

A legal consideration of distributive justice and rights to health in the COVID-19 era

Minsoo Jung^{*,**}

^{*} Associate professor, Department of Health Sciences, Dongduk Women's University

^{**} Takemi fellow, Department of Global Health and Population, Harvard T.H. Chan School of Public Health

Objectives: This study examined the theory of distributive justice and discussed its implications in terms of health rights. **Methods:** This study reviewed current distributional theories in terms of liberal distributive justice. **Results:** As a criterion for distribution, merit is appropriate in the sense that individual choice, effort, or ability can result in legitimate inequality, and merit-based distribution of the results can account for individuals with merit. Based on the difference principle enunciated by Rawls, the distribution occurs first in order to resolve unfair inequalities. According to the priority theory, distributions are intended for those who are poorer. According to the theory of hypothetical insurance by Dworkin, the distributions move according to need based on sufficientarianism, to ensure basic living standards to compensate for inherent disabilities and allow people to pursue their own preferences. **Conclusion:** Because of a diverse range of social aspects in reality, a just and perfect distribution theory is impossible. Nonetheless, we can gauge feasibility of each method by coherently examining the method of distribution combined with the objects of distribution.

Key words: distributive justice, rights to health, COVID-19

I. Introduction

The study of justice has been presented with a wide variety of perspectives: Rawls' distributive justice, Nozick's liberalism, and Sandel's communitarianism (Kymlicka, 2001). Rawls' distributive justice harmonizes liberty and equality appropriately, and the notion of justice, as represented by Nozick, considers individual freedom as the most important parameter. The well-known position of Sandel emphasizes values shared by the community. Following Rawls, the political interests of philosophers were characterized by either distributive justice or social justice theory (Daniels, 2007). Justice is considered as the first virtue

of social institutions (Rawls, 1971).

Distributive justice differs from retributive or restorative justice. First, retributive justice refers to punishment for unjustifiable losses or damage. The principle is causality and retaliation: 'an eye for an eye; a tooth for a tooth'. Retributive justice is aimed at punishing a perpetrator who transgresses a legal right or possession when it is unfairly lost or infringed upon. The method of punishment may be designed to inflict equal damage to the perpetrator by the victim or third party. Thus, the subject who practices justice can be either a victim or by a third party (Matravers, 2000).

Restorative justice is also required when rights or

Corresponding author: Minsoo Jung

Department of Health Science, Dongduk Women's University, 60, Hwarang-ro 13-gil, Seongbuk-gu, Seoul, 02748, Republic of Korea

주소: (02748) 서울특별시 성북구 화랑로 13길 60 동덕여자대학교 보건관리학과(예지관 403호)

Tel: +82-2-940-4483, Fax: +82-2-940-4480, E-mail: mj748@dongduk.ac.kr, minsoo_jung@hsph.harvard.edu

※ This study was supported by the Dongduk Women's University grant (2019-04996).

• Received: June 29, 2020

• Revised: August 12, 2020

• Accepted: September 1, 2020

possessions are improperly lost or compromised. However, unlike retributive justice, the goal is compensation or the recovery of damages. Restorative justice is delivered by the perpetrator or a third party. The purpose of restorative justice is recovery, unlike retributive justice, although the victim may be restored by punishing the perpetrator according to the principle of retributive justice. Therefore, restorative justice involves a feeling of sympathy or forgiveness.

In contrast, the principle of distributive justice can be justified or rationalized (Daniels, 2007). The principle of retributive justice can also be said to be just; however, defining what is just and legitimate as a principle of distributive justice is not as simple as doing so in the case of retributive justice. The grand principle of distributive justice is to return the proportional equality of which Aristotle spoke or to provide a share for each (Miller, 1976). Justice gives each one a share, and a just society is one in which each individual is assigned goods and costs according to his own personal characteristics and circumstances. Thus, the requirement of distributive justice is not when rights or possessions are unfairly lost or infringed upon but when there is conflict between the needs of individuals with regard to goods or costs. However, the act of distribution is not intended simply for individuals or even for a large number of individuals but for society as a collective of individuals. Therefore, distribution should not be intended for individuals or for several individuals, but for society. Given that distributive justice is required in situations where more social goods are acquired and social expenses are less likely to be paid, the object of distribution is the society's goods or costs (Daniels, 2007). Finally, while retributive and restorative justice are required in situations in which the rights or possessions of an individual are unjustly infringed upon, distributive justice is required when there is a conflict between individual needs and goods. The

objects of retributive and restorative justice are individuals who are parties. On the other hand, the subject of distributive justice is a society of individuals. Retributive justice is punitive, restorative justice involves forgiveness, whereas distributive justice focuses on a fair share.

