

Health and Human Rights

Edited by

Rebecca J. Cook

University of Toronto, Canada

and

Charles G. Ngwena

University of the Free State, South Africa

ASHGATE

© Rebecca J. Cook and Charles G. Ngwena 2007. For copyright of individual articles please refer to the Acknowledgements.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com
--

British Library Cataloguing in Publication Data

Health and human rights

I. Right to health care

I. Cook, Rebecca J. II. Ngwena, C.G.

362.1

Library of Congress Cataloging-in-Publication Data

Health and human rights / edited by Rebecca J. Cook and Charles G. Ngwena.

p. cm. – (International library of medicine, ethics, and law)

Includes bibliographical references and index.

I. Right to health care. 2. Human rights–Health aspects. 3. Social medicine. 4. Health. I. Cook, Rebecca J. II. Ngwena, C.G. III. Series

[DNLM: 1. Human Rights–Collected Works. 2. World Health–Collected Works. 3.

Health Services Accessibility–Collected Works. 4. Public Health–Collected Works

WA 530.1 H43379 2007]

RA418. H3871 2007

362.1–dc22

2006037923

ISBN: 978–0–7546–2618–3

Printed in Great Britain by TJ International Ltd, Padstow, Cornwall

Acknowledgements

The editors of this volume gratefully acknowledge the research help of Joanna Erdman, Martin Hevia, Linda Hutjens, Daniel Mekonnen, Samara Polansky and Beatrice Tice, and the many individuals, far and wide, who responded to calls for help, including Nehal Bhuta, Judith Mesquita, Asako Hattori, Eszter Kismodi, Magda Mierzevska, Piotr Mierzewski, Smita Narula, Helena Nygren-Krug and Mario Oetheimer.

The editors and publishers also wish to thank the following for permission to use copyright material.

Blackwell Publishing for the essays: Scott Burris (2002), 'Disease Stigma in U.S. Public Health Law', *Journal of Law, Medicine and Ethics*, **30**, pp. 179–90; Leslie London (2002), 'Human Rights and Public Health: Dichotomies or Synergies in Developing Countries? Examining the Case of HIV in South Africa', *Journal of Law, Medicine and Ethics*, **30**, pp. 677–91. Copyright © 2002 American Society of Law, Medicine and Ethics; Colleen M. Flood (2006), 'Just Medicare: The Role of Canadian Courts in Determining Health Care Rights and Access', *Journal of Law, Medicine and Ethics*, **33**, pp. 669–80; Joanna Manning and Ron Paterson (2005), '"Prioritization": Rationing Health Care in New Zealand', *Journal of Law, Medicine and Ethics*, **33**, pp. 681–97. Lisa Forman (2005), 'Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy', *Journal of Law, Medicine and Ethics*, **33**, pp. 711–24; Enrique González Mac Dowell (2002), 'Juridical Action for the Protection of Collective Rights and its Legal Impact: A Case Study', *Journal of Law, Medicine and Ethics*, **30**, pp. 644–54. Copyright © 2002 American Society of Law, Medicine and Ethics; Gerald M. Oppenheimer, Ronald Bayer and James Colgrove (2002), 'Health and Human Rights: Old Wine in New Bottles?', *Journal of Law, Medicine and Ethics*, **30**, pp. 522–32. Copyright © 2002 American Society of Law, Medicine and Ethics; Allyn L. Taylor (2004), 'Governing the Globalization of Public Health', *Journal of Law, Medicine and Ethics*, **32**, pp. 500–08.

Copyright Clearance Center for the essay: Lance Gable, Javier Vásquez, Lawrence O. Gostin and Heidi V. Jiménez (2005), 'Mental Health and Due Process in the Americas: Protecting the Human Rights of Persons Involuntarily Admitted to and Detained in Psychiatric Institutions', *Pan American Journal of Public Health*, **18**, pp. 366–73; Lawrence O. Gostin and Madison Powers (2006), 'What Does Social Justice Require for the Public's Health? Public Health Ethics and Policy Imperatives', *Health Affairs*, **25**, pp. 1053–60. Copyright © 2006 Project HOPE - The People to People Health Foundation, Inc.

Elsevier for the essays: Lesley Doyal (2000), 'Gender Equity in Health: Debates and Dilemmas', *Social Science and Medicine*, **51**, pp. 931–39. Copyright © 2000 Elsevier; Davidson R. Gwatkin, Abbas Bhuiya and Cesar G. Victora (2004), 'Making Health Systems More Equitable', *Lancet*, **364**, pp. 1273–80. Copyright © 2004 The Lancet.

