COMMON BUT DIFFERENTIATED RESPONSIBILITY

In Global health

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Is there a Case for “Common but Differentiated Responsibility” in Global Health?

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Should all countries have equal responsibility to prepare, respond and fight health emergencies? This paper argues that it is critical for countries to have “common but differentiated responsibilities” (CBDR) to address global health emergencies, like the one precipitated by the COVID-19 pandemic.

World Health Organisation (WHO) has mandated an Intergovernmental Negotiating Body (INB) to develop a new legally binding instrument under the WHO Constitution for pandemic prevention, preparedness and response - now referred as a pandemic accord. While Member States are deliberating on many issues, a proposal to incorporate the principle of CBDR into the pandemic accord has brought on a contentious debate between developed and developing countries. The principle of CBDR recognises historical and present inequalities between developed and developing countries and acknowledges differentiated responsibilities among countries to address global challenges depending on their capacities.

This essay maps out the origin and the development of the principle of CBDR in the international legal framework, and how this has featured in the current negotiations. The essay also discusses the feasibility and possibility of incorporating the principle of CBDR under the global health law, as articulated by experts.

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1. The principle of CBDR

The concept of CBDR formally evolved as a principle in international environmental and climate change law after it was first embedded in the United Nations Conference on Environment and Development (UNCED) 30 years ago in 1992. The UNCED, under Principle 7, states that *"... In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities ...*". The principle of CBDR was then operationalised in Article 3 of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which entered into force in 1994 with near-universal membership. Article 3.1 of UNFCCC asserts "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities*". In sum, the principle of CBDR requires that the States, while striking to achieve a common goal, undertake different obligations contingent on their socio-economic capacities and proportionate to their historical contribution. The principle was reaffirmed in the 1997 Kyoto Protocol, the first protocol of the UNFCCC.

However, the United States of America refused to ratify the protocol and sought to dilute the principle with the argument that large emerging economies like Brazil, China and India had acquired equal capability but had not been obliged to respond. Nevertheless, the principle was strongly reiterated in several substantive provisions of the 2015 Paris Agreement, the second protocol to the UNFCCC, following tough negotiations between developed and developing countries.

The incorporation of the principle of CBDR in the UNFCCC marked a turning point in global environmental governance, as for the first time, a political consensus was reached between developed and developing countries.

Developed countries admitted their historical responsibilities, and agreed to assume higher obligations to combat environmental and climate change challenges. The notion of CBDR, an outcome "from the application of equity in general international law", has emerged as a guiding principle of international cooperation and solidarity and become the bedrock of most Multilateral Environmental Agreements. Although the principle of CBDR has gone through considerable upheavals, the principle has been progressively recognised in the international legal framework.

The principle of CBDR has two elements, i.e. "common responsibility" and "differentiated responsibility". The notion of "common responsibility" evolves from the concept of 'common heritage' and 'common concern of humankind'. Whereas the idea of "differentiated responsibility", which remains highly contested in global negotiations, aims to address the issue of substantive equality. The philosophical rationale for the CBDR principle rests in Aristotle's idea of equity which provides that equals should be treated equally and unequals unequally. Thus, the principle of CBDR most closely relates to the theoretical concepts of 'equality', 'equity', 'justice' and 'fairness'.

The principle of CBDR has been adopted beyond international environmental and climate change laws. It also features in the World Trade Organisation (WTO) Agreements; its essence is highlighted in the United Nations

Convention on the Law of Seas (UNCLOS) and the WHO Framework Convention on Tobacco Control (Tobacco Convention).

In the WTO Agreements, the principle of CBDR is referred to in the "special and differential treatment" provisions which confer developing countries special rights, including flexibility of commitments, technical assistance etc.

In the UNCLOS, it is embodied in Articles 203 and 278, which obliges international organisations to give preferences in funding and other assistance, and to facilitate cooperation on developing and transferring marine technology to developing countries, respectively. The principle of CBDR is also reflected in the Tobacco Convention, which under several provisions (Articles 4-21, 22.1, 26.2, 26.3 and 26.4), set forward common obligations and differential responsibilities, requiring developed countries to provide financial and technical assistance for the economic transition of tobacco growers and workers in developing countries.

2. CBDR in current Global Health Negotiations

The proposal to include the principle of CBDR in the new pandemic accord has divided countries in the currently ongoing negotiations.