Therefore, who is the target of justice? Retributive and restorative types of justice define individual actions or options, including those of third parties. However, distributive justice implies that the parties are legally represented in a social system or institution. It covers applicable principles. Therefore, distributive justice is not a subject of personal justice that defines individual behavior but a subject of social justice that defines institutions and the institutions of society (Daniels, 2007). Distributive justice is a virtue that must be followed and enforced by a nation that exercises its authority when the system or institution distributes the goods of society. When Rawls says that justice is the first virtue of social institutions, a society is considered as a nation. Accordingly, the subject of distributive justice is the basic structure of society. It implies that the subject of the theory of justice is not a person but society, although it also refers to a society as a nation in which laws are enforced. In the end, the theory of distributive justice exists under the principle that, when distributing social goods or costs in situations where individual interests are in conflict, a legitimate share must be returned. It is a theory that suggests specific principles for implementation by institutions and society, which legitimately represent individuals in a national society. Thus, Nozick argued for a distinction between before and after with regard to Rawls's study of the theory of distributive justice (Nozick, 1974). This article examines the theory of distributive justice and discusses its implications in terms of health rights.

II. Methods

We reviewed current distributional theories in terms of liberal distributive justice. As a criterion for distribution, merit is appropriate in the sense that individual choice, effort, or ability can result in legitimate inequality, and merit-based distribution of the results can account for individuals with merit. Based on the difference principle enunciated by Rawls, the distribution occurs first in order to resolve unfair inequalities. According to the priority theory, distributions are intended for those who are poorer. According to the theory of hypothetical insurance by Dworkin, the distributions move according to need based on sufficientarianism, to ensure basic living standards to compensate for inherent disabilities and allow people to pursue their own preferences. Because of a diverse range of social aspects in reality, a just and perfect distribution theory is impossible. Nonetheless, we can gauge feasibility of each method by coherently examining the method of distribution combined with the objects of distribution.

III. Results

1. Purpose of distribution

According to Rawls's principle of the theory of justice, basic freedom is the ultimate goal of distributive justice (Rawls, 1971). Rawls deems basic freedom as a type of political liberty and lists specific examples of freedom of doctors and assembly, freedom of conscience, freedom of thought, and freedom of property ownership (Rawls, 1971). Individual freedom via distribution is the goal of community. In that sense, Rawls' theory of justice is referred to as a liberal theory of justice. Nozick, also considered to be a libertarian, is a liberalist in the sense that society

claims not to infringe on individual liberty. Nozick argues that no one can infringe on legitimate property acquired under Locke's concept of property rights. According to Locke, the government is justified in protecting its legitimate property rights. In this sense, Nozick argues that individual freedom is what society should aim for with regard to distribution (Nozick, 1974). Both Rawls and Nozick claim personal freedom as the goal of distribution by society, under the belief that individuals determine the criteria for their happiness and identify the relevant needs.

On the other hand, Sandel's assertion of justice presupposes that the criteria for individual happiness are not completely free from the historical and cultural values of the community to which an individual belongs (Sandel, 1982). Furthermore, there is virtue, which can be owned jointly, and the freedom to practice it can bring real happiness. Therefore, the position of justice represented by Sandel is called communitarianism. In fact, communitarianism is not one of the theories of distributive justice but is a philosophical dogma presented as a critique of liberal justice. Distributive justice assumes that the individual interests are in conflict with social goods and costs, which are distributed individually. Communitarianism, on the other hand, places greater emphasis on the community value, contrary to the foregoing assumption and defines the individual identity rather than the distribution of benefits. In other words, communitarianism does not discuss why and how to distribute something.

On the other hand, utilitarianism is a theory that defines the goals of society to maximize the happiness of its members, and not the individual freedom. Utilitarianism aims not only to maximize individual freedom but also to maximize the sum of happiness of each member in a society. Thus, for example, a newly created hospital claims to be able to ignore a person's injury if it is beneficial to 10 people. However, this is

a position that liberalists cannot accept, because liberals consider the rights of one to be as heavy as the rights of the other ten. The sum of the weights of individual rights in the ten others is not included in the equation by liberals. Utilitarianism, similar to communitarianism, need not to be understood as a type of distributive justice, as utilitarianism aims to maximize the sum of the happiness of each member in a society regardless of the libertarian economic system, which rejects distribution by interventionist economic systems that emphasize distribution. Thus, utilitarianism may refuse or relinquish distribution in order to expand the sum of happiness. Therefore, libertarian justice, which aims at individual freedom in relation to the purpose of distribution, is the only theory of distributive justice.

2. Rationale for distribution

The rationale for distribution of social goods and costs is based on the recognition that it is not justified unless it is implemented. According to Rawls, natural distribution is neither legitimate nor justified. It cannot be said that people are not justified by birth of a particular family in society. This is merely a natural fact. Legitimacy or fairness depends on the perspective of social institutions and institutions (Rawls, 1971). It is not appropriate for society to abandon an inequality attributed to luck, although natural fortune cannot be judged as legitimacy per se. Therefore, Rawls is hypothetical, and those who are unaware of such misfortune will be assigned the universal basic principles, and in the presence of inequality, it will benefit the person with the least income or wealth. Thus, reducing actual inequalities is the primary reason for distribution of social goods and costs. We, therefore, designate Rawls' justice as the theory of equality and liberal justice. Nozick's position, on the other hand, is defined by liberal justice, which places liberty at the highest value. He is not interested in

reducing inequalities created by circumstances in which an individual cannot be held accountable, as every individual has absolute ownership and related property rights, and that violation of one's ownership and fulfilling another's needs is an infringement of absolute ownership. Thus, Nozick basically opposes the distribution of society's goods and costs among individuals.

