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DISCUSSION KICK-OFF

The WHO's new emergency powers – from SARS to Ebola

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The Ebola outbreak is only the third Public Health Emergency of International Concern (PHEIC) ever declared by the World Health Organization (WHO). The WHO's emergency authority is based on the International Health Regulations (IHR) adopted in 2005. While these regulations enable the organization only to recommend measures to states, its decisions to declare a PHEIC and to issue temporary recommendations are de facto authoritative points of reference for global and national containment efforts. In fact, the WHO performs well in governing this transboundary health crisis, at least compared to earlier

outbreaks of infectious diseases. Its actions are assertive but transparent, and it has taken a leading role in bioethical debates.

This has not always been the case. In terms of emergency governance, the WHO has gone through a dialectical process of authorization and learning: self-empowerment and excess led eventually to the adoption of principles of Global Administrative Law (GAL). The GAL-framework provides a heuristic to trace and assess mechanisms promoting the accountability of global administrative bodies, in particular those ensuring their compliance with adequate standards of transparency, participation, and review. Still, GAL alone cannot be an antidote to the legalized inequalities in global health underlying the Ebola epidemic and other neglected diseases.

Self-empowerment and excess in WHO crisis response

The WHO's "emergency powers" are of relatively recent origin. In fact, under the 'old' International Health Regulations that governed infectious disease management since 1951/1969, the WHO had basically no authority other than the gathering and dissemination of information. By 1995 the World Health Assembly eventually instructed the Director-General to revise the IHR. Yet, it was only the outbreak of SARS in 2002 and the WHO's exceptional self-empowerment which created a precedent for the IHR revision. The Director-General declared SARS to be a 'worldwide health threat' and issued travel warnings for China, Hong Kong, and Canada. Because of its relative success, this then extra-legal measure became the blueprint for the 'new' IHR which authorize the WHO and its Emergency Committee to determine the existence of a

PHEIC as well as the measures to be implemented for its containment.

Once formally empowered, however, the first test case for the WHO's emergency governance capacities – the swine flu outbreak in 2009 – rather discredited the organization since its reaction was both excessive and highly intransparent. First, the Emergency Committee met in secret and the names of its members were kept classified for the duration of the PHEIC. Journalistic investigations then later uncovered close ties of many of its members to the pharmaceutical industry, which benefited from the declaration of a PHEIC as it boosted demand for available medication. Secondly, the WHO Secretariat played fast and loose with the criteria of the pandemic alert phases so as to fit the worst phase 6 "pandemic" to the relatively low H1N1 mortality rate. Based on this assessment, the WHO then advised its members to order largely dispensable vaccines and antiviral medicines.

When it became clear that the swine flu was hardly worse than any seasonal influenza, resistance against the WHO emergency handling arose. Early in 2010, the Council of Europe's Parliamentary Assembly initiated a public inquiry into the WHO's response to the H1N1 crisis, culminating in a highly critical report which noted grave shortcomings in the decisionmaking procedures at the WHO during the H1N1 crisis. The resulting public pressure also made an impression on the WHO's internal review body, whose final report demanded more transparent procedures in future crises.

Lessons learnt for Ebola

Its reaction to the Ebola crisis demonstrates that the WHO has learnt from previous mistakes. It has enhanced the transparency of its emergency measures and proactively deals with potential conflicts of interest. Unlike previously, the WHO has now published the names of the Emergency Committee members in parallel with its recommendations of August 8. Additionally, the WHO provides a fact sheet that explains how an Emergency Committee is put together and how it operates. The same transparency standards were applied to the ethics panel that has issued a set of considerations to be taken into account regarding the use of untested drugs, published on August 12. The panel intervened in a heated international debate about the adequate use of unregistered medicines. It advised that specific treatments and antivirals should be used, even if their safety and efficacy are yet to be tested. The WHO published the names of the panelists, disclosing also of one of the panelists' relationship with pharmaceutical companies. It also pledged to publish a report of the panel's proceedings.

This does not yet amount to a public debate on the issue, but it goes at least some way towards addressing the moral dilemmas involved in recommending the use of pharmaceuticals that are of uncertain value and available in insufficient amounts. Reminiscent of post-H1N1 allegations that the WHO's pandemic preparedness plans had concealed conflicts of interest of the experts involved, and that it had recommended antivirals of dubious safety and efficacy, this is a major step forward. This increasing deliberative quality of bioethical debates surrounding global health emergencies cannot do away with tough moral decisions but it creates a fairer ground on which to discuss these issues.

Progress in emergency law amidst an unhealthy legal infrastructure

The handling of the current Ebola crisis reflects a learning process in the WHO initiated by external and internal reviews of its emergency mechanisms. These mechanisms have now become more transparent and accountable. At least from the GAL-perspective, this is a success story. Yet, the Ebola case also demonstrates that underlying questions of distribution cannot be resolved by crisis interventions, procedurally sound or not. As of yet, the WHO has postponed an answer to the question who should have priority in getting access to scarce drugs and why. The experience of the multi-year intergovernmental negotiations over access to influenza medication here teaches a sobering lesson: Only minor concessions were made to developing countries where vaccines and antivirals are often scarce and unaffordable. The worldwide enforcement of intellectual property rights and global health regulations such as the Pandemic Influenza Preparedness Framework define a legal order that cements health inequalities in a way that is far more consequential than single emergency measures.

A response to this post is here.

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