

Book Review

Global Health Law, Lawrence O. Gostin (Harvard University Press, Cambridge, MA, USA), 2014, 560 pp., \$55.

Professor Lawrence Gostin sets forth a noble ideal – global health justice achieved through global health governance and global health law – in his latest tome, *Global Health Law*. As presented here, Gostin’s vision for the world is essentially an extended sermon about the utopia to which good people and, more importantly, good countries (in other words, those who agree with the author’s normative paradigm) should aspire. In this brief review, I examine Gostin’s vision through a critical lens, wondering about such questions as: Are the lofty theoretical constructs of health justice, health governance, and global health law even real things? Can they actually be achieved? Can they be achieved through the means that Gostin advocates? Are there better, alternative ways to improve the health and lives (two distinct concepts that Gostin conflates in his “everything is health” heuristic) of the intended beneficiaries of health justice?

From his prestigious perch as the Founding O’Neill Chair in Global Health Law at Georgetown University (USA), Professor Gostin has published prolifically in this sphere and *Global Health Law* is in essence an expanded compilation of those other writings [2]. The author graciously acknowledges (p. 521) the invaluable production role of his fleet of O’Neill Institute Fellows, explaining, “They researched, wrote, edited, and conceptualized the book from the onset and throughout. They are the ones who provided the intellectual firepower that fueled the ideas and the prose in this book.”

The strikingly immodest goal of this book is “to define the field” (p. xvi) of global health law for an audience of “scholars, practitioners, and passionate advocates” (p. xv). The social justice action model argued for consists of multiple, related components that collectively, ultimately compel a conclusion that the international community has a moral and political obligation—not just a charitable opportunity—to assure that every human being is able “to achieve the highest attainable standard of physical and mental health” possible (p. xii). Gostin enunciates his conception of the role of law in this schema in terms that are unbounded, bordering perhaps on grandiose:

Each global health problem is shaped by law’s language of rights, duties, and rules of engagement, such as setting high standards, monitoring progress, and ensuring compliance. It is only through law that individuals and populations can claim entitlements to health services, and that corresponding state obligations can be established and enforced. And it is through law that norms can be set, fragmented activities coordinated, and good governance (e.g., transparency, stewardship, participation, accountability) ensured. (p. 18)

For Gostin, there is today fundamental unfairness in the distribution of three main global health threats: infectious diseases, noncommunicable diseases (that is, chronic adverse health conditions), and injuries.

He claims that the chief impediments to health equity for the world's population are the forces of globalization, capitalism and competitive markets leading to economic growth, liberalized trade policies (p. 270), and the international migration of health workers (Chapter 11). Consequently, he intones, the free marketplace cannot be depended upon to assure the positive human right of health, and indeed for him the private economic interests of corporations and individuals almost always work in the opposite direction. What is needed instead, in his estimation, is global governance—"the method by which organized society directs, influences, and coordinates public and private activities to achieve collective goods" (p. xii). Since organized society will not behave nicely on its own, coercion of recalcitrant national governments (not to mention private actors) to redistribute resources in a manner that best promotes public health, maximizes the positive and minimizes the negative social determinants of health, and supplies direct health services to specific patients is necessary.

That is where global health law comes into play, encompassing as it does "international instruments that shape norms, processes, and institutions" (p. xii) aimed at the health justice target. As promoted in this book, global health law and global health governance amount primarily to a mechanism for imposing a version of Wilsonian idealistic internationalism [7] in the health context (which really translates into transnational collectivism in all matters under a "health in all policies or HiAP" worldview (p.xiv)) that effectively skirts around the perceived inconveniences and frustrations of national sovereignty.

The problem is that, in his global solidarity zealotry, Gostin's occasional perfunctory nods to real, serious reasons for cautiousness are entirely too weak. There do exist obstacles that are powerful antagonists to the Pollyannish [5] posturing that often ends up serving poorly the tangible interests of the purported beneficiaries of global health law theory. Several particular real world impediments to the idyllic universe portrayed by the author are worthy of discussion.

One basic concern is the conceptual imprecision that clouds efforts from the outset.

A foundational problem with the development of global health law competencies has been establishing a standard definition and conception of the field. One prominent legal scholar notes that the term 'global health law' is currently used in diverse ways, and settling on a definition is complicated by the fact that there 'is not a body of global health law distinct from national and international law' that affects public health. Another scholar in the field declared that, in its broadest definition, global health law includes all international legal regimes relevant to public health and construed more narrowly, incorporates only those international legal regimes specifically designed to address health threats [9, p. 908, internal references omitted].

However the "health" part of global health law is defined, the "law" aspect of the remaining concept is just as imprecise. Gostin notes the vital distinction between "hard" and "soft" international law, but is less than happy with that distinction (pp. 65–68). "Hard" international law, comprised of treaties that individual countries have formally ratified and therefore agreed to be bound by, is the only type of international activity that properly deserves to be classified as "law." By contrast, everything else (for example, Framework Conventions, Statements, Resolutions, Declarations, Charters, Covenants, and the like) is "soft" international law; this sort of stuff may serve some aspirational and inspirational purpose, but it is not "law" in any meaningful (which is to say, enforceable) sense of the word. Nonbinding instruments and approaches to global health governance offer the advantage of more flexibility than ratified legal treaties, but at a steep cost in terms of legitimacy and hence practical significance [12]. Even Gostin tempers his enthusiasm for the power of international law with the reluctant observation, "The rights and obligations contained in international law cannot be fulfilled without robust domestic implementation through legal, policy, and economic reforms." (p. 71) Put another way, "If global health

treaties fail to gain traction in the hierarchy of international law, then other regimes could effectively eviscerate their impact.” (p. 295).