The personal freedom that Rawls claims involves individual freedom of action without limits. However, this is the universal freedom, which can be partially restricted if it conflicts with individual freedom. This equality of freedom is the freedom desirable for everyone. However, the actual degree of individual freedom is bound to differ between individuals. According to Rawls, it is the goal of social justice to protect the freedom of all individuals by stipulating the basic structure of society to maximize the degree of freedom (Rawls, 1971). On the other hand, in Nozick's case, the concept of individual freedom as the goal of distribution is derived from the absolute self-ownership of each individual. Self-ownership is a right that must not be infringed upon. The right to property legitimately acquired through one's own work should not be used to compensate others for their misfortunes. Furthermore, the freedom to exchange legitimate property should be provided. Nozick argues that the right to own property and the exercise of the right to exchange property, starting with ownership, is the aim of social justice, which protects and guarantees such freedoms (Nozick, 1974).

3. Object of distribution

The state must distribute social goods and costs in order to alleviate the inequalities that undermine the principles of justice by regulating the individual liberties equally. The social goods in question are abstractly referred to as the basic necessities for promotion of happiness, and the social costs are

defined as the costs of producing or maintaining social goods. However, the objects of distribution can vary depending on the purpose. We can perceive whether a theory asserts equality of results or equality of opportunity, and at the same time whether it asserts equality of welfare or equality of resources. In other words, challenges relate to the equalization of welfare as a result of distribution, the uniform allocation of resources, equal distribution of opportunities for welfare, or an equitable distribution of resources.

First, there is the equal distribution of welfare. Currently, welfare can be regarded as the satisfaction of a preference. It is the goal of distribution that the equality theory of welfare argues for to satisfy individual preference. However, this theory is limited by a few challenges that must be addressed immediately. First, individual preferences vary; especially, if one person's preferences can only be met at a very high cost, it is an unfair proposition. Furthermore, conflicting preferences and abilities entail unfair expenses.

Second, there is an equitable distribution of resources. According to Rawls, the social goods and resources should be allocated equitably, for example, the rights, freedoms, opportunity and power, income and wealth, and self-esteem that rational people need to satisfy their preferences (Rawls, 1971). According to the principles of utilitarianism, it is necessary to distribute equitably the utility and satisfaction gained by using these goods. On the other hand, Rawls' "propertyism" argues that such utility and satisfaction depend on individual preferences and should be equally distributed for fulfilment of the intended goals. Moreover, unlike utilitarianism, which maximizes the sum of each individual's satisfaction, Rawls's theory argues that equitable distribution of goods is necessary to ensure individual freedom equally. Thus, Rawls proposes equality liberalism and resource-based distributive justice, which is linked to Dworkin's

position regarding the equitable distribution of resources. However, according to Rawls, the challenges associated with equitable distribution of major goods are similar to those of equitable distribution of welfare. In other words, the equal distribution of major goods in society does not compensate for the relatively greater need or lack of capacity. Basic living standards vary and individuals may lack the ability to meet such a standard. It is not justifiable to neglect this limitation if the greater need or a lack of capacity is not your responsibility; however, the distribution of equally important goods in a society does not address this issue.

Third, there is the equal distribution of opportunity. Amartya Sen argued that a just society should distribute opportunities, not results (Sen, 1980). According to Sen, the distribution of social goods as claimed by Rawls works independently of the various circumstances including varying needs and abilities. Therefore, under various conditions, equitable distribution of opportunity is necessary without equalizing the results of distribution of goods in a society. According to Sen, personal capabilities rather than welfare or resources should be the object of distribution. The exercise of rational judgment is a practical opportunity. Accordingly, individuals at different levels of natural or socially constructed needs must distribute their skills equally to meet their reasonable needs. This ability is understood as a compromise between welfare and resources. Therefore, the impact of resources on humans is more important than the resources themselves since the resource management depends on the diverse needs and abilities of each individual. Further, the equitable distribution of power leads to distribution of basic skills in order to respect human dignity (Nussbaum, 2011).

The social consensus on the object of distribution should be based on various factors. First, equitable distribution of the results of welfare ensures equal

liberties once individual preferences are addressed. On the other hand, if the resources are equally distributed, not everyone enjoys the same freedoms, as those who have greater needs or insufficient abilities are less likely to enjoy freedom compared with those who are fully endowed. Furthermore, when opportunities for welfare are equally distributed, everyone enjoys equal freedoms in the sense that they have the opportunity to satisfy their preferences. However, when the opportunities for resources are equally distributed, individuals lacking capacity have a narrow range of freedom to use equal opportunities. The equal distribution of competence guarantees freedom to address the basic needs. Thus, it seems more equitable to distribute the outcome of welfare rather than resources, or to distribute the opportunity or ability as opposed to welfare. However, it is difficult to determine the feasibility of such a distribution without considering the mode of distribution.

