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Transnational Solidarity and the Global Health System

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The coronavirus pandemic is just one of many examples of the unjust distribution of scarce resources. Scarcity, in this context, is not to be understood in the sense that the conditions for a healthy life, such as clean water, raw materials or land, are limited. It is true that confrontation with those limitations is perceived as potential shortage. However, in contrast to general finiteness, scarcity is only relevant when it comes to distribution in an economic sense. It is only through distribution that resources, finite in principle, are separated into scarce and non-scarce goods.

For example, sufficient coronavirus vaccines could have been produced during the pandemic. However, patent restrictions severely curtailed production options, leading to a scarcity of vaccines. The pandemic has once again shown that scarcity and distribution are *political* problems. It is therefore no surprise that existing power structures were reproduced when tackling the pandemic. The persistence of post-colonial dominance structures is particularly noticeable in the distribution of vaccines. Colonial continuities made access to vaccination significantly more difficult for people of the Global South, while at the same time large parts of the population of the Global North were already being vaccinated for the second or third time.

Solidarity vs. Scarcity?

How can this unfair distribution of resources be countered? One possibility is to create mechanisms that establish a distribution structure based on solidarity. In general, solidarity can be defined as mutual support based on a common bond. As a legal concept, solidarity can be further specified by dividing it into a negative and a positive form. Negative solidarity can be seen as a reactive response to certain dangerous situations, while positive solidarity transcends this reactive dimension. It postulates rights and duties, including preventive measures. Solidarity, certainly with constitutional characteristics, is most explicit in its form as reactive solidarity in the context of collective defence law. An example of that is the possibility of collective self-defence in accordance with Article 51 of the UN Charter. Similar provisions can be found for the EU in Article 42 (7) of the EU Treaty or for NATO in Article 5 of the North Atlantic Treaty.

However, the structures of solidarity in the global health system do not amount to the level of those in the defence sector. For example, there is no mutual assistance clause in the event of a public health emergency. Instead, the focus is on voluntary action. COVAX was intended to achieve solidarity-based distribution of the vaccine at a global level, with all countries in the world obtaining their vaccine via a joint fund. However, the mechanism was not set up as an exclusive distribution channel, but as one option among others. Therefore, it did not prevent the countries of the Global North from concluding bilateral contracts with the pharmaceutical industry. Moreover, the post-colonial distinction between the Global North and the Global South was directly inscribed in the decision-making structures themselves. Self-financed countries (SFP countries) of the Global North were placed on the COVAX Shareholders Council to ensure their participation in the strategic governance of COVAX. Meanwhile, the AMC countries of the Global South participated exclusively in the COVAX Advance Market Commitment Engagement Group (hence AMC countries), a separate consultative body that relates only to the operational aspects of the use of the distributed vaccines – and in which, among others, the donors are also involved.

The result of this half-baked solidarity promise: while the rate of those who had received their first vaccination in Germany was 78% in March 2023, just 24% of the population in Namibia had received their

first vaccination by the same date. The global average of fully vaccinated individuals, standing at 67%, remained far from attainment in most African countries. The quasi-solidarity invoked within the global health system thus far pales in comparison to the enduring post-colonial dominance structures.

Transnational Political Solidarity

One of the many problems of solidarity as established in the global health system is that it is primarily understood as solidarity between states and as such reproduces postcolonial power structures. Accordingly, the UN Committee on the Elimination of Racial Discrimination criticized the privileging of "former colonial powers to the detriment of formerly colonized states and the descendants of enslaved groups" in the context of the coronavirus pandemic. This reflection of postcolonial violence in interstate relations is a first step. But the challenges of the postcolonial constellation are not limited to interstate relations. Therefore, the UN Committee not only overlooks a significant portion of the postcolonial critique of global frameworks but also constricts the potential for viable solutions. Apart from the formulation "descendants of enslaved groups", which is too narrow to capture the extent of colonial continuities, remaining within the state-centric dichotomy of "former colonial powers" and "formerly colonized states" also has its pitfalls. The post-colonial world encompasses not only this dualism but also includes numerous states that profited from colonization or actively participated in it, despite lacking colonies of their own. Also not included are those who suffer from the consequences of colonialism but are not organized as states. For example, the Ovaherero and Nama operate as organized collective entities capable of entering into contractual agreements but not as a state; neither are they a "formerly colonized state". Nevertheless, they are particularly disadvantaged by colonial continuities. The genealogy of postcolonial dominance in world society can therefore not be reduced to constellations of legal succession. Rather, it must include a comprehensive reconstruction of the respective power and knowledge complexes. As subalterns, people are not only subject to post-colonial dominance structures in the Global South, but worldwide. For example, forms of postcolonial subalternity can also be found in the Global North, namely in the case of inadequate healthcare for migrants (e.g. through the German practice of reporting obligations, s. para 26) and Black people and People of Color in general. It is therefore short-sighted to understand solidarity primarily as solidarity between states and is particularly unsuitable for dismantling post-colonial dominance structures. [1]

Examples like COVAX serve as illustrations of the repercussions of a narrow concept of solidarity that is based on the idea of nation-states. Yet there are myriad cases in which solidarity transcends borders. For example, protest movements such as Black Lives Matter or the climate movement would be incomprehensible if they were only viewed in the context of nation-states. Although there certainly exists a restrictive understanding of solidarity with the tendency to exclude, there is also political solidarity as a critical and transformative concept which carries with it an orientation towards the common good. Rooted deeply in its essence is the transnational element.

