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Mary Ann Torres*

I. INTRODUCTION

The human right to health has been part of the discourse on international law and public health since 1946, when the World Health Organization ("WHO") proclaimed that the enjoyment of the highest attainable standard of health is a fundamental human right. Numerous treaties and other international instruments subsequently developed the right to health in international law. The right to health has served as inspiration for global public health initiatives, such as WHO's Health for All effort launched in the late 1970s. Controversy has, however, plagued the development of the right to health as an international legal principle, raising the question whether the right to health serves as a guiding light for global public health policy in the twenty-first century.

Recent campaigns to increase access to essential drugs in developing countries, led by local and global non-governmental organizations ("NGOs"), have brought the human right to health back into the spotlight. Many of these campaigns have focused on increasing access in developing countries to antiretroviral ("ARV") therapies to treat HIV/AIDS. ARV therapies, such as Highly Active Anti-Retroviral Therapy ("HAART"), have helped developed countries treat HIV/AIDS and manage it as a chronic condition. These new therapies provide renewed hope for people living with HIV/AIDS ("PLWHAs") because they have proven effective, prolonged survival, reduced mortality, and improved quality of life. Unfortunately, over one-third of the

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world's population today does not have access to essential drugs,³ let alone access to expensive ARV therapies for the treatment of HIV/AIDS.⁴ In addition to activism at the global level, NGOs composed of and working with PLWHAs within individual countries have been mounting efforts to increase access to ARV therapies using arguments informed by the human right to health. These campaigns sometimes involve litigation in national courts in which PLWHAs argue that the government's failure to provide access to ARV therapies violates the right to health enshrined in international and national law. These national cases are important to the international legal discourse on the right to health because they often provide a window on how the right operates at the local level where disease and death ultimately take their toll.

In this article, I analyze the 1999 decision of the Venezuelan Supreme Court in the case of Cruz Bermúdez, et al v Ministerio de Sanidad y Asistencia Social,⁵ in which the Court held the government's failure to provide PLWHAs with access to ARV therapies violated their right to health.

Before analyzing the Bermúdez case, I briefly examine the international law concerning the right to health (Part II). This analysis focuses on specific problems that have made the right to health a difficult concept to define and implement effectively. These problems become central features of the Bermúdez case, as revealed by the status of the right to health in Venezuelan law and the arguments made by the PLWHAs and the government to the Venezuelan Supreme Court (Part III). The next part of the analysis considers the Venezuelan Supreme Court's decision and reasoning and its implications for discourse on the right to health in international law (Part IV). I conclude with general observations about how the Bermúdez case helps illuminate not only debates on the right to health in international law, but also on whether the right to health retains importance for global public health in the twenty-first century (Part V).

II. THE RIGHT TO HEALTH IN INTERNATIONAL LAW: A BRIEF OVERVIEW

A number of international legal instruments contain the right to health. One of the best known treaty provisions on the right to health is found in the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"). Under the ICESCR, states parties recognize the human right to enjoy the highest attainable standard of health and undertake to provide for such a standard through measures aimed at: (1) reducing the stillbirth rate and childhood mortality and promoting the development of children; (2) improving environmental and industrial hygiene; (3) preventing, treating, and controlling epidemic, endemic, and other diseases; and (4) creating the conditions for assuring medical services and attention to all. The right to health in the ICESCR is subject to the principle of progressive realization, found in Article 2.1:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The substantive scope of the right to health and the impact of the principle of progressive realization have been the subject of much debate and analysis that cannot be adequately summarized here. The major themes in this discourse have concerned (1) the scope and nature of the actions governments must take in connection with the right to health, and (2) how much the principle of progressive realization weakens government duties to take action to fulfill the right to health. For example, states parties to the ICESCR accept treaty obligations on a long list of rights, including the rights to an adequate standard of living (Article 11), health (Article 12), education (Articles 13–14), and to share in the benefits of scientific and technological progress (Article 15). For each of these rights, a state party is obliged to take steps to achieve progressively the full realization of the rights to the maximum of its available resources. The open-ended nature of these rights and the flexibility and discretion left to states under the principle of progressive realization create rights that are difficult to define and enforce under international law.

