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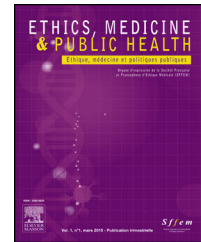


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COMMENTARY

Commentary on an article by Alberto Quintavalla & Klaus Heine. Recognizing the importance of the right to health as a prerequisite to rights hierarchization



Commentaire sur un article d'Alberto Quintavalla & Klaus Heine. Reconnaître l'importance du droit à la santé comme condition préalable à la hiérarchisation des droits

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Summary This commentary, on Heine and Quintavalla's article *Priorities and Human Rights*, considers the authors' position that, while the right to life and other civil and political rights are equally as important as health and other social rights, some degree of prioritizing types of rights is necessary because all rights cannot be implemented simultaneously. This commentary concurs with Heine and Quintavalla's challenge to the common argument that civil and political rights are of higher importance (Phillips J, 2013; Farer T, 1992; Koji T, 2001). But this commentary goes further, in suggesting that before a society begins to prioritize implementation of human rights, it must first secure the basic understanding that the right to health is indeed equally important to civil and political rights. This commentary uses the example of national courts to show how judicial engagement with the right to health has begun to chip away at the boundary between the categories of rights. It suggests that greater interconnection among health and other rights has also made mapping out a hierarchical relationship far more difficult. Thus, before implementation can have any defined order, states must first come to a shared understanding regarding the equal if not greater importance of the right to health.

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MOTS CLÉS

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Résumé Ce commentaire, qui porte sur l'article de Heine et Quintavalla, intitulé « *Priorités et droits de l'homme* », examine la position des auteurs selon laquelle si le droit à la vie et les autres droits civils et politiques sont aussi importants que la santé et les autres droits sociaux, il est nécessaire de hiérarchiser les types de droits dans une certaine mesure, car tous les droits ne peuvent être mis en œuvre simultanément. Ce commentaire rejoint la contestation par Heine et Quintavalla de l'argument commun selon lequel les droits civils et politiques sont d'une importance supérieure (Phillips J, 2013; Farer T, 1992; Koji T, 2001). Mais ce commentaire va plus loin, en suggérant qu'avant qu'une société ne commence à donner la priorité à la mise en œuvre des droits de l'homme, elle doit d'abord s'assurer que le droit à la santé est effectivement aussi important que les droits civils et politiques. Ce commentaire utilise l'exemple des tribunaux nationaux pour montrer comment l'engagement judiciaire en faveur du droit à la santé a commencé à effacer la frontière entre les catégories de droits. Il suggère qu'une plus grande interconnexion, entre le droit à la santé et les autres droits, a également rendu beaucoup plus difficile l'établissement d'une relation hiérarchique. Ainsi, avant que la mise en œuvre puisse avoir un ordre défini, les États doivent d'abord parvenir à une compréhension commune de l'importance égale, voire supérieure, du droit à la santé.

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In an increasingly globalized world, with threats to public health constantly emerging, and the such risks embodied in the current COVID-19 pandemic, it is critical that states protect health and other social rights as fundamental human rights. The legal recognition of health in this respect is paramount, as it confers a binding duty on states to protect the well-being of their people. Stemming from the iconic Universal Declaration of Human Rights (UDHR) to the International Covenant on Economic Social and Cultural Rights (ICESCR), the right to health is now well established under international human rights law. Yet, in comparison to civil and political rights, the realization of health and other social rights has largely lagged behind. For one, the International Bill of Rights established two separate rights-oriented treaties – one focused on civil and political rights, and the other on social and economic rights – with different approaches to implementation. Under these treaties, civil and political rights are subject to immediate realization. The fulfillment of health, however, is undermined by the fact that it is subject to only progressive realization [4]. Simply put, states have been able to put off the realization of the right by claiming resource constraints, excusing almost any kind of health deprivation. Such matters are compounded by the fact the current international legal order does not provide an adequate framework for how the right to health should be implemented or prioritized in comparison to other rights, particularly civil and political rights.