International Journal of Gynecology and Obstetrics for the essays: B.M. Dickens and R.J. Cook (2005), 'Adolescents and Consent to Treatment', *International Journal of Gynecology and Obstetrics*, **89**, pp. 179–84. Copyright © 2005 International Federation of Gynecology and Obstetrics; R.J. Cook and C.G. Ngwena (2006), 'Women's Access to Health Care: The Legal Framework', *International Journal of Gynecology and Obstetrics*, **94**, pp. 216–25. Copyright © 2006 International Federation of Gynecology and Obstetrics; L.P. Freedman (2001), 'Using Human Rights in Maternal Mortality Programs: From Analysis to Strategy', *International Journal of Gynecology and Obstetrics*, **75**, pp. 51–60. Copyright © 2001 International Federation of Gynecology and

Obstetrics; Chris Beyrer (2001), 'Shan Women and Girls and the Sex Industry in Southeast Asia: Political Causes and Human Rights Implications', *Social Science and Medicine*, **53**, pp. 543–50. Copyright © 2001 Elsevier.

John Wiley & Sons Ltd for the essay: Amartya Sen (2002), 'Why Health Equity?', *Health Economics*, **11**, pp. 659–66. Copyright © 2002 John Wiley and Sons Ltd.

Johns Hopkins University Press for the essays: Alicia Ely Yamin (2005), 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda', *Human Rights Quarterly*, **27**, pp. 1200–44. Copyright © 2005 Johns Hopkins University Press; Paul Hunt and Judith Mesquita (2006), 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health', *Human Rights Quarterly*, **28**, pp. 332–56. Copyright © 2006 Johns Hopkins University Press.

Journal of Juridical Science for the essays: N.M. Naylor (2005), "'Cry the Beloved Continent ...': Exploring the Impact of HIV/AIDS and Violence on Women's Reproductive and Sexual Rights in Southern Africa", *Journal for Juridical Science*, **30**, pp. 52–79; L.M. Kelly (2006), 'Polygyny and HIV/AIDS: A Health and Human Rights Approach', *Journal for Juridical Science*, **31**, pp. 1–38; K. Syrett (2005), 'Revisiting the Judicial Role in the Allocation of Healthcare Resources: On Deference, Democratic Dialogue and Deliberation', *Journal for Juridical Science*, **30**, pp. 1–29.

Juta Law for the essay: Michael Kirby (2004), 'The Never-ending Paradoxes of HIV/AIDS and Human Rights', *African Human Rights Journal*, **4**, pp. 163–80.

McGill Law Journal for the essay: Erin Nelson (2004), 'Reconceiving Pregnancy: Expressive Choice and Legal Reasoning', *McGill Law Journal*, **49**, pp. 593–634. Copyright © 2004 McGill Law Journal.

Arvind Narrain (2004), 'The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva', *Health and Human Rights*, **7**, pp. 143–64. Copyright © 2004 Arvind Narrain.

Oxford University Press for the essay: Audrey R. Chapman (2002), 'The Human Rights Implications of Intellectual Property Protection', *Journal of International Economic Law*, **5**, pp. 861–82. Copyright © 2002 Oxford University Press.

Springer Science and Business Media for the essays: Eileen V. Fegan and Rachel Rebouche (2003), 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency', *Feminist Legal Studies*, **11**, pp. 221–54. Copyright © 2003 Kluwer Academic Publishers; Allen Buchanan and Matthew Decamp (2006), 'Responsibility for Global Health', *Theoretical Medicine and Bioethics*, **27**, pp. 95–114. Copyright © 2006 Springer.

VerLoren van Themaat Centre for Public Law Studies, Unisa for the essay: Charles Ngwenya (2004), 'Access to Legal Abortion: Developments in Africa from a Reproductive and Sexual Health Rights Perspective', *SAPR/Public Law*, **19**, pp. 328–50.

