The Right to Health

The Right to Health: A Discussion

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The two authors in this section took a few moments to discuss the broader themes related to their research.

One recurring theme is the content of the right to health and its relationship to notions of public health. There can be synergies or tensions between the approaches taken in these different areas, depending on how public health is approached.

Another issue is how to understand the relationship between policy makers and scientists, and the evidential basis for decision-making. It arises, for instance, in discussions about triage and prioritisation of access to treatment. It is important to consider who is involved in devising responses to the pandemic. It is interesting, for instance to consider who has been involved in developing the different triage guidelines and what their role is vis-à-vis the state; typically this has been professional associations or government bodies with public health professional participation. In most instances there has been little input from communities of interest such as disability groups; groups representing the elderly or minority groups with a higher susceptibility to the disease and mortality rate. Despite the importance of inclusivity and participation, so far, the global human rights community has not engaged with these issues very closely.

Science was understood, at least in principle, as a more effective, rational and more neutral, and less political or contentious, basis for decision-making. However, given the limited scientific knowledge about Covid-19, particularly in the first weeks and month after its emergence, the advice which is based on the 'evidence' has been evolving, whilst there has also been difference of opinion among scientists and social scientists about some aspects of the most appropriate responses. Policy or decision-making needs to continually respond to emerging research and take account of different findings and views. The triage guidelines tend to focus on the 'scientific' basis for their decisions, but if the science is not yet conclusive or sufficiently probative, what are the guidelines actually based on? Also, scientific criteria can be used to hide ethically contentious decision-making.

In terms of decisions about access to treatment or other interventions, there are difficult decisions that may arise where demand outstrips supply. There are certain approaches which are clearly unjustifiable, because of their discriminatory nature. For instance, though the evidence points to the fact that certain minority groups, because of the social determinants of health, are more susceptible to contract the disease and less likely to survive it, "clearly" it would be wrong to deny those groups access to treatment because they have a lesser likelihood to survive it. Yet, one could easily make the opposite argument that those groups should benefit from even greater access to treatment, a form of "affirmative action" to positively address structural inequalities. On the other hand, for some, it has been less problematic to deny treatment to persons over a certain age or with certain health conditions or disabilities, even though these denials would constitute other forms of discrimination. These differences in what societies find "clearly" problematic or not, perhaps underscores our own limitations and limited capacity to be guided simply by instinct; involving communities of interest tends to be important in its own sake but also to serve as a counterbalance to the unconscious biases of those usually tasked with making policy and taking decisions.

From a human rights perspective, one can be uncomfortable with some of the triage criteria (e.g., age; health prospects) – partly because of the problem of the limited participation of affected groups in the development of the policy. Indeed, why should doctors and ethicists be allowed to take these fundamental decisions about who will live or die? Clearly, communities of interest should have a right to be involved in decisions on public resource allocation. By involving communities of interest, there is a lesser likelihood to arrive at blanket, and probably unintended positions or decisions; it reduces the danger of unreasonable or inflexible policies.

In conflict zones, the human rights community has not challenged prioritisations based on likely health outcomes for soldiers in need of treatment, and seems to defer to the medical or scientific community to determine who should receive treatment. Most soldiers will have similar health backgrounds (relatively young and healthy), which means triage decisions tend to focus exclusively or mainly on the likelihood that soldiers would survive treatment for battlefield injuries. Though even in this example, the decision will not necessarily be neutral, if for example decisions are also taken on the basis of the rank of the soldier.

Beyond the procedural rights associated with access to decision-making, are there additional substantive components of the right to health which may assist us with our approach to prioritization of access to treatment? There has been limited articulation by scholars and advocates of how precisely the right to health applies during pandemics; despite the knowledge about the significant risk of a global pandemic. The Committee on Economic, Social and Cultural Rights' General Comment 14 on the right to health, provides a useful focus on positive health outcomes. Similarly, the right to health is relevant to articulations of what might be meant by “maximum available resources,” and the need for states to actively and positively invest in health systems. Beyond the right to health, these thorny questions raise other human rights issues such as the right to non-discrimination and the right to life.

It was obvious to the discussants that there are limitations associated with looking at issues from a single perspective; there are so many angles and complexities involved with these issues, many of them interlinked. And, maybe one of the most important lessons from the current pandemic is that discussion of these issues needs to continue in quieter times that make it possible to consider the many difficult issues with time for wide consultations.