In this respect, Heine and Quintavalla's article *Priorities and Human Rights* is a welcome step toward a theory of the implementation of all human rights [5]. In an era in which states still question whether health and other social rights are even rights to begin with, Heine and Quintavalla's article shows how scarcity of resources affects the implementation of all categories of human rights alike. The main goal of the article is to develop a theory that can "serve as a

stepping-stone towards the achievement of shared and well-defined priorities" ([5]; p679) in the implementation of all human rights, but in a way that preserves the understanding that all human rights are "universal, indivisible, interdependent and interrelated" [6].

The authors use Maslow's pyramid to show the extent to which priorities can be set based on the level of fulfillment of certain rights. Yet, in suggesting a possible outline for prioritization of rights fulfillment, the authors put the right to life at the base, or the most important level. Of course, you must be alive to enjoy any other consequential right. Moreover, in countries around the world, courts have found that the right to life is inextricably linked to the right to health. But by stressing at the base of a potential hierarchy the fundamental importance of civil and political rights, the article does not adequately address the equal, if not greater, importance that the protection of health plays in the realization of all human rights today. Protection of civil and political rights may sometimes lead to greater respect of health and other human rights [7], but not always. It is possible that the right to health could remain relatively unfulfilled even while civil and political rights are enforced. For example, in the United States, the U.S. Constitution establishes the right to life and other civil and political rights, but it does not recognize the right to health. Per the Constitution's 10th Amendment, health and other social rights are the domain of the fifty states. Even though the Patient Protection & Affordable Care Act was passed in 2012, a fundamental debate exists between the two major U.S. political parties over whether health is even a human right. On the very day President Trump entered office, he passed an executive order instructing officials to "waive, defer, grant exemptions from, or delay" implementing parts of the Affordable Care Act [8]. Indeed, in the midst of the country's grappling with COVID-19, the recognition of health as a basic

right could help direct the response of the state in ensuring access to basic services.

This commentary, using rulings by national courts as case studies, cautions against prioritizing civil and political rights among the category of human rights, and urges legal and political recognition of the equal and fundamental importance of the right to health for a range of reasons.

Firstly, ensuring the equal recognition of health could help put to rest the deep-seated belief in some liberal democracies that economic and social rights are more different than they are similar to civil and political rights. Today, the right to health and other social rights are well established under international law. Yet, in comparison to civil and political rights, the right to health is still considered the “step child of the human rights movement” [9]. While states readily accept civil and political rights as fundamental, they have often viewed health and other social rights, which are particularly costly to enforce, as inferior, if even as rights at all. Legal scholars continue to argue that treating needs such as health and housing as “rights” “undermines the enjoyment of individual freedom and distorts the functioning of free markets” [10]. For Cass Sunstein, for example, recognizing rights such as food, health, and housing would provide an excuse “to downgrade the importance of civil and political rights” [10]. In fact, while civil and political rights are inherently justiciable, the ability of judges to adjudicate matters of health is frequently questioned. Aryeh Neier and Dennis Davis, for instance, argue that courts lack the legitimacy and competency to adjudicate health and other social rights. They find that judicial remedies are not always effective in vindicating these rights, and so administrative remedies and the democratic process are better suited to deal with matters of social rights [11,12]. Thus, they argue that health and other social rights should remain outside the purview of courts altogether. Even when courts have successfully protected the right to health, legal scholars have still felt that the adjudication of health undermines goals of equity. Studies from Brazil, for example, show that judicialization has worsened health inequities as only the wealthy have access to courts [12]. Citing such concerns, public health scholars have largely dismissed courts’ potential to help protect the right to health.

Today, much literature has argued that the right to health is indeed a human right and should not be seen as secondary to civil and political rights. Importantly, in stressing this relationship, some scholars have cautioned against prioritizing civil and political rights. The European Convention on Human Rights, for example, does not guarantee the right to health care. This, however, has not prevented the European Court of Human Rights from protecting the right to health through an expansive interpretation of other human rights. As one author puts it, the Court has adopted an integrated approach to rights, advancing creative solutions to protect economic and social rights and even “reconceptualize the contours of civil and political rights” altogether ([13]; p1220).

