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ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

Applying human rights to maternal health: UN Technical Guidance on rights-based approaches

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ABSTRACT

In the last few years there have been several critical milestones in acknowledging the centrality of human rights to sustainably addressing the scourge of maternal death and morbidity around the world, including from the United Nations Human Rights Council. In 2012, the Council adopted a resolution welcoming a Technical Guidance on rights-based approaches to maternal mortality and morbidity, and calling for a report on its implementation in 2 years. The present paper provides an overview of the contents and significance of the Guidance. It reviews how the Guidance can assist policymakers in improving women's health and their enjoyment of rights by setting out the implications of adopting a human rights-based approach at each step of the policy cycle, from planning and budgeting, to ensuring implementation, to monitoring and evaluation, to fostering accountability mechanisms. The Guidance should also prove useful to clinicians in understanding rights frameworks as applied to maternal health.

1. Introduction

It is a global scandal that an estimated 287 000 women and girls continue to die each year of maternal causes, and between 10 and 15 million more suffer debilitating complications annually [1,2]. The World Health Organization (WHO) estimates that as much as 98% of maternal mortality is preventable [2], and human rights advocates have long insisted that failures to prevent the grave suffering wrought by maternal mortality and morbidity (MMM) constitute breaches of States' human rights obligations [3–6].

Millennium Development Goal (MDG) 5 has focused the world's attention on the magnitude of maternal mortality around the world and, as technocratic approaches have failed to advance maternal health, a greater understanding has emerged in recent years that the underlying causes of MMM lie in denials of women's human rights and compounded discrimination against women [7]. Approaches that fail to address these underlying causes, including the underprioritization and even criminalization of services that are needed only by women, are unlikely to be sustainable, nor to shift the power relations that deny women the ability to control their own lives and well-being.

In the last few years there have been several critical milestones in acknowledging the centrality of human rights to sustainably addressing the scourge of maternal death and morbidity around the world [1,7,8]. Perhaps none has been more important than the work of the United Nations Human Rights Council (the Council), which has had an extraordinary level of engagement with the issue of maternal mortality and human rights. The Council has played a fundamental role in forging linkages between the human rights and health fields on this topic, and in highlighting the importance of issues relating to voice, gender equality, and accountability.

In 2010 and 2011, reports prepared for the Council by the Office of the High Commissioner for Human Rights (OHCHR) made very clear that women and girls are continuing to die in massive numbers because they still face discrimination in their households, communities, and societies, and because their voices are not listened to and their lives are not valued. In 2011, the Council took a bold step in requesting that OHCHR prepare a "Technical Guidance on the Application of a Human Rights Based Approach to the Implementation of Policies and Programmes for the Reduction of Preventable Maternal Mortality and Morbidity" (Technical Guidance).

In 2012, the Council adopted a resolution welcoming this Technical Guidance and calling for a report on its implementation in 2 years. In so doing, the Council signaled its historic intention to move beyond a human rights analysis of the problem of maternal mortality and morbidity, in order to offer concrete guidance on putting human rights into practice. This is the first time that the Council has adopted anywhere near the level of specificity about what a human rights-based approach requires in terms of a social development issue, and as a result its importance extends beyond maternal health and women's health more widely.

The present paper provides an overview of the contents and significance of the Technical Guidance. It reviews how the Technical Guidance can assist policymakers in improving women's health and

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their enjoyment of rights by setting out the implications of adopting a human rights-based approach (HRBA) at each step of the policy cycle, from planning and budgeting, to ensuring implementation, to monitoring and evaluation, and fostering accountability mechanisms in accordance with human rights standards. The Technical Guidance has the potential to be used by a wide variety of stakeholders, and should prove a useful tool to clinicians in understanding HRBAs, as applied to maternal health.

2. General principles

The Technical Guidance begins with general principles about HRBAs, including that an HRBA is premised upon empowering women to claim their rights, including their sexual and reproductive health and rights, and not merely avoiding maternal death or morbidity. This is crucial to understand, as human rights cannot be seen merely as instrumental to enhance existing maternal health programs.

An HRBA further underscores the importance of the social determinants of women's sexual and reproductive health, such as education, access to employment, access to land, and inheritance laws, which can perpetuate discrimination against women and exacerbate women's inequality across many spheres of life. Law is an important social determinant of health, as for example, in the case of criminalization of reproductive health services that are only needed by women, such as abortion.

An HRBA is concerned with the principle of equality and nondiscrimination, as well as special concern for marginalized groups, which requires investment in addressing and redressing historic confluences of discrimination and exclusion, even if there may be trade-offs in aggregate advances for the overall population.