4. Method of distribution

It is the principle of the distribution of justice that each share is equally distributed. However, it is not reasonable for each person to receive equal and unconditional distribution because the size of the share varies depending on the needs, abilities, responsibilities, choices, and abilities, for which individuals cannot be held accountable. Therefore, it is important to establish a standard in each case. In general, the criteria including merit, priority, and need are reviewed.

First, distribution may differ according to merit, as it is based on the common conception that it is appropriate to receive the corresponding distribution if one has voluntarily selected the resources, has worked hard, or has abilities superior to those of others. However, in cases of fortuitous events such as winning a lottery, the voluntary choice of one person cannot determine all the types of distribution.

Moreover, if the social structure is characterized by inequality, the results can vary greatly even if all efforts are identical. According to the principles of luck egalitarianism, inequalities arising from circumstances affecting people for which they cannot be held accountable are unfair and should be resolved. Luck egalitarianism advocates a choice-sensitive and luck-insensitive principle (Tan, 2008), and a society based on luck egalitarianism is a community without inequalities that arise from uncontrollable natural or social luck. However, because it is not possible to directly control natural or social luck, it is a priority and a necessity to compensate for or equalize the resulting inequalities.

Second, resources can be distributed differently according to priority, which suggests that we should preferentially distribute the goods in society among individuals or populations less endowed than the others. Accordingly, among the principles underlying the theory of justice proposed by Rawls, based on the difference principle, the societal goods should be distributed equally among individuals, to provide the greatest benefit to the poorest. According to the difference principle, it is clear that the distribution of goods should be undertaken in a manner that is beneficial to poorer people due to their greater need or lack of ability. The difference principle is referred to as democratic egalitarianism in the sense that it guarantees freedom by acknowledging the consequences of one's own choices and presupposes the consequences of promoting rather than infringing on the freedom of others. While luck egalitarianism argues that unequal distribution should be determined only by choices for which individuals can be held accountable, democratic egalitarianism is based on the assumption that unequal distribution is based on individual freedom. Moreover, when luck egalitarianism aims to dissolve inequalities and ensure equality, democratic egalitarianism aims to protect the

rights and freedoms of the victims instead of completely resolving inequalities (Anderson, 1999). Rawls's method of distribution based on the principle of difference, seeks equality and allows inequality only when it results in the distribution of goods to the poorest in the society. However, if the wealth of the poor is increased but still does not reach the basic necessary level, such re-distribution will remain inadequate in fulfilling the legitimate needs. Moreover, it is difficult to justify excessive distribution of goods if the poorer person's goods have already exceeded the basic minimum level.

Third, resources can be distributed differently according to the need. In this case, the emphasis is on the basic living standards of the individual as a human being considering the environment of the society to which the individual belongs. Sufficiencyarianism representing this position has emerged as an alternative to Rawls' difference principle and concept of priority. The key aspect in this regard is that while not everyone possesses the same things, everyone is provided with enough to meet the basic needs (Frankfurt, 1987). It is not morally important that someone has more than someone else if everyone has enough to meet their basic needs of survival. Therefore, this position suggests that society should be responsible and distribute the goods of society so that individuals can enjoy a basic living standard in society. According to the principles of sufficiencyarianism, a person poorer than the poorest person who adheres to Rawls differential principle does not appear to exhibit an urgent need for a basic living standard at all times. People who need the goods of society are the poor, who cannot meet the basic living standard. It is right to distribute goods to such a person. However, there are cases in which the poor are so selective or intentional that they cannot live a basic life. In such cases, it is not reasonable to distribute social goods. Hence, Dworkin proposed a method of hypothetical

insurance allocation. According to Dworkin, distribution must be 'ambition-sensitive and endowment-insensitive' (Dworkin, 1981). Therefore, a person who voluntarily chooses to work hard should receive a large volume of distributions and, as a consequence, should not be penalized for inherent disabilities. Efforts to treat all individuals in society equally are limited by a lack of knowledge regarding their capabilities or disabilities in the actual society. Moreover, every individual is allocated the same amount of social resources; however, they are not used in life equally due to lack of knowledge regarding inherent disability. Therefore, each individual leaves some of their resources to society through the method of taxation and uses the remaining resources for his personal life. In other words, they contribute some of the resources to social insurance, while using the remaining for their preferred lives. The resources entrusted by hypothetical insurance are used as welfare funds for society, and in the event of an unexpected disability, compensation is provided in the form of medical welfare or unemployment benefits. A challenge arises when one cannot assume responsibility for such rewards when society pays hypothetical premiums for resolving these issues and uses what is left for the life one desires. However, it creates an equal starting point. This approach distributes the goods of society on the basis of needs arising from problems for which the individual cannot be held accountable. However, Dworkin's hypothetical method of distribution is not perfect. Hypothetical premiums and the goods people use for their own lives are inversely proportional to each other and therefore, cannot allow the creation of a perfect state on either side. In other words, they cannot completely compensate for inherent disabilities, and they cannot allow the use of all of one's goods for personal choices. Therefore, it is inevitable to determine the distribution of the next best alternative rather than the

best one. In addition, the hypothetical insurance has a limitation in that talented people must use some of their resources for people with a natural disability.