The weak monitoring system established under the ICESCR—self-reporting by states parties—further undermines efforts to clarify the meaning of economic, social, and cultural rights, such as the right to health. Under Article 16 of the ICESCR, states parties must "submit ... reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." States parties submit their reports to the Secretary-General of the United Nations, who

then transmits copies to the United Nations Economic and Social Council ("ECOSOC"). But the ICESCR gives ECOSOC little if any power to criticize or condemn what appears in these reports.

Confronted with the controversies surrounding the right to health, ECOSOC issued a General Comment in 2000 that contributed to the discourse on the meaning of the right within the ICESCR. The ECOSOC stated:

The right to health, like all human rights, imposes three types of obligations on States parties: the obligations to respect, protect, and fulfil. In turn, the obligation to respect contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

While this may provide a helpful framework for thinking about the right to health, ECOSOC’s interpretation of Article 12 still leaves open the question whether a state party is doing enough to fulfill the right to health in terms of legislative and especially budgetary measures. The principle of progressive realization allows governments to raise scarcity of resources as a legitimate reason for not fulfilling the right to health. Governments must make difficult decisions how to allocate limited public resources, and such budgetary decisions accord with the state’s duty to achieve progressively and over time the full realization of many different human rights. Further, the ICESCR leaves to states parties the determination of how public funds are allocated and what constitutes “the maximum of its available resources.” Neither ECOSOC nor any other international body has any power under the ICESCR to proclaim a state party in violation of its obligations under the right to health or to order more money be spent on health or different health policies be pursued. This reality has led some experts to argue that the right to health is not enforceable or justiciable at the international level, raising further questions about the meaning and effectiveness of this human right.

The absence of international case law on the right to health heightens the international legal importance of national cases brought pursuant to the right to health. National court decisions can inform international legal analysis in a number of ways. First, national court decisions involving treaty obligations could be said to constitute subsequent state practice under those treaties for the purpose of treaty

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8. ICESCR art 2(1) (cited in note 6).
interpretation. Second, national court decisions can be considered evidence of state practice and opinio juris for purposes of determining rules of customary international law. Third, as Article 38(1)(d) of the Statute of the International Court of Justice provides, national court decisions are subsidiary means for interpreting rules of international law.

The cases being brought by PLWHAs against various governments for failing to provide access to ARV therapies and thus violating the right to health constitute an important set of materials for international legal analysis of the right to health. My attention now turns to the Bermúdez case from Venezuela to explore the connections between this national court decision and international law on the right to health.

III. The Bermúdez Case: Legal Context and Arguments of the Parties

A. The Right to Health in Venezuelan Law

At the time the Bermúdez case came before the Venezuelan Supreme Court in 1999, the right to health found expression in Venezuelan law in two ways. First, Venezuela is a party to the ICESCR and thus accepted the obligations pursuant to Article 12. Under Venezuelan law, treaty duties such as those found in the ICESCR create obligations for the Venezuelan state that are directly enforceable by citizens against the government; and Venezuelans can invoke such obligations before courts and administrative authorities without the need for implementing legislation. Second, the Venezuelan Constitution contained a constitutional right to health. As

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9. Consider Vienna Convention on the Law of Treaties, art 31(3)(b), 1155 UNTS 331 (1969) (noting that "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is to be taken into account when interpreting a treaty.

10. The Constitution in force at the time of the Bermúdez case was the Constitution of 1961, which contained a provision providing that "[t]he enunciation of rights and guarantees contained in this Constitution must not be construed as a denial of others which, being inherent in the human person, are not expressly mentioned herein." Venezuelan Const Art 50 (1961) (Pan Am Union, trans). The Venezuelan Supreme Court held that this provision means that treaties protecting human rights have at least the same standing as the Constitution in Venezuelan law. See Andrés Velázquez, Corte Suprema de Justicia en Pleno, Sala Político Administrativa, Republica de Venezuela, Vol I 122 Gaceta Forense 166 (1983). The new Venezuelan Constitution, adopted in December 1999 after the Bermúdez case was decided, contains the same principle in Article 23:

"Treaties, pacts and covenants related to human rights, which have been subscribed to and ratified by Venezuela have constitutional hierarchy and have prevalence in the internal judicial order to the extent that they contain norms of scope and execution that are more favorable than those contained in the Constitution. These norms are of immediate application by the courts and by all the organs of public administration." Venezuelan Const Art 23 (1999).