On July 13, 2022, the INB presented a working draft (A/INB/2/3) for the negotiation between WHO Member States. The working draft under Article 4, paragraph 9 provided the principle of CBDR. However, the draft does not use the phrase "common but differentiated responsibilities and respective capabilities" as prescribed in the UNFCCC. Instead, it introduced a new terminology: "shared but differentiated responsibilities and respective capabilities". The INB working draft omitted the words "common" and "respective" from the principle of CBDR, creating profound implications for developing countries. Article 4 paragraph 9 explains the principle of "shared but differentiated responsibilities and respective capabilities" as follows:

"*Full consideration and prioritisation are required of the specific needs and special circumstances of developing country Parties, especially those that (i) are particularly vulnerable to adverse effects of pandemics; (ii) do not have*

adequate conditions to respond to pandemics; and (iii) would have to bear a disproportionate or abnormal burden".

During the second INB meeting held in July 2022, developing countries asserted the necessity to incorporate the principle of CBDR in the working draft to ensure global equity in health and to strengthen pandemic preparedness and response. However, developed countries countered the proposal on the ground that the CBDR is not a recognised principle in the international legal framework on health and that such objectives can be incorporated in the provisos of the new instrument without conscripting the principle of CBDR.

During the meeting, Monaco stated that the principle of CBDR in the draft text "is already covered under the principles of equity and international solidarity". It asserted that the principle might not be appropriate in the context of pandemic governance. New Zealand cautioned against drawing principles – like the concept of CBDR – from other agreements, as they would be less relevant and helpful in the current context. United States maintained that the principle of CBDR is "not a recognised principle in global health and strongly recommend we not import such potential decisive concepts that are not proven effective in mobilising action". The European Union stated that incorporating the concept of CBDR in a lock, stock and barrel approach is not convincing and needs reflection. The United Kingdom argued that the CBDR approach would not steer the INB to consensus, and Australia proposed the need to consider if the principle of CBDR is appropriate to be adopted in the context of an instrument on pandemic preparedness and response.

On the other hand, Brazil, while referring to the pandemic experience, pointed to "how in some places, there are stockpiles of vaccines while in other places they don't have a bare minimum to start vaccinating the population. This gives a simple example and idea of what we mean when we mention the issue of 'shared but differentiated responsibilities'". Paraguay asserted that it is important to "differentiate between responsibilities for the pandemic and responsibilities for the response to the pandemic".

On the principle of CBDR, Bangladesh strongly affirmed that "in our understanding, CBDR must be an integral component of the instrument – as a matter of fact, [it is] the most important element for the developing countries like Bangladesh" and added that "if developed countries are not able to include CBDR because of their constraints, then developing countries like Bangladesh would be constrained to implement [the] One Health Approach because of their capacity and resource limitations". Bangladesh had also remarked that the principle of CBDR has been erroneously placed as "shared but differentiated responsibilities and respective capabilities" and appealed the INB Bureau to correct this.

Namibia, while endorsing the statement made by Kenya on behalf of the African region, further stressed that "it believes achieving true equity would require explicit acknowledgement of the principle of common but differentiated responsibilities. We also emphasised that this principle includes taking measures to ensure that the pharmaceutical sector contributes fully to the global effort by sharing intellectual property, transferring technology to developing countries and sharing monetary benefits to support pandemic preparedness, surveillance, and rapid response capacity".

During the third INB meeting held in December 2022, the Members States participating in the deliberations sought further examination of the principle of CBDR. For example, Brazil pointed out that the path to the One Health Approach ran through the principle of CBDR. Similarly, Bangladesh submitted that the approaches based on CBDR, and access and benefit-sharing are critical to support the developing countries in raising requisite funds and domestic resources for pandemic preparedness and response.

On February 1, 2023, the INB Bureau released the Zero Draft of the WHO CA+ (A/INB/4/3) (Zero Draft) for consideration of the INB at its fourth meeting and presented the principle of CBDR in a new language under Article 4, paragraph 8. It is pertinent to note that, like the other provisions of the Zero Draft, the provision on the principle of CBDR does not distinguish between developed and developing countries; instead, it assumes all WHO members have equivalent economic competence and technological capacity. Article 4, paragraph 8 states the principle of CBDR as follows:

"*All States are responsible for the health of their people, including pandemic prevention, preparedness, response and recovery, and previous pandemics have demonstrated that no one is safe until everyone is safe. Given that the health of all peoples is dependent on the fullest cooperation of individuals and States, all Parties are bound by the obligations of the WHO CA+. States that hold more resources relevant to pandemics, including pandemic-related products and manufacturing capacity, should bear, where appropriate, a commensurate degree of differentiated responsibility with regard to global pandemic prevention, preparedness, response and recovery. With the aim of supporting every Party to achieve the highest level of proven and sustained capacity, full consideration and prioritization are required of the specific needs and special circumstances of developing country Parties, especially those that (i) are particularly vulnerable to adverse effects of pandemics; (ii) do not have adequate capacities to respond to pandemics; and (iii) potentially bear a disproportionately high burden*".