IV. Discussion

1. Medical resources and justice

It is necessary to determine a proper method by which to distribute medical resources. Today, health scholars use the concept of quality-adjusted life years (QALY), as proposed by McKie and Singer. This places the highest priority on the distribution of resources. However, there is growing criticism of equalityists who prioritize equal access to medical resources in terms of health rights. Norman Daniels represents Rawls' principle of equality of opportunity as the most important principle for the distribution of medical resources, and John Harris and Ezekiel Emanuel, who proposed the allocation of resources in a lottery fashion, are considered to be equalityists. The question arises as to what the egalitarian view regarding the distribution of healthcare resources is, and assuming that people stand by their claims, whether we can justify the right to health should be determined.

According to Aristotle's Nicomachean ethics, distributional justice is the distribution of honor, political office, and money according to the merit. This is close to a formal definition that is distinct from the market definition. However, the concept of justice today is more complex. First, justice is not a specific type of moral interest but is rather a kind of reality that is applied. In particular, obtaining justification based on the degree of acceptability is important in determining whether or not something is justified. In addition, given that definitions are obtained through distributions and rewards, it should be possible to compare their distributions to determine how fair they

are. However, not all individuals need to be compensated at the same rate, and how harmoniously rewards are distributed according to individuals' positions is important to realize the concept of justice. Thus, a fair distribution is achieved when respecting the rights of the weak and retaining mutual moral obligations.

The first aspect to consider when discussing distributional justice is libertarian justice, as conceived by Nozick. In his book "From Anarchy to Utopia," he explained that no one had the right to material goods that no one had acquired as private property. Moreover, artificial redistribution would continue to be hampered by free donations and exchanges such that continuous interventions in trading and exchanges among individuals based on ownership was impossible. On the other hand, the utilitarian doctrine is combined with an element of maximization and impartiality that is ethically desirable when maximizing overall welfare. In other words, it judges whether the result of an act is desirable rather than the motive or intention of the act considering the equal position of all individuals. Therefore, in any case, if we only calculate maximum satisfaction, we can determine the justification of any distribution. Rawls, on the other hand, criticizes existing utilitarian justice in his book "Theory of Justice," arguing that "justice" arises from the fact that reasonable people will agree under fair circumstances. Therefore, we have introduced a fair virtual situation, followed the principle of justice, and then applied an actual situation and introduced the principle of correction to be applied if the action is unfair. The hypothetical situation introduced by Rawls concerns the original position and the veil of ignorance. No one in the original position knows their social status or hierarchy, and no one knows what qualities, abilities, intelligence, or physical strength he inherited. They also do not know their own values or their specific psychological

tendencies. The principles of justice are chosen under this veil of ignorance, ensuring that no one is advantaged or disadvantaged by the consequences of innate coincidences or the contingencies of social conditions. Justice is a fair consensus because everyone is in a similar situation and no one can conceive of a principle that is favorable to them. As a result, the two principles of justice agreed are: 1) that each person should have an equal right to a system of similar freedoms for all and a system of equal basic freedoms that is compatible; and 2) they should be tied to positions open to all under the principle of equality of opportunity, with the greatest benefit to the least beneficiary. In other words, the distribution of social resources is a just distribution system that maximizes the amount of resources that the minimum beneficiary of a society can receive.

Medical resources are closely linked to the health and survival of members of society. Social resources such as income, wealth and education are important, but they can be distributed preferentially when members of society are healthy. In addition, because medical resources consist of medical services, medical devices, and medicines implemented by medical personnel, human resources and physical resources must be distributed in harmony at the same time. Above all, medical resources are scarce because they are expensive. For example, if MERS quickly becomes so prevalent such that many people are infected, can anyone be isolated in a negative-pressure isolation room? Who should be vaccinated when an outbreak of a very strong new form of influenza occurs? How should we prioritize treatment when a large catastrophe occurs and patients are brought to an emergency room? How do you determine the order of transplant recipients considering those with end-stage renal failure? All of these are examples of the distribution of medical resources that must undergo a very challenging discussion process.

Discussions of the proper distribution of medical resources began in the 1980s in relation to the right to health care (Powers & Faden, 2000). The initial issue was whether a right to health existed. Liberals generally denied the existence of health rights. For them, medical justice guarantees individual freedom and ownership, and the issue of distribution is excluded. In order to guarantee active rights such as health rights, it is necessary to distribute social resources, which is not the role of the state or society. Instead, they proposed a means of ensuring minimal health care for the poor through different types of vouchers. On the other hand, equalityists support universal health rights. Norman Daniels viewed a nation as having a natural obligation to ensure minimum health care for its members. However, due to the scarcity of medical resources, there are many cases in which welfare states add utilitarian elements to egalitarianism. In other words, the minimum health care access is guaranteed to all members of society, but cost-benefit or cost-effectiveness factors are introduced into the principle of distribution. Therefore, in order to devise a workable definition of the distribution of medical resources, it is necessary to examine the principles and criteria of instances of specific distributions. Because medical resources are limited, it is sometimes important to know how to allocate, not to distribute. In particular, macro-allocation to allocate health care budgets and micro-allocation to define the coverage of diseases should be coordinated in unison. Only then can we determine the prioritization related to the treatment of patients.