Two other key principles of an HRBA, which are set out in the Technical Guidance, relate to women's active participation and accountability. In an HRBA, women are not passive targets of public health programming. Rather, they are active agents who are entitled to participate meaningfully in decisions that affect their sexual and reproductive health and in turn their lives.

The Technical Guidance emphasizes that accountability is a thread that runs throughout the application of an HRBA. Thus, remedies are essential to failures of accountability, but true accountability changes the process of decision making at multiple levels of government throughout and beyond the policy cycle, as described below. Also, States are accountable for ensuring that third parties do not interfere with the enjoyment of sexual and reproductive health rights.

The Technical Guidance further notes the centrality of a just, as well as effective, health system. Health systems are not merely collections of goods and services; they are core social institutions, which are part of the fabric of any society [9]. Thus, the application of an HRBA to health systems means that claims for sexual and reproductive health goods, services, and information are understood as rights, not commodities or matters of charity. Within health systems, human rights law requires that sexual and reproductive health goods, services, and information are available, accessible (physically, financially affordable, on a basis of nondiscrimination and with respect to information), acceptable (ethically and culturally), and of good quality [10].

3. Applying human rights across the policy-making cycle

Even with the greatest political will, policy makers within and beyond the health sector must be able to understand how a rights-based approach would be different from a conventional public health approach to maternal mortality at every stage of the policy-making cycle, from a situational analysis to national planning processes, to budget formulation and allocation, to implementation of programs, to monitoring and evaluation, to remedies. The innovation and significance of the Technical Guidance is that it does just that.

3.1. Planning and budgeting

The Technical Guidance states: "Public health planning traditionally begins with the acknowledgement of a maternal mortality and morbidity problem, and then goes on to propose how to address it within the current societal framework. Rights-based planning goes further by also examining the dominant assumptions underlying the structural determinants of women's health, and then includes strategies to address those factors, to reshape the possibility frontier for advancing maternal health. A human rights-based approach therefore changes decision-making processes, and the issues and actors included in those processes, as well as outcomes" [11] (para. 24). Thus, planning is not a technocratic exercise in an HRBA; rather, it is far broader in that it calls for examining what assumptions and institutional arrangements are taken for granted, which may in fact not be meeting women's needs or rights.

In an HRBA there is necessarily a multisectoral approach to economic and social planning and budgeting, including, at a minimum, coordination among a variety of government ministries and departments, as well as with other key actors, such as the private sector, development partners, and civil society, and the need to devise the plan in consultation with, and with the full participation of, affected populations. In addition, the Technical Guidance points to measures to address discrimination, and to strengthen capacities of multiple duty bearers [11] (para. 10,14,41,42).

However, the Technical Guidance balances broad principles with specificity about what interventions are required to be prioritized. Noting that adopting a national plan of action or strategy on health is a core obligation in the realization of the right to health, the Technical Guidance provides details on what should be included in a national action plan from a human rights perspective, including essential medicines and services, defined in accordance with the latest technical guidelines from international agencies [11] (para. 26–43). It notes that "appropriate" measures under international law are evidence-based measures, and that governments must justify any departure from international standards through relevant reasons, which do not include religious or cultural beliefs [11] (para. 31,32).

With respect to budgeting, the Technical Guidance breaks new ground for a UN document. Under human rights law, States are obliged to devote the "maximum of available resources" [12] to the realization of the right to health, including sexual and reproductive health. Based upon an exhaustive evaluation of statements by human rights treaty monitoring bodies (TMBs) as well as some leading national constitutional jurisprudence, the Technical Guidance offers specific advice on assessing whether the "maximum available resources" are being allocated and on ensuring transparent and participatory budgetary processes [11] (para. 21). For example, in keeping with international law, it states: "The budget should ensure that financing is not borne disproportionately by the poor." It then clarifies that "out-of-pocket costs cannot impede accessibility of care, irrespective of whether services are provided by public or private facilities" [11] (para. 46), [13]. In other words, if user fees present a barrier to women accessing sexual and reproductive health care, a state is not complying with its obligations under international law.

Moreover, while acknowledging that certain obligations do not have budgetary implications (such as eliminating harmful traditional practices), the Technical Guidance notes that addressing maternal health as a human rights issue in budget formulation confers added protection for resources allocated to related programs at both the national and subnational levels. Thus, if the overall available budget increases, "resources for maternal health should increase accordingly insofar as significant need in that area remains"; if the overall budget of the State decreases, "resources for sexual and reproductive health programmes should not be decreased unless the Government demonstrates that it has taken all reasonable measures to avoid such reductions" [11] (para. 47a,c). Further, reducing budgets for programs