During the fourth INB meeting held in February 2023, while contesting the principle of CBDR in the pandemic accord, Japan asserted, "CBDR has no place in the context of pandemic preparedness, prevention and response. Was not COVID-19 a reminder to the whole world to work together?" The United States, continuing its opposition to the principle of CBDR, stated, "This concept is not appropriate in the context of pandemic preparedness, prevention and response. We look forward to seeking common ground to best ensure universal application, while also ensuring capacities are strengthened so that countries can meet their obligations". However, India extending support to the principle of CBDR noted that "The principle of common but differentiated responsibilities underpins the principles of equity in the draft. The capabilities gap of certain Member States which are constrained by limited resources needs to be effectively and equitably addressed".

3. CBDR in Global Health Law

The COVID-19 pandemic shattered health systems worldwide and caught the global health governance bodies dangerously unprepared to prevent and respond to the pandemic equitably. The health crisis precipitated by the COVID-19 pandemic was further aggravated due to a lack of global solidarity and cooperation that impacted the effectiveness of a coordinated

response globally. A key example of the disjointed global response to the pandemic is vaccine inequity: glaring disparities in global access and distribution of the COVID-19 vaccines. The unprecedented health crisis that appeared to have been precipitated by the pandemic was, only waiting to happen. The pandemic simply shed light on the challenges and glaring gaps in global health.

Global health governance and legal frameworks are a complex and multifaceted field that require careful consideration of various factors, including social determinants, economic inequalities and geopolitical power dynamics. The principle of CBDR offers a critical approach to navigating these complexities in global health matters. The principle of CBDR would be a tool to address global health inequities by recognising different levels of responsibility and capacity among countries to address common challenges and promote a more collaborative and equitable approach to global health governance. Therefore, it would be relevant in addressing shared global health challenges.

In the ongoing INB negotiations for a new pandemic accord, member states are deliberating on whether to include the principle of CBDR as a foundational principle to guide future actions for preparing and addressing future health emergencies. While developing countries support the inclusion of the principle of the CBDR in the new global health accord, the developed countries (as discussed above) oppose this principle. They have registered their apprehensions which can be summed up as follows:

- the concept of CBDR is a principle in environment and climate change law, it is not familiar in global health law, and

- the principle of CBDR would be ineffective in addressing public health emergencies.

3.1. CBDR beyond the environment and climate change law, for "common responsibility"

The opponents of the concept of CBDR in global health argue that the principle may not be applicable in the context of a pandemic, as it is

primarily intended to address climate change and environmental issues. This is a superficial argument, in our view.

The principle of CBDR is valued as a norm and has been put into practice in multiple international instruments, beyond the environment and climate change regime. For example, the principle of CBDR (as discussed earlier) can be found in the WTO Agreements in the form of "special and differential treatment" provisions, its spirit is drawn in Articles 203 and 278 of the UNCLOS, and most importantly, the principle of CBDR is also reflected in global health law in the form of differential treatment obligations under Article 4.6 (technical and financial assistance), Article 22.1 (cooperation to strengthen capacity), Article 26.3 (funding) and Article 26.5(a) (use of public and private financial and technical resources) of the Tobacco Convention.

The principle of CBDR recognises a common responsibility towards addressing a challenge posed by a common concern to humankind. At an event organized recently by Third World Network, Matiangai Sirleaf asserted that "there is no reason why this responsibility [CBDR] should only need to apply to environmental resources. The idea is that, where resources are shared, like global public health … it is subject to common legal interest". Under the UNFCCC, environmental and climate change issues are considered a common concern for all humanity, and thus, it recognises the shared responsibility of all States to address climate change. Similarly, like the environment, public health – more specifically, health emergencies like the COVID-19 pandemic – is a common concern. Therefore, all States are responsible for cooperating in addressing the global health challenges for the common good. Moreover, the transboundary nature of the COVID-19 pandemic specified that preparedness and response to public health emergencies are common responsibilities of all States. Thus, the principle of CBDR strengthens the rule of "common responsibility" in global health law.