"Everyone shall have the right to protection of his health. The authorities shall oversee the maintenance of public health and shall provide the means of prevention and attention..."
a result of both international and constitutional legal sources, the right to health found strong expression in Venezuelan law. Venezuela's legal system thus provided fertile ground for PLWHAs to challenge the government's failure to provide better access to ARV therapies.12

B. ARGUMENTS OF THE PARTIES

The plaintiffs in this case argued that the Venezuelan government violated their rights to life, health, and access to scientific advances under Venezuelan law by failing to provide them with ARV therapies. The plaintiffs utilized the growing scientific and public health evidence that ARV therapies, if provided, would enable them to live longer and perhaps allow them to benefit from a cure should one arise in the future. The plaintiffs asked the Venezuelan Supreme Court to order the Ministry of Health to remedy these violations of their human rights by (1) providing periodically and regularly all medicines necessary, including ARV therapies and drugs for opportunistic infections, to PLWHAs in Venezuela; (2) covering the expenses of PLWHAs for blood tests needed to monitor the disease and the effect of the medications; and (3) developing and funding policies and programs to provide medical treatment and assistance for PLWHAs in Venezuela.

The Ministry of Health rejected the accusation that the government violated the plaintiffs' rights to life, health, and access to scientific advances protected under Venezuelan law. The Ministry's main defense rested on economics: the government could not pay for ARV therapy and related medicines for all Venezuelan PLWHAs because such expenses would be impossible to sustain. The Ministry pointed to programs on HIV/AIDS prevention it had started (for example, distributing informational booklets and condoms and implementing a "safe sex" initiative) as evidence that it was fulfilling its obligations toward health under Venezuelan law given its financial constraints.

The Ministry of Health's arguments about the financial difficulties of increasing access to ARV therapies dovetail with arguments governments frequently use in

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12. The Bermúdez case was not the first "right to health" case filed by Venezuelan PLWHAs seeking access to ARV therapies. In NA, et al v Ministerio de Sanidad y Asistencia Social, the Venezuelan Supreme Court held in 1998 that the Ministry of Health violated the rights to health and life of twenty-three HIV positive plaintiffs by not providing them with ARV therapy. See NA, et al v Ministerio de Sanidad y Asistencia Social (Ministry of Health), Sala Político Administrativa, Corte Suprema de Justicia, Republica de Venezuela, Expediente numero: 14.625 (1998), available online at <http://www.csj.gov.ve/sentencias/SPA/SPA14081998-14625.html> (visited Mar 24, 2002). This decision, however, only benefited the twenty-three plaintiffs and not other HIV positive persons in Venezuela because such constitutional actions (acción de amparo) did not affect persons beyond the parties to the dispute. The Bermúdez case changes this feature of Venezuelan constitutional law.
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connection with questions about their commitment to the right to health under international law. Under the ICESCR, the right to health is to be achieved progressively; and the determination about how resources are allocated in this progressive project is left to the responsible government. The Ministry of Health in the Bermúdez case argued that it was progressively achieving improvements in connection with HIV/AIDS under the budget constraints it faced as a health ministry in a developing country.

The Ministry’s arguments echo much of what experts have faced in dealing with the HIV/AIDS pandemic since the 1980s. This pandemic highlights the problems that economic, social, and cultural rights confront as elements of contemporary international law. Inadequate financial resources, unequal and uneven economic development, poverty, social injustice, and other problems endemic in the developing world have fueled the HIV/AIDS pandemic and severely constrain what developing-country governments can do to respect, protect, and fulfill the right to health.