2. Health rights and the distribution of medical resources in the COVID-19 era

The allocation criteria for medical resources can be divided into medical and social standards (Kilner, 1990).

First, according to medical standards, the most basic

principle is imminent death. The intuitive judgment that patients who are at risk of death should be treated prior to other patients is the accepted standard of patient selection. Hence, the order of care in the emergency room is determined according to severity and not on a first-come-first-served basis. However, this criterion reveals limits when distributing transplant organs. If organs are transplanted first to patients most at risk of death, they will be rejected if multiple patients are given the same organs. In other words, we may incur the criticism that it is more justified to implant an organ in a patient who can have the most medically prolonged life rather than undertake distribution according to severity. Thus, the concept of health economics introduced is quality-adjusted life years (QALY). It applies a cost-utility analysis (CUA) as a method by which to determine the distribution of medical resources based on quality of life with regard to medical resource allocation. A distribution system that considers quality-adjusted life years attempts objectively to distribute medical resources by assigning measurable values to the quantity and quality of life and comparing them. Thus, the health status of individuals is calculated as a comparable number based on the quality of health, life expectancy, and the expected cost of maintaining or improving health. QALY quantifies the health status of each individual, assigning a score of 1 for the healthiest condition and 0 for death. The distribution of fair medical resources through QALY can effectively increase QALY through resource allocation. Therefore, health care activities with high QALY costs are considered as the top priority (Maynard, 1987). For example, if the quality of life is 0.8 and if the patient is untreated and can live for two more years in that state, the quality of life of the patient is scored as 1.6. However, if treatment with treatment A results in a 0.3 increase in the quality of life of the patient, the value of this treatment is 0.6 if the patient can live for two more years. On the other

hand, if treatment of the same patient with treatment B results in a 0.2 quality of life and two years of survival, the value of this treatment is 0.4. If Therapy A costs 6 and Therapy B costs 8, QALY scores of A and B are 10, respectively. Therefore, if treatment outcomes are identical, choosing therapy A is a just distribution of medical resources. However, depending on who has assessed the health status of a person during the process of determining the QALY outcome, subjective factors may be involved. For example, the numerical value of the quality-corrected life span given to the same condition can vary depending on the individual. However, it is difficult for patients to determine their own quality-adjusted life expectancy. As a patient knows best about his/her illness, they can distort numbers in their favor to acquire more medical services. In addition, there are various limitations, such as a lack of evidence, limitations of evaluations, disadvantages to the elderly, a lack of understanding due to information asymmetry, evaluations limited to extensions of life spans, and difficulty in objectifying the nature of the treatment. Nevertheless, attempts to allocate and prioritize medical resources according to treatment outcomes have their own meanings.

Next, according to social standards, various socioeconomic characteristics of the population should be reflected when establishing the distribution criteria of medical resources. For example, it can be argued that today's aging population is accelerating and that limited medical resources should be allocated to younger people rather than to older people. As a society ages, higher national medical expenses become a burden on the nation and medical resources become scarcer. Therefore, the distribution of priorities is again a problem. The introduction of age as a standard for allocating medical resources is fundamentally based on the principle that resources should be distributed as needed. The elderly typically use an amount of medical resources equal to their

lifetime medical expenses when they are last hospitalized before death. However, life expectancy is very challenging to increase proportionally. However, for the younger, if life expectancy can be expected to increase, it becomes more likely that the young will be given the opportunity of life and will contribute to society. Therefore, the inclusion of diverse social factors, such as each patient's educational background, income, occupation, and role in the local community, as factors that determine the distribution criteria of medical resources can be seriously considered. However, these criteria should not be determined only according to how much they contribute to the increase in social productivity but should be based on a community-wide consensus. Of course, reaching a social consensus may require much effort and time. In such a case, it also becomes a way to limit the recipients of resources in advance during distribution of medical resources. For example, a favored group such as the Veterans' Hospital is set. Alternatively, when an organ is transplanted, the distribution area can be divided according to area to give priority to a waiting area existing in the area. However, if an agreement cannot be reached, recipients of resources should be determined by a lottery method. Because every individual has the right to maintain their life and promote their health, such a lottery has its own grounds (Harris, 2002). If there are large differences in life expectancy, it may be reasonable to allocate medical resources to patients who will experience significantly improvement in their quality of life. However, if there is little difference in life expectancy outcomes, it becomes difficult to conclude that it is proper to deny resources. Therefore, an easy answer is difficult to reach as to whether this method is the best way to realize the aforementioned definition. In this case, a weighted lottery is proposed. The more socially agreed distribution standards meet the criteria, the greater the chance of winning and the least chance to

receive medical resources if they the criteria are not met.

