Towards Member-driven International Pandemic Lawmaking

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The COVID-19 pandemic has blatantly exposed the flaws of the World Health Organization (WHO) and its International Health Regulations (IHR) in addressing cross-border communicable diseases. Commentators have examined the IHR's decades of struggle in fulfilling its objectives to control cross-border pandemics such as COVID-19, pointing out problems over the level of obligation, precision of language, delegation of power, settlement of dispute, and lack of enforcement power, among others. What has been overlooked, however, is the crucial question of whether the institutional design of the IHR enables the WHO and its Member States to deliver good global pandemic governance.

We argue that the IHR is ill-designed: its rules and mechanisms are disproportionately tied to the Director General's (DG) exercise of power, rendering insufficient member access to and participation in core decision-making and greater tendency of regulatory capture. For example, the IHR failed to facilitate the timely declaration of a Public Health Emergency of International Concern (PHEIC) due to the DG's and the Emergency Committee's misinterpretation and misapplication of rules allegedly driven by political considerations. On 23 January 2020, even when COVID-19 cases had already been found outside of China, thereby indicating the risk of cross-border transmission (IHR Article 12(4)(e)), the second meeting of the Emergency Committee decided to confine the definition of "international spread" to "having *actual local spread* of COVID-19 in a country beyond China," instead of "having the *potential* for, or a *risk* of, cross-border transmission," and refused to declare a PHEIC. The WHO is also criticized for abusing its bureaucratic influences to further the agendas of individual Member States like China, letting politics override science.

Clearly, an institutional design overhaul is sorely needed for the future of international pandemic lawmaking. To make headway on this goal, we argue that the new treaty should embrace a member-driven rather than a DG-oriented governance model, to be supported by mechanisms that ensure civil society inclusiveness and public reason. A framework convention could be a promising first step in this direction.

The WHO Constitution empowers the WHO to adopt two legal instruments to achieve global health: Article 21 "Regulations" and Article 19 "Conventions" — both are technically "treaties" but demonstrate different strengths and weaknesses. A framework convention can better address pandemic control challenges because its institutional design generally allows for regular review, deliberation on emerging issues, and progressive/adaptive lawmaking, thereby creating more room for Member State access, deliberation, and decision-making. This is particularly desirable in the rapidly changing and unpredictable context of pandemic control.

Compared to a full-fledged convention, which includes comprehensive and deep commitments and incurs cumbersome negotiations, a framework convention draws political momentum more easily, as it focuses on core principles, priorities, and targets for pandemic control, presenting a model that puts aside political disagreement over specifics. The framework convention constructs a forum for Member States (usually a Conference of the Parties) to deliberate, because basic principles, rights, and obligations set out in the framework convention need further clarification and elaboration through guidelines or protocols negotiated and adopted by State Parties. This normative

structure ensures a member-driven process with direct engagement, consensus building, and regular exchange of views and information. In the issue area of global pandemic control, it is imperative to enable full stakeholder participation and facilitate a continuing process of treaty evolution that encourages adaptive and innovative solutions in response to dynamic and complex risks patterns and scenarios.

While the WHO is formed by its Member States, it does not automatically entail member-driven governance. Rather, it has been dominated by its bureaucratic bodies and technocratic traditions. While the WHO has previously deferred to national governments' agendas when formulating pandemic control actions, these practices by no means demonstrate member-driven international pandemic lawmaking because such deference is usually paid to the sovereignty of one individual Member State rather than based on the collective will or consensus. By contrast, a framework convention systematically solicits a wider scope of interests, views, expertise, and agendas from State Parties (and beyond), especially when they convene to negotiate upon and shape the forms and substances of detail-oriented, readily operational implementation guidelines and protocols.

A member-driven rather than DG-oriented governance model embedded in the framework convention can also alleviate legitimacy and accountability deficits and enhances transparency. For example, the emergency power plays an important role in global pandemic control, and the WHO's technical expertise is usually a source of legitimacy and a basis of (technocratic) authority therein. However, controversies and frictions have remained regarding the question whether technocratic authority should prevail merely in the context of scientific debate, or should stretch more broadly to justify political decisions. In light of the politically salient nature of pandemic emergencies, the tension between scientific and legal/political values cannot be overemphasized, and technical expertise should not stand as the sole justification for the WHO's decisions. A member-driven international pandemic lawmaking under the framework convention model, such as the Framework Convention on Tobacco Control, supplemented by proper mechanisms to ensure civil society inclusiveness and public reason, presents a potential balance between technocratic and democratic decision-making and better safeguards transparency, legitimacy, and accountability.

We envisage the future of international pandemic lawmaking to premise not on mere bureaucratic influences of an international organization, but on a shared arena of stakeholder access, deliberation, and decision-making. A member-driven international pandemic lawmaking in general, and a framework convention approach in particular, promise this vision of global pandemic governance.

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