanitarian search and rescue policy) to *Triton* (essentially border protection) [1]; the visceral response to Obama’s proposed amnesty for illegal immigrants; the infamous Australian immigration policies, and the rise of anti-immigration political parties and social movements across Europe.⁵

The logic of rights is fundamentally oppositional. For one person to ‘win’ a right another person must ‘lose’ (and this is the case whether these are different rights or whether they are the same right held by different rights holders).⁶ This is certainly the assumption and logic in much of the debates about immigration where the debate is often couched in the terms of right versus right [10]. The rights of some individuals are presented as trumping the rights of others and it is assumed granting rights to one group of individuals will be at the expense of the rights of another group. Similarly, in health debates, the presumption is that if some people are given

⁴ The place of non-citizens is particularly problematic when it comes to those who are internally displaced, refugees or migrants [12].

⁵ For example, the rise of UK Independence party (UKIP) and movements such as Pegida, protesting against Islam and immigration in Germany, as well as worries about jobs and scarce state resources.

⁶ To illustrate, rights are oppositional whether it is two individual’s competing against each other for the recognition of their right to the same good, or whether it is competing different rights, for instance, between the right to privacy and the right to security.

rights to some treatment then this must be at the expense of others who will have to forgo some other treatment or procedure. Rights then—understood in this way (and this is the way that they are most often understood)—produce scenarios of conflict and opposition. You ‘win’ only if others ‘lose’.

That rights language is perceived—and has been used—in this way is understandable. Rights do provide a language where you can demand something from someone else—and this has been a strength for political campaigns. This is the second point. Rights talk is most effective when what needs to be granted is a change in status or behaviour—rather than the exchange of goods. For instance, when rights are granted by changes in law this works well, for instance, changes to who is allowed to vote or laws against gender or sexual discrimination. Also for single issues rights work well. To use one of Gostin’s examples, AIDS advocates made their stand on the grounds that ‘health is a right and not a privilege’ [5, p. 243], but what they were asserting was not a right to health in general, nor a communal right to health which Gostin envisages. But rather they were asking for a single good, simply for access to medication.⁷ Rights are less effective when it comes to complex goods and upstream goods: it is easier to grant a single good, such as a bed-net, than a malaria free environment (which would require improved sanitation, environment and infrastructure). This does not, of course, mean rights should not be used for these single issue campaigns, they should. When they are effective, and likely to galvanise a range of interests and actors behind the cause, then rights should be used. Clearly they have been used effectively for single issues or to attain simple goods. There are even times when appeals to complex rights can deliver single goods, like the right to health being successfully used to gain AIDS medication.

Rights are undeniably politically important and have been some of the most effective political tools for attaining goods and improving status. However, they are better for achieving and attaining some things than others, and in the current context of austerity, where resources are perceived as particularly scarce, rights-talk may fail to provide the political rallying cry that is necessary for political and social mobilisation. If this is correct—and rights are oppositional and not-suited to attaining communal and complex goods—then to attain goods such as global health, it might be clearer to avoid what can be confusing and oppositional rights-talk and overtly promote communal goods.

Advantages of Abandoning Rights-Talk

There are two advantages to abandoning rights-talk: first the language of shared goods erodes the false assumption that some individuals or groups can only benefit at the expense of others; and second, it provides self-interested reasons for action and may encourage mobilisation. To adopt a non-rights approach chimes with much of Gostin’s communal emphasis, for instance, that public health measures benefit all, and that all benefit from healthy populations. Moreover for Gostin rights are

⁷ Although as Gostin notes, the security paradigm was also important in global mobilisation against AIDS [5, p. 321].

only one way to make claims for global health, and he highlights two other approaches: “two other paradigms join the human rights framework in recognising global health as a shared responsibility, a partnership, and a priority that requires international cooperation: human security and global public goods” [5, p. 21]. Given this it is worth considering whether these two approaches, of global public goods and human security, could be relied on alone, or at least predominantly, rather than trying to redefine the right to health.