With its humanitarian orientation, political solidarity is directed beyond the territorial state towards the needs and hopes of humanity as a whole. Political solidarity, moreover, focuses on those marginalized communities who are often excluded by narrow understandings of solidarity. By critiquing these structures, political solidarity surpasses mere reactionary responses and emerges as a proactive force with the potential for transformation. This is because the reaction to a specific event, such as a pandemic, becomes the starting point to criticize the system that is the root cause of the event. Political solidarity thus expands the boundaries of what is usually considered practically and politically possible, without entirely losing sight of reality as a necessary corrective. In this way, a collective response to an emergency situation grounded in solidarity becomes the starting point for

[1] *Anne Garland Mahler*, From the Tricontinental to the Global South: Race, Radicalism, and Transnational Solidarity, Durham: Duke University Press 2018, 126 ff.

imagining a realistic utopia. Notably, political solidarity doesn't confine itself to those who have earned it, such as through adherence to structural adjustment programs. This distinguishes it from mere aid: While the latter is designed to uphold the status quo, political solidarity aims at changing the system. Thus solidarity, unlike aid, is capable of dismantling post-colonial dominance structures.

Solidarity in the Proposal of a Pandemic Treaty

However, despite the challenges outlined above, issues like pandemics and climate change, which possess global dimensions, are often narrowly framed within the context of individual nation-states. This also applies to the legislative efforts within the framework of the WHO with regard to the Proposal for negotiating text of the WHO Pandemic Agreement. For instance, Art. 2 (2) Sec. 6 emphasizes solidarity, which is elevated to the point of reference for pandemic measures. According to the proposal, preventing and combating pandemics requires "national, international, multilateral, bilateral and multisectoral cooperation, coordination and collaboration." However, this form of lateralization remains within the statist paradigm. The proposal of a pandemic treaty falls short of embracing a broader conception of solidarity that transcends national, linguistic, racial or ethnic categories. Therefore, hybrid forms of action of PPPs and non-state actors as transnational forms of participation are left out of the solidarity structures.

Transnational solidarity understood in this way means, on the one hand, that the relevant actors, such as transnational companies, should be included as an obligated party. On the other hand, entitlement structure transnationalized. In doing so, the fragmented patterns of global law need to be addressed as a starting point. This means dealing with the problem of inequality normatively in the respective context while acknowledging interactions between the regimes. Ultimately, this can only be achieved through polycentric constitutionalization processes that also incorporate national patterns of relation. [2]

Procedurally, dismantling post-colonial dominance structures demands sufficiently sophisticated decision-making and accountability mechanisms. These need to take into account the differentiation of the global healthcare system, the hybrid forms of action and the relevant dominance structures in this field. There is currently a lack of appropriate procedural structures, such as a transnationally oriented pandemic treaty, which would also have to involve local communities, NGOs and patients more broadly than before through more inclusive multi-stakeholder processes.[3]

It is also crucial that global health law is aligned more closely with human rights. To this end, the SDG 3.8 for universal coverage of essential health services should be linked to human rights and the WHO Constitution in such a way that legal mechanisms to ensure minimum health protection can be developed.

Cross-Species Solidarity

In other words, it is not enough to simply establish an organizational framework through the WHO constitution, which given its lack of sufficient checks and balances, hardly deserves the name constitution. What is needed is a comprehensive health constitution that develops sector-specific constitutional law, which in particular guarantees equal participation in the organizational part and equal access to rights, including health care.

Only through such measures can legal frameworks transcend the postcolonial dichotomy between the Global South and Global North, replacing charity with robust global health law and polycentric solidarity norms. [4] This solidarity, as called for in One Health approaches (see also Anne Peters' contribution to this symposium), will have to include non-human life, such as animals and ecocomplexes, in addition to human

[2] *Amy Kapczynski*, The Right to Medicines in an Age of Neoliberalism, Humanity Journal 10 (2019), 79-107 (93f.), is instructive on the scope for constitutional interpretation of national patent rights.

[3] *Thana Campos-Rudinsky/Mariana Canales*, Global Health Governance and the Principle of Subsidiarity, I.CON 20 (2022), 177-203.

[4] *Zeinabou Niamé Daffé/Yodeline Guillaume/Louise Ivers*, Anti-Racism and Anti-Colonialism Praxis in Global Health-Reflection and Action for Practitioners in US Academic Medical Centers, Am J Trop Med Hyg. 105 (2021), 557-560 (558).

life – because the "solidarity of people is [...] a part of the solidarity of life in general." [5]

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[5] *Max Horkheimer*, Materialism and Morality, in: *Telos September 21, 1986, p. 85 et seq.*