IV. THE BERMÚDEZ CASE: DECISION OF THE VENEZUELAN SUPREME COURT

Although the plaintiffs raised claims under the rights to life, health, and access to scientific advances, the Venezuelan Supreme Court focused its opinion on the right to health. Venezuelan law contained strong expressions of the right to health in both constitutional law and international legal obligations accepted by Venezuela. In examining the right to health arguments, the Court noted that

HIV positive people and people with AIDS, as human beings, are also protected by international law. This Court has taken such international legal principles into account by collecting data about the most current and relevant cases and decisions from the entities that have faced the situation of people with HIV/AIDS before. Unfortunately, the Court failed to provide any specifics regarding what international legal instruments, international legal principles, cases, or decisions it actually consulted in evaluating the right to health arguments of the parties. Presumably, the Court consulted the ICESCR because Venezuela is a state party, triggering directly enforceable rights for Venezuelans under Article 12’s right to health provisions. The Court’s decision reads as if constitutional law were the more important source for the right to health analysis, but the Venezuelan Constitution incorporates international legal norms directly into the national legal system, thus producing a seamless legal commitment to the right to health for purposes of the Bermúdez case. The Court noted that the right to health was protected by Article 76 of the Venezuelan Constitution and international human rights instruments related to this constitutional provision. Its holding in the Bermúdez case is, thus, important as an interpretation for both Venezuelan constitutional law and Venezuelan state practice under international law on the right to health, specifically under the ICESCR.

The Court observed that, based on the evidence presented by the parties, the Ministry of Health was not complying with its duty under the right to health, the
The immediate consequence of which was to place the lives of the plaintiffs at risk. The Court noted, however, that the non-compliance by the Ministry of Health was not intentional but resulted from its lack of financial resources: “the budgetary capacities of the [Ministry] have been insufficient to fulfill the duty to assist the HIV/AIDS patients.” The Court also refers to the Ministry of Health confronting difficult financial situations at a moment Venezuela was facing an economic crisis. As the Court succinctly stated, “everything is reduced to a budgetary problem.”

Despite these serious constraints on the Ministry of Health, the Court held that the government violated the plaintiffs’ right to health. To reconcile the plaintiffs’ need for treatment and the Ministry’s budgetary dilemma, the Court argued that the Ministry had available mechanisms under Venezuelan law through which it could seek additional funds for the purpose of dealing with the medical requirements of PLWHAs. The Ministry’s failure to utilize these mechanisms contributed to the Court’s sense that the Ministry’s actions constituted a violation of the right to health.

The Court dramatically expanded the scope of its right to health holding when it reversed prior constitutional jurisprudence on similar constitutional appeals by declaring that its holding applied not only to the plaintiffs before the Court but also to all PLWHAs in Venezuela. This ruling meant that the right to health, as interpreted by the Court, had the broadest possible application in Venezuela, giving every HIV positive person in the country the right to access ARV therapies. While this decision made the right to health in connection with ARV therapies a universal right in Venezuela, the holding also significantly increased the budgetary challenge facing the Ministry of Health.

In the concluding sections of its opinion, the Court ordered the Ministry of Health, among other things, to (1) request immediately from the President the needed funds for HIV/AIDS prevention and control for the remaining fiscal year and an increase in budgetary allocations for future needs and (2) provide ARV therapies and associated medicines to any PLWHAs in Venezuela. “All Venezuelan governmental authorities,” the Court concluded, “have to comply immediately with the decision in this constitutional appeal of protection, or they will be in violation of this decision and the constitutional rights it upholds.”

