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Healthcare and Human Rights: A Complicated Story

Philip Barlow's assertion that healthcare is not a human right is misleading. He assumes the right to health and the right to healthcare are interchangeable while discarding the critical role human rights play in public health work. Introducing the right to health into international law allows for maximum public health gains through state accountability. By enshrining a right to health in international law, states are held to a minimum standard in respecting, protecting and fulfilling the rights of individuals under their discretion. Health and human rights are inextricably linked. By recognizing that human rights belong in the realm of healthcare, officials can maximize their public health policies by considering the social determinants that impact an individual's health. That said, the right to health goes beyond the right to healthcare, and it is crucial to continually distinguish between the two concepts.

In 2000, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 14, affirming that individuals have a right to the highest attainable standard of health (Barrett and Tobin, 68). Notably, however, General Comment 14 explicitly states that "the right to health is not to be understood as a right to be healthy" (CESCR 2000, para.8). Essentially, no state is capable nor responsible for guaranteeing the health of individuals. For example, there are several biological and socioeconomic preconditions that states cannot control, an example being chronic illness (Barrett and Tobin, 68). Second, the CESCR recognizes that

states have different resource availability; thus, the highest attainable standard of health will vary across countries, and services might not always be available (68). In essence, General Comment 14 strives to address the social determinants of health that impact an individual's ability to lead a healthy lifestyle. These determinants include food and nutrition, housing, sanitation, healthy working conditions, and a healthy environment (69).

Philip Barlow questions whether the right to healthcare includes access to all forms of treatment, including things like expensive surgery and cosmetic treatment (Barlow, para.2). While there is no right to healthcare in international law, General Comment 14 affirms that the right to health does not include access to all forms of healthcare (Barrett and Tobin, 68). Instead, the right to health focuses on the right to *primary* healthcare, setting a minimum standard for states within their resource capabilities (Hunt, 604). International law recognizes that resource limitations are constantly present in the realm of healthcare, forcing states to choose where they allocate money (604). For example, states often have to decide who gets access to life-saving treatments such as organ transplants or dialysis for kidney failure. As noted by a CBC article in 2015, one-third of patients in Canada who need an organ transplant will never receive one (Sagan para. 3). That number is significantly higher in lower-income countries.

If a human right to health does not imply automatic access to all forms of healthcare, why is it important? Enshrining a right to health in international law imposes a certain level of responsibility on governments to fulfill the commitments laid out in UN treaties. Under General Comment 14, the CESCR adopted the 3AQ model, assessing health based on availability, accessibility, acceptability, and quality (Barrett and Tobin, 71). These measures ensure that individuals effectively enjoy the right to health and are not discriminated against for disability, socioeconomic status, race, or gender. By having a minimum standard for the right to health,

individuals and advocacy groups can generate case law and other jurisprudence that shed light on the scope of the right to health. Finally, human rights are essential in healthcare because, similar to other human rights, they have a particular concern for the vulnerable, disadvantaged, and those living in poverty (Hunt, 604).

Historically, the right to health has been challenging to implement because it is a positive right that requires government action to realize. However, as noted by Emmet McFarlane, negative rights frequently need governments to take action and spend money (153). An example of money expenditure can be drawn from individuals' right to a fair trial (153). Second, UN treaties relating to the right to health are binding, meaning that there is an expectation that the right to health is recognized among its signatories (Hunt, 604). While there may not be direct repercussions for failing to implement the right to health, states are persuaded to realize this right in order to uphold their reputation in the international community (604).

Similarly, UN Special Rapporteurs, independent experts appointed to protect human rights, can respond to violations of the right to health. They do so by reporting to the UN Commission on Human Rights or the UN General Assembly, placing their findings, concerns, and recommendations in the public domain (604). Some key objectives of Special Rapporteurs include promoting the right to health, clarifying the scope of the right to health, and identifying good practices for the right to health (605). In essence, Special Rapporteurs help keep states accountable for implementing the right to health with maximum efficacy within their available resources.

While there is no right to health in Canada, the government has acted in some situations to recognize inequities and human rights violations in healthcare. In Canada, examples can be drawn from past court cases. One example is *Eldridge v. British Columbia*, where a court

unanimously decided that deaf hospital patients were suffering from “adverse discrimination” due to the failure of the province’s Medical Services Commission to provide sign-language interpretations (McFarlane, 162). This case forced the government to implement positive change, ensuring that deaf persons would be able to receive the same quality of care as non-disabled individuals. Similarly, human rights help to highlight sex-based discrimination concerning abortion access, as well as dignity-based violations regarding assisted suicide legislation. In 2016, Abortion Access Now PEI drafted a constitutional challenge to PEI’s long refusal to provide abortion services, suggesting that lack of access to abortion would be unlikely to survive Charter scrutiny (163). Soon after, Premier Wade MacLauchlan announced that PEI would provide access to abortions by the end of 2016, claiming that the province would likely lose a legal challenge. On January 31, 2017, the first abortion was performed in PEI (Kingston, para.1). While these examples do not suggest a human right to healthcare, they exemplify how human rights can help to achieve equitable healthcare through legal action.

Aside from mere violations of the right to health, human rights are essential for medical ethics. Two examples can be drawn from the Stanford Prison Experiment and the case of HeLa cells and Henrietta Lacks. The Stanford Prison Experiment was a study conducted in 1971 to understand the development of norms and the effects of roles, labels, and social expectations in a simulated prison environment (Bavel et al., para 1). However, the experiment had several ethical concerns, as it deprived participants of the right to withdraw from the study and the right to informed consent (Bavel et al., para 5). The study was shut down just six days in over ethical concerns.

Henrietta Lacks was an African American woman who died at age thirty-one from an aggressive form of cervical cancer. Months before her death, researchers at John Hopkins

Hospital extracted her cancerous cells without her knowledge or consent (McDaniels, para. 2). Lacks' cells had a tremendous capacity to reproduce, and they were the first known immortal human cells. The cells became known as HeLa, and they have played a crucial role in cancer research, immunology, and infectious disease. More recently, HeLa cells have been used in research for the COVID-19 vaccine (Johnson, para. 2). The case of HeLa cells highlights the extreme racial injustices in the American healthcare system. None of the companies that profited from Lacks' cells passed money back to her family, and for decades after her death, Lacks' medical records were given to the media and published online (para. 3). In 2013, some of Lacks' family members settled with the National Institute of Health, requiring family permission to use her cells going forward (McDaniels para. 9). This example highlights racial discrimination in healthcare and the essential role of human rights in cases of discrimination.

Although there is no explicit right to health in Canada and several other countries worldwide, human rights play a vital role in ensuring the availability, accessibility, acceptability and quality of health services. Human rights can help keep states accountable, especially when health services violate other human rights, namely life, liberty, and security of person. Human rights ensure that health facilities and services are attainable for everyone, regardless of disability, sex, or race. Finally, by ratifying UN treaties such as the ICESCR, it is in states' best interest to respect an individual's right to health in order to uphold their reputation in the international community. Philip Barlow's argument that healthcare is not a human right stands, as states cannot provide every form of healthcare to all of their constituents. That said, the right to health is fundamental in healthcare and helps achieve maximum public health outcomes. There might not be a human right to healthcare, but healthcare and human rights are inextricably linked.

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