Gostin’s supreme confidence in the efficacy of collective international action, preferably organized and carried out through the World Health Organization (to which he devotes Chapter 4 and much more), overlooks the sometimes disappointing or even tragic results of normative central state planning (under the guise of “allocation”) efforts in related areas of human rights in the historical past [11]. The courts, on whom Gostin rests a lot of his expectations, have an especially negative track record in running large social welfare operations [8].

Neither is the author’s enthusiasm constrained in any manner by serious acknowledgement of the strong modern global forces of nationalism and national sovereignty [6]. Isn’t expecting individual countries to sacrifice a big share of their legal autonomy the antithesis of representative democracy, under which a nation’s elected leaders ought to be answerable to the will of their own populace rather than the self-interested preferences of other countries that may have a much worse record regarding human rights violations of their own people? It is eminently understandable that countries will cooperate in international initiatives, particularly to promote human rights, when but only when it is in their own interests to do so. If we cannot trust the moral commitment and resource dedication of individual countries to adequately achieve human rights goals (and such distrust by Gostin seems apparent), how could we reasonably put our faith in international bodies that exist, after all, only through the membership of precisely those individual governments that were deemed untrustworthy in the first place? Should we expect or desire well-intentioned states to relinquish any portion of their national sovereignty to join forces with politically and socially corrupt states that belie their own propaganda by ignoring or even brutalizing their own citizenry?

Gostin’s conception of global health law squarely places the obligation for assuring affirmative human rights (encompassing social, economic, and cultural entitlements for everyone) on individual governments. He and his disciples [10] distinguish governments’ human rights duties to provide goods and services to their people from governments’ more limited role in protecting the individuals’ mere political or civil rights. In progressing from the abstract to the concrete, the shortcoming in Gostin’s repeated refrain about the expansive responsibilities of national governments to positively assure health equity for their own, and frequently other, people lies in his failure to acknowledge that “states” are not independent, disembodied magical entities with lives (and unlimited resources) of their own. They are not divorced from the flesh-and-blood citizens who must be imposed upon to pay for their state’s laudatory undertakings. The impact on those citizens, in the form of the personal contributions they would need to make in order to provide the necessary support, of simply assigning more and more obligations to states is significant, but almost ignored in Gostin’s enthusiasm for government as the preeminent beacon of health justice light. To the extent that he pays attention at all to the contributions of individuals demanded by his vision of global justice (that is, resource redistribution), Gostin justifies imposing those contributions by taking an antagonistic stance toward economic or property rights generally (and even more so toward intellectual property rights (Chapter 9)). He is highly critical of the World Trade Organization (WTO) economic development agenda, proposing the eternal vigilance of the WHO as a counterbalance (p. 301). While it may be fashionable in certain popular contemporary academic circles to sweep under the rug the negative economic and behavioral ramifications of forced resource redistribution [1], especially when health promotion is the justification, excluding the business and taxpayer sectors of society from the discussion table risks perpetuating an intellectual echo chamber and jeopardizing the eventual practical success of the global justice endeavor.

As exemplified by the author’s proclivity to turn to government for solutions to longstanding (far predated the modern *bête noirs* of globalization and economic growth [3], liberal trade policies, and

workforce migration) failures in population health, Gostin's recommendations all fall on the supply side of the equation. Without in any way diminishing the importance of trying to maximize public health interventions, direct health services, and positive social determinants of health, supply side inputs do not define the whole story. Even in parts of the developing world with severe resource constraints, it should not be considered "blaming the victim" to suggest that individuals retain a degree (albeit incomplete) of personal autonomy, and hence responsibility, for their own actions. For example, there is extensive discussion in *Global Health Law*, as well as elsewhere in the human rights literature [4], about domestic and international law's role in regulating the tobacco industry. However, *Global Health Law* devotes not a single word to individual choice about whether or not to consume tobacco products. The terms "Personal," "Individual," "Choice," and "Responsibility" are all missing from the book's densely packed, 17-page Index. It is by summarily dismissing any possibility for personal behavioral control and moral agency because one's choices are socially and culturally influenced (p. 392–393) that really but erroneously patronizes those in jeopardy as totally helpless victims of circumstances. A limited menu does not equal no choice, or responsibility, at all.

In sum, *Global Health Law* presents the most comprehensive and articulate explication available of the very attractive global health justice/global governance/global health law paradigm approach to morally intolerable, but thus far intractable, health status inequities around the world. The reader will have to determine whether conflating individual nations' responsibility for their own people, international cooperation, and global governance is likely to be the most efficacious strategy to alleviate the problems animating the more-than-ambitious systemic blueprint orchestrated by Professor Gostin and his followers. By now, we should have learned our lesson from misadventures in other contexts that developed countries ought to exercise utmost restraint concerning self-annointment followed by swooping in and imperially telling less-developed countries, as though they were our colonies, how they ought to live righteously and treat their own citizens. By the same token, reason for caution is not an excuse for complacency, let alone apathy. I join with Professor Gostin in urging that we be prepared to constructively and ambitiously, but realistically, assist those countries with honest governance structures and systems ("robust democracies," p. 415) who evidence sincere concern about improving the quality of their citizens' well-being.

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