V. CONCLUSION: IMPLICATIONS OF THE BERMÚDEZ CASE FOR THE RIGHT TO HEALTH IN INTERNATIONAL LAW

The Bermúdez case is important to discourse on the right to health in international law for a number of reasons that relate to both substantive and procedural issues. Substantively, the most striking aspect of the Court’s decision is the Court’s refusal to accept the Ministry of Health’s plea of poverty as a valid justification for the government’s failure to provide access to ARV therapies. A perennial difficulty with the substance of the right to health in international law has been the ability of governments to argue that their lack of financial resources means
that they are not in violation of the right to health because only progressive realization is required under international law. This dynamic has eroded the duty to fulfill the right to health—to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards its full realization—because progressive realization rendered the right to health relative to a country's level of economic development and a government's willingness to spend resources on health. The Court held, however, that the legislative, budgetary, and administrative steps taken by the government in connection with the HIV/AIDS problem in Venezuela were not acceptable under its reading of the right to health.

The ability to challenge countries' decisions on health spending and policy under the right to health in international law is something proponents of the right have desired for a long time. Efforts to blunt the erosion of the principle of progressive realization include arguments that the right to health contains a minimum core that includes the provision of essential drugs not subject to the progressive realization principle. The Bermúdez case does not purport to create an irreducible minimum core for the right to health in Venezuela, but it stands as evidence that tolerance for the plea of poverty from governments may be shrinking in countries beset by worsening public health problems that the government refuses to confront adequately. One case from one country certainly does not constitute a seismic shift in state practice for purposes of treaty interpretation or the formation of customary international law; but other countries, notably South Africa, are also experiencing mounting frustrations with government failure to properly address the problems of HIV/AIDS and access to treatment.

Procedurally, the Bermúdez case is important for international law because it represents yet another example of the important role NGOs play in contemporary international law. Scholars and policymakers have focused much attention on the growing role NGOs play in creating and monitoring international law at the global level. The Bermúdez case illustrates that such NGO activism in connection with human rights norms is also vital at the national and local level. This case may also suggest that, in connection with the human right to health, such national and local activism by the NGO community offers more potential than NGO action on the right to health at the global level. No international institution has ever been in a position to expose Venezuela's inadequate HIV/AIDS policies as the NGOs and PLWHAs that brought the Bermúdez case were able to do. The public health cliché

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13. See, for example, Brigit C.A. Toebes, The Right to Health as a Human Right in International Law 283–84 (Intersentia 1999).

14. See, for example, Treatment Action Campaign et al v Minister of Health et al, Transvaal Provincial Division of the High Court of South Africa, Case No 21182/2001 (Dec 14, 2001) (holding the South African federal and provincial governments to be in violation of the right to health guaranteed by the South African Constitution for limiting the distribution of, and access to, ARV therapy to prevent mother-to-child transmission of HIV).
that all disease is local also resonates with the notion of transforming the right to health from rhetoric to reality because ultimately the right has to be enjoyed locally.

The Bermúdez case is also important for international law because it reaffirms the important role that the right to health can play in the overall public health discourse. Trends in global public health appear to be moving away from a rights-based approach to health concerns (for example, the Health for All campaign) toward a more economics-based, utilitarian paradigm that seeks to improve health because it contributes to more worker productivity and faster rates of economic development (for example, the Commission on Macroeconomics and Health). The framing of the access to treatment issue as a human rights concern in the Bermúdez case is perhaps more important today than it was just three years ago.

Connecting access to treatment to human rights concepts also remains critical because of another lesson of the Bermúdez case, the enormous distance the human right to health still must travel in many countries around the world. Despite the Venezuelan Supreme Court’s holding in the Bermúdez case, the Venezuelan government has done little to nothing to improve the access to ARV therapies for PLWHAs. Most of the Venezuelan government is—in the words of the Court—“in violation of this decision and the constitutional rights it upholds.” The Bermúdez case notwithstanding, health as a human right still has not penetrated Venezuelan political and popular culture. The reality that the Venezuelan government ignores the Court’s ruling in the Bermúdez case with impunity only contributes to the widespread perception that the right to health is symbolic rather than vital to the life of the nation. NGO activism is important; but, as public health experts know, the active and intelligent participation of the government is critical to improving a population’s health, especially in the face of disease threats such as HIV/AIDS. The sustained lack of government commitment to health as a human right produces a conspiracy of silence that hides the fatal threat of AIDS and other diseases from innocent and vulnerable people.