Although there is a policy of categorizing patients in emergencies (aka triage committee), there are different opinions about what is the right way to allocate medical resources when a large number of patients suddenly occur in a specific area, such as Covid-19 situation. As discussed in this study, there is no perfect distribution criteria for all situations among egalitarianism, utilitarianism, communitarianism, luck egalitarianism, prioritarianism, andlottocracy. This means that it is not yet possible to conclude how to allocate the emergency treatment resources, such as negative pressure hospital room or ventilators, in order to respond to Covid-19, is the most ideal and justified. What's more, we still don't fully understand the nature and prognosis of the virus, and there are no vaccines and treatments. Therefore, now it is desirable to understand the various principles that can realize the distributive justice and to agree it through a democratic process through a committee in which members of society participate. It is difficult for a medical institution to make a decision to secure a patient's life because of legal and ethical responsibilities. Therefore, in order to prepare for the second Covid-19, it is necessary to present the principle of distributing medical resources at the national level and reach an agreement that reflects social values.

3. Implications of distributive justice in health care reforms

It is not easy to achieve fairness and implement justice through the allocation of medical resources. Therefore, we will consider how we can arrive at a distribution definition in terms of health insurance by focusing on the work of Norman Daniels. Daniels, as a disciple of Rawls, refined the concept of reflective equilibrium and attempted to bridge distribution

theory and democratic theory. In particular, he published *Just Healthcare* in 1985 and *Just Health* in 2008 to identify how health and health care are linked to social justice. According to him, the central concepts related to the distribution problem of medical resources are as follows (Daniels, 1994). The first is a democratic approach to how representative and legitimacy are secured when individuals make decisions about social distributions. The second is an approach to how fair chances and best outcomes can be derived with limited resources. The third is a matter of priorities and aggregation as to which direction is proper, with small benefits to more people with the same medical resources and more important benefits to fewer people.

According to Daniels, in order to understand health rights issues in terms of health care, we must understand health needs properly. Health is not the absence of disease, and it is essential to maintain functional equivalents as normal species (Daniels, 2007). The health needs that individuals must meet in relation to the social determinants of health are as follows: personal hygiene, safe and pleasant living and working conditions, guaranteed exercise and rest, balanced nutrition, preventive/therapeutic/rehabilitative healthcare services, social support, and socio-economic factors, among others. Therefore, Daniels contends that this concept cannot be replaced by the preference concept of welfare economics. According to him, individuals within a society must be within the normal opportunity range of self-development. This implies that an innate or acquired health condition of an individual should be kept at a minimum level within the notion of social justice. On the narrow side, this guarantees access to healthcare services, while in a broader sense it implies a healthcare system that allows individuals to enjoy health care. To this end, health care resources must be equitably distributed across generations and life spans to achieve justice.

Rawls, who advocated justice as fairness, argued that for the purpose of justice, a list of primary goods should be used as an objective method to determine who is wealthy and who is unfortunate. However, an explanation is lacking as to how the items on such a list are structured and how much can be reflected, and whether a mutual exchange would be possible. Hence, there was a restriction on the application of the list of primary goods to reality, and health problems were also excluded. According to Daniels, the opportunity given to individuals is to maintain normal functionality. In other words, institutions that meet health needs perform a limited function of maintaining normal functionality, eliminating only significant individual differences due to disease. It is therefore difficult to see how Daniels pursued more rewards or equalization against the inequality of natural luck than those by Rawls. Rawls seeks democratic equality by combining fair equality and difference principles of opportunity, while equality of opportunity is regarded as a constraint on procedural justice. This means that individuals can accept the consequences of a fair process throughout their lives if they are administered properly and distribution benefits all, with the basic structure of an open society. The difference principle produces fewer health inequalities than other inequalities and can benefit not only the poorest, but also the middle-income group. However, Daniels found that it was difficult to ensure fairness by removing only obstacles that impeded the enjoyment of primary social goods. In other words, we must ensure that *health* to the extent that it limits opportunity is guaranteed to a certain level for all members of society so that fair equality is achieved. He argued that health care should be distributed to the foundation of primary social resources because if health needs are unmet, this situation will limit the opportunities of individuals and discriminate against a proper opportunity distribution. It is his position that

society should provide health care to patients with severe illnesses in such a way as to ensure a minimum opportunity to realize their life plans. There is of course a critique of what a normal function is as a human species (Sillers, 2001). However, his claim that a society should meet the needs of individuals through health care systems can be regarded as a step forward in justice according to Rawls' equitable distribution.

Daniels' claim that the list of primary social goods should be based on health rights is for the practical implementation of justice and may be set differently for other countries. The point is that the reasons and the basis behind the decision related to the distribution of healthcare resources during the process of reaching a social consensus must be disclosed to all decision makers. Implementing a formal definition implies that a social consensus can freely and equally collect opinions and make corrections and appeals in relation to citizens' health. Fundamentally, it is necessary to ensure basic access to medical services through the healthcare system. Moreover, legitimacy and fairness of a consensus can be secured if decision-making strengthens deliberation, engages healthcare consumers, and makes the grounds for accountability of reasonableness transparent. If all members of society have health rights, the specific scope and distribution criteria of health care services that can be guaranteed depend on the consensus of the members of the society. However, through the right to health, all members of society can achieve justice as fairness if they can enjoy equality of opportunity more broadly, which is liberal equality.