3.2. CBDR for addressing health emergencies through differentiated responsibilities

A global health emergency declared by WHO constitutes a common threat that triggers the WHO Member States' duty to cooperate in addressing such threats for the common good. However, all WHO Member States do not have

equal capabilities and resources due to underlying economic and technological disparities; therefore, their contribution towards preparation and response differs given their respective needs and capacities.

Lawrence O Gostin et al., in a 2021 report, revealed that about "two-thirds of countries do not have IHR core health systems capacities to detect and alert the global community about novel outbreaks, including communications, surveillance, and response".

Though Article 44 of the 2005 International Health Regulations (IHR) legally bound Members States "to collaborate with each other, to the extent possible" to strengthen global public health capacities. However, there is no mechanism to ensure the provision's implementation or hold the member states accountable for their failure.

The WHO describes such a situation as a "common danger". The WHO Constitution notes that "The achievement of any State in promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger".

While all member states are equally responsible for taking measures within their capacities to prevent, mitigate and respond to health challenges, due to persisting economic and technological inequity, not all States have equal resources and capabilities to respond to the crises in the same manner. Therefore, there is undoubtedly a need for "differentiated responsibility" in global health law which prescribes differentiated obligations on the States, proportional to their historical roles and/or financial capacity, following the principle of equity.

Given the structural inequalities in the international system, Sirleaf suggested that differentiated responsibility can be recognised according to need, culpability and capacity. Differentiated responsibilities based on need and capacity are more straightforward to justify in the case of global health than culpability, but culpability is somewhat harder to establish and is extremely relevant in addressing global health inequities, she added.

As Sirleaf has discussed, differentiated responsibilities based on need are limited to the actual necessity of the receiving country. For example, since public health is not equally distributed across all countries, some countries desperately need financial and technical assistance to secure minimum core capabilities to respond to health emergencies. Differentiated responsibilities based on capability require that states with larger capacities and resources assist and support those with less capability, to ensure an equitable response to the pandemic. Differentiated responsibilities based on culpability primarily require those who contributed to the harm should be responsible for addressing the harm. Secondly, it requires tracing and assessing the responsibility of the historical damages which impacted the capability of countries to build efficient health systems to respond to an epidemic or pandemic diseases.

The very foundation of the new pandemic accord will be shaky without the inclusion and substantive integration of "differential responsibilities" – a principle that would strengthen substantive equity in the pandemic accord and make the new regime equitable.

During a discussion on the principle of CBDR and its applicability to global health law, Vicente Paulo Lu, elaborating on the necessity of CBDR in the new pandemic accord to defend equity, emphasised that "the aim of having equity fully reflected through a CBDR-RC type approach in the Pandemic Treaty is to make sure that the obligations under the treaty:

- Will not be unduly burdensome for developing countries that might have scarce resources

- Is linked to enabling support being provided by developed countries to developing countries to ensure effective implementation

- Is embedded within a framework of substantive equity, fairness and justice that encourages effective implementation and cooperation".

Colonialism in global health: recognition of historical wrongs

Historical injustices in global public health should be redressed and equity in the new pandemic accord is upheld. Scholars have recognised colonialism as

a broader social determinant of health and documented how colonial repression has contributed to inequalities that adversely impacted health outcomes in many developing countries. Moreover, it is also important to identify and take into consideration the responsibilities of neo-colonialism policies of international financial institutions that have affected public health in the most vulnerable countries. The historical wrongs perpetuated during the colonial period, on the one hand, led to the economic growth and accumulation of wealth in the developed countries and on the other hand, it severely restricted the capacity of developing and emerging economies to build their own infrastructure capacities. The integration of the principle of CBDR in the global health framework is critical to amplifying the discourse on the responsibility of historical wrongs necessary for reconciling the past and shaping the future.

Our view:

The principle of CBDR should be at the heart of the pandemic accord and in the consideration of the amendments to the IHR. Developing countries and partners who believe in equity in global health will continue to argue for the principle of CBDR in the Pandemic Accord. The principle of CBDR could ensure equity in global health and promote a fair and equitable burden sharing approach to address global health challenges, which is in the long-term interest of the global community, including developed countries. It is important to note that the implementation of the principle of CBDR requires ongoing collaboration and coordination among countries, as well as a shared commitment to address the root causes of health disparities and promote global health equity.