To explore this possibility let us consider Ebola as an case-study where the language of health security and global public goods might be more effective than the language of rights. Ebola has made politicians and the general public increasingly aware that health threats are global—and that granting health goods to distant others is not charity, but something precautionary and which benefits the giver. Such tactics fit with Gostin’s communal approach, namely that “the concept of health aid as charity must be jettisoned in favour of a justice-based commitment to mutual responsibility beyond state borders” [5, p. 18]. Indeed, Gostin frequently champions such an approach: in chapter 2 on health hazards he aims to “demonstrate the urgent need for collective global action to tackle the world’s most pressing health threats” [5, p. 32]; and in chapter 6, he describes the IHR as “arguably the most important global health treaty of the twenty-first century”, a treaty made “politically possible” by the advent of “frightening emerging infectious diseases, notably SARS and avian influenza” [5, p. 175]; and he emphasizes that, “health security is not only a public imperative, but a matter of social justice” [5, p. 360]. Infectious diseases are the most obvious global health threat—discussed throughout, including chapters 2, 4, 5, 6, 10 and 11—and lend themselves to arguments from global public goods and health security.⁸

In a case such as Ebola there are at least three groups of good which might follow if a global goods approach was adopted based on an appeal to human security and the shared vulnerability of all. First, global funding of some sort would be required to address global threats and Gostin has suggested an ‘International Health Systems Fund’ [6]. Of course this is but one possibility, others could also be devised, but what matters is a shift in rhetoric from ‘helping *them*’ to ‘helping *us*’. Second, some form of international capacity for surveillance is necessary. To adequately monitor one must have regular and up-to-date data, and to collect this one needs some basic health infrastructure. Again this is justified because it benefits all of *us*, and not just *them over there*. Indeed, pushed hard enough this might begin to look something like universal basic care as monitoring will only be effective if compliance is high and providing basic health goods is a good way to ensure compliance. Such infrastructure would also require a third good, that of healthcare workers appropriately spread globally which would challenge the current migration of healthcare workers (mostly) one way from the developing world to the developed world.

⁸ It should be noted, that Gostin critiques disease-focused responses, and health security approaches are in danger of collapsing into these. However, it should be possible to build public goods and security approaches which are not narrow and which deliver significant goods.

This basket of goods is potentially significant and goes some way towards global health justice. Moreover arguments made from these paradigms, of health security and global public goods, might have more global support than those which assert a right to health. Sadly, in the Ebola case claims that people in Guinea, Liberia and Sierra Leone have to a right to health failed motivate much action: It was the possibility of Ebola spreading to the developed world which resulted in significant action.

There are of course a number of problems with adopting an approach based on global public goods and health security. I will briefly gesture to just three of them. First even using these arguments it is hard to motivate action for complex and upstream goods, such as sanitation and health infrastructure. Life-saving though they may be, they do not have quite the same appeal as single and simple goods. Second, accusations of paternalism will no doubt be levelled at these non-individual approaches as communal approaches cannot be chosen individually but only collectively and must be enforced. However, in many spheres communal action is required for social living and often arguments which appeal to an exaggerated fear of paternalism ultimately collapse [11]. Even if the paternalist accusations are justified, the harm of such paternalism has to be weighed against the goods attained. In cases of significant health threats it is likely the communal goods will outweigh the individual harms of coercion. Third, this approach, at least at first pass, works less well for non-communicable diseases (NCDs). However, if Gostin is correct then NCDs are not quite as non-communicable as is often assumed. But, even so such diseases may have less prudential reasons for action—the protection of all by all—and the public goods and health security paradigms might work less well in some contexts. There are other criticisms, and the claim is not that this approach works better in all contexts indeed often it would be best to use a number of complementary approaches. The claim is just that if communal arguments are central to Gostin's work it may be best to focus on these explicitly rather than to invoke rights.

Conclusion

In conclusion, rights-talk might not be the best approach to deliver the complex goods of global health, or to motivate different actors to deliver these goods. Indeed, to invoke rights language, runs the risk of confusing the strong and clear claims of Gostin's communal understanding of global health and justice as it relies on redefining the right to health in way which is in tension with fundamental and underpinning assumptions about rights. However, abandoning rights-talk has little impact upon Gostin's project as his other two paradigms of global public goods and health security, provide a non-oppositional approach which appeals to shared and self-interested reasons for action. Moreover, if the health goods implied by such approaches are realised significant elements of global health justice will be attained.

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