V. Conclusion

The right to health is the right of the people to demand the benefits and considerations necessary for the maintenance of a healthy life expectancy from the

state. It is a subjective public right and has the characteristics of an objective value order. In other words, while having a defensive character against possible infringement of the right to health, it also has the character of a basic social right that requires an environment necessary to maintain and promote health. Therefore, modern right to health is regarded as a basic right to survival that can equally receive comprehensive protection from the state or society in order to pursue a healthy state. In order for these rights to be effectively guaranteed, it is required that the right to health is not limited to a declarative meaning. In other words, regardless of their socio-economic status, the right to access health and medical resources should be guaranteed. However, due to the so-called market failure of health care services, intervention by the state or society is required to ensure equality of these rights, and a legal review is also required, but related studies have been somewhat insufficient so far. This study examined the nature of the basic liberal rights and the basic social rights that the right to health has, and investigated various rights theory and related discussions. In addition, various arguments related to distributive justice are reviewed as theoretical arguments for effective and normative guarantee of the right to health, and new solutions to related difficulties are reviewed. To this end, we looked at the positions Rawls, Nozick, and Sandels have on social justice. In particular, we analyzed that the distributive justice theory of Norman Daniels has some strengths and weaknesses in resolving the unfair cases of health care resources related to the right to health. In this process, the purpose, reason, object and method of distribution related to health care resources are examined, and various cases are reviewed to see if the guarantee of the right to health through distributional definition can lead to alleviation of health-related inequality. This is linked to the limitations of formulas such as quality-adjusted life

year, which is a widely accepted criterion for distributing medical resources in health science. Consideration of the distributional justice of problems that arise when prioritization of treatment or vaccination for a new infectious disease occurs, or a conflict between access rights to medicines and patent rights can provide new insights, and ultimately to the effective guarantee of health rights. It is the condition for the individuals that make up the community to meet their individual health needs in order to function as a normal species and to be placed within an equal range of opportunities. If this is the right to guarantee and the value to achieve through the fair distribution of the primary social goods of health within a country's health care system, this study can have its own significance.

Acknowledgement

A seminar with Dr. Ole F. Norheim on distributive justice helped me to finalize this study. He is a faculty member of the department of global public health and primary care, University of Bergen, Norway. I would like to express my gratitude to him.

References

- Anderson, E. S. (1999). What is the point of equality? *Ethics*, 109(2), 287-337. doi: 10.1086/233897.
- Daniels, N. (2007). *Just health: Meeting health needs fairly*. Cambridge: Cambridge University Press.
- Daniels, N. (1994). Four unresolved rationing problems: A challenge. *Hastings Center Report*, 24(4), 27-29.
- Dworkin, R. (1981). What is equality? Part 2: Equality of resources. *Philosophy and Public Affairs*, 10(4) 283-345.
- Frankfurt, H. (1987). Equality as a moral ideal. *Ethics*, 98(1), 21-43. doi: 10.1086/292913.
- Harris, J. (2002). Justice and equal opportunities in health care. *Bioethics*, 13(5), 392-404. doi: 10.1111/1467-8519.00167.
- Kilner, J. F. (1990). *Who lives? Who dies?: Ethical criteria in patient selection*. New Haven: Yale University Press.
- Kymlicka, W. (2001). *Contemporary Political Philosophy: An introduction* (2nd ed). Oxford: Oxford University Press.
- Matravers, M. (2000). *Justice and Punishment: The rationale of coercion*. Oxford: Oxford University Press.
- Maynard, A. (1987). Logic in medicine: An economic perspective. *British Medical Journal*, 295, 1537-1541. doi: 10.1136/bmj.295.6612.1537.
- Miller, D. (1976). *Social Justice*. Oxford: Clarendon Press.
- Nozick, R. (1974). *Anarchy, State, and Utopia*. Oxford: Blackwell.
- Nussbaum, M. C. (2011). *Creating Capabilities: The human development approach*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Powers, M, & Faden R. (2000). Inequalities in health, inequalities in health care: Four generations of discussion about justice and cost-effectiveness analysis. *Kennedy Institute of Ethics Journal*, 10(2), 109-127. doi: 10.1353/ken.2000.0014.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge, MA: Harvard University Press.
- Sandel, M. J. (1982). *Liberalism and the Limits of Justice*. NY: Cambridge University Press.
- Sen, A. K. (1980). Equality of what? In McMurrin S (Ed.). *The tanner lectures on human values*. NY: Cambridge University Press.
- Silvers, A. (2001). No basis for justice: Equal opportunity, normal functioning, and the distribution of healthcare. *American Journal of Bioethics*, 1(2), 35-36.
- Tan, K. C. (2008). A defense of luck egalitarianism. *Journal of Philosophy*, 105(11), 665-690.

■ Minsoo Jung <http://orcid.org/0000-0003-3317-6507>