Henry Shue was amongst the first to suggest that fundamental needs such as health are in fact basic human rights [14]. But in noting the equal importance of all human rights, he moved away from dependence on hierarchies and classifications. As he put it: “Typologies are at best abstract instruments for temporarily fending off the complexities of

concrete reality that threaten to overwhelm our circuits. Be they dichotomous or trichotomous, typologies are ladders to be climbed and left behind, not monuments to be caressed or polished” ([14]; p160). Therefore, by Shue’s account, while it may eventually be possible to set priorities among different categories of rights, until the importance of health and other social rights is taken more seriously we may want to be cautious in establishing hierarchies that simply reinforce the lower importance of this right. Consider, for example, how the COVID-19 crisis is reinforcing the urgent need to recognize and protect everyone’s right to health and a secure social safety net in times of crisis. Indeed, the crisis underscores that these rights are not less important in less threatening times.

Secondly, as health comes to be recognized as a justiciable right itself in national constitutions, it becomes increasingly complex to map out shared relationships among the kinds of rights. Today, the right to health and other social rights are well recognized in countries around the world, including in approximately 67.5% of all constitutions [15]. Where health was once deemed merely an aspirational goal to be worked toward over the long term, it has now translated into a justiciable right, with corresponding legal obligations. In other words, it has become enforceable. Courts, by drawing on the interconnections among different rights, have upheld the fundamental importance of the right to health.

To protect the right to health at the level of the population, courts have expressly drawn upon the interconnectedness among rights, explaining that the violation of the right to health could infringe on both the protection of life and the right to a clean environment¹. The right to life has been used to enforce the right to health, but in a growing number of instances the right to health and other social rights have been used to in turn develop civil and political rights. For example, in *Gupta v. Union of India*, the Supreme Court of India held that civil and political rights are meaningless unless accompanied by the social rights necessary to make them effective for all². In this way, the boundaries among “categories” of rights have begun to dissolve, and the very meanings of rights themselves have simultaneously expanded. While this greater interconnectedness can help identify shared priorities among health and other rights, namely civil and political rights, as Heine and Quintavalla note, it can also make mapping out a hierarchical relationship far more difficult. Therefore, societies may want to first prioritize the equal importance of health before defining an order to the implementation of rights.

Lastly, through the recognition of the right to health, it may be possible for states to create an enabling environment for the realization of all human rights. As the world has become ever more interconnected, with the growth of international trade and mass migration, disease patterns have changed. Public health threats can no longer be addressed through an individual medical lens. Indeed, increased globalization has meant that responses to pub-

¹ *Murli S. Deora v. Union of India and Ors.* AIR 2002 SC 40 (Supreme Court of India).

² *Gupta v. Union of India*, AIR 1982 SC 149, 191 (Supreme Court of India).

lic health emergencies, such as COVID-19, go beyond purely medical responses to incorporate the various social determinants that can impact population health. To this end, it is crucial to understand health as an inclusive right, extending not only to timely and appropriate health care but also to the underlying determinants of health [16]. Indeed, people's ability to lead healthy lives depends on the availability of sufficient food and clean air. Courts have focused on the greater population's needs when enforcing health and other social rights, recognizing this idea that the right to health vests both individually and collectively. Following this trend, in the context of tobacco control, states have adopted population-based initiatives to create smoke-free laws, raise taxes on cigarettes, and place restrictions on the advertisement of tobacco products in order to ensure wider health outcomes³. In this respect, measures have targeted sources of disease to focus on prevention and promotion of health and other human rights. Because the protection of health and its underlying determinants, such as the need for a clean environment, seeks to ensure an enabling environment for people as a whole to live and breathe, the right to health can help facilitate the implementation of all human rights. Thus, through the recognition of health, it may be possible to ensure the protection of even civil and political rights.

Priorities and Human Rights is a welcome step toward achieving shared priorities in the implementation of all human rights. But before any order of implementation can be defined, we must first come to a shared understanding regarding the equal, if not greater, importance of the right to health.

Uncited Reference

[1–3].

Disclosure of interest

The authors declare that they have no competing interest.

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³ See for example *Murli S. Deora v. Union of India and Ors.* AIR 2002 SC 40 (Supreme Court of India); *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (Supreme Court of Appeal, South Africa).