World Health Organization for the essay: Paula Braveman and Sofia Gruskin (2003), 'Poverty, Equity, Human Rights and Health', *Bulletin of the World Health Organization*, **81**, pp. 539–45; Norman Daniels, J. Bryant, R.A. Castano, O.G. Dantes, K.S. Khan and S. Pannarunothai (2000), 'Benchmarks of Fairness for Health Care Reform: A Policy Tool for Developing Countries', *Bulletin of the World Health Organization*, **78**, pp. 740–50. Copyright © 2000 World Health Organization.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Series Preface

Few academic disciplines have developed with such pace in recent years as bioethics. And because the subject crosses so many disciplines, important writing is to be found in a range of books and journals, access to the whole of which is likely to elude all but the most committed of scholars. The International Library of Medicine, Ethics and Law is designed to assist the scholarly endeavour by providing in accessible volumes a compendium of basic materials drawn from the most significant periodical literature. Each volume contains essays of central theoretical importance in its subject area, and each throws light on important bioethical questions in the world today. The series as a whole – there will be fifteen volumes – makes available an extensive range of valuable material (the standard ‘classics’ and the not-so-standard) and should prove of inestimable value to those involved in the research, teaching and study of medicine, ethics and law. The fifteen volumes together – each with introductions and bibliographies – are a library in themselves – an indispensable resource in a world in which even the best-stocked library is unlikely to cover the range of materials contained within these volumes.

It remains for me to thank the editors who have pursued their task with commitment, insight and enthusiasm, to thank also the hard-working staff at Ashgate – theirs is a mammoth enterprise – and to thank my secretary, Anita Garfoot, for the enormous assistance she has given me in bringing the series from idea to reality.

MICHAEL FREEMAN
Series Editor
Faculty of Laws
University College London

Introduction

The translation of human rights into rights that transcend rhetoric is an enduring challenge for the community of nations. Whilst the notion of the indivisibility and interdependence of rights that was reaffirmed in the UN Vienna Declaration and Programme of Action of 1993¹ has gained increasing ascendancy in human rights jurisprudence, for billions of humankind, a holistic realization of human rights remains seemingly unattainable. Persisting human rights violations by state and non-state actors, and unresponsive domestic and international policies and practices, remain obstacles to the realization of a universal right to health that was first espoused in the Constitution of the World Health Organization (WHO) of 1946.² The juxtaposition of 'health' with 'human rights' in the title of this volume is, therefore, an acknowledgement that health and human rights are mutually dependent and that the challenge of transcending the rhetoric of health as a human right is a contemporary one.

The unambiguous recognition of the right to health under international human rights instruments, the inclusion of the right to health under the provisions of an increasing number of domestic constitutions and judicial pronouncements from various jurisdictions affirming the right to health³ are reasons for suggesting that (see, Kinney and Clark, 2004) in the twenty-first century, the challenge of vindicating the right to health will increasingly lie not so much in establishing the right but in determining application of the right to health and enhancing the realization of its imperatives. The challenge is to engage policy-makers and domestic courts to see how they might play a more effective role in promoting the realization of the right to health. The challenge also lies in developing new thinking about effective and feasible ways of implementing and monitoring the right at a programmatic level so that it does not remain an abstract ideal that rarely rises above rhetoric.

In modern times, the Constitution of the World Health Organization provided the earliest conceptualization of the right to health when it proclaimed in its preamble that '[t]he enjoyment of the highest attainable standard of living is one of the fundamental rights of every human being, without distinction of race, religion, political belief, economic or social condition'. Beginning with Article 25 of the Universal Declaration of Human Rights of 1948, a series of United Nations instruments has explicitly acknowledged the right to health as a universal right that is no less compelling than traditional civil and political rights. The Committee on Economic, Social and Cultural Rights (CESCR), established under the International Covenant on Economic, Social and Cultural Rights (ICESCR), has clarified the obligations imposed by

¹ United Nations Vienna Declaration and Programme of Action (1993). Adopted at the World Conference on Human Rights, Vienna, 11–25 June.

² Constitution of the World Health Organization, adopted by the International Health Conference on 22 July 1946 and entered into force on 7 April 1948.

³ For example, *Mariela Viceconte v. Ministry of Health and Social Welfare*, Case No 31.777/96 (1998), Court of Appeals of Argentina; *Minister of Health and Others v. Treatment Action Campaign and Others* (2002), 10 BCLR 1033 Constitutional Court of South Africa; *Mendoza and Others v. Ministry of Public Health*, Resolution No 0749-2003-RA, 28 January 2004, Constitutional Court of Ecuador.

the Covenant's Article 12 on the right to health in its General Comment No. 14.⁴ This Comment rendered an expansive and egalitarian interpretation of the right to health against the backdrop of Article 2(1) of the ICESCR, which enjoins each state '... to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

An important dimension of United Nations' instruments that acknowledge the right to health is the clarification of their normative content in respect of historically disadvantaged and vulnerable groups such as racial groups,⁵ women⁶ and children.⁷ The Committee on the Elimination of Discrimination against Women (CEDAW), established under the Convention on the Elimination of All Forms of Discrimination against Women, provides gender-based yardsticks in the Committee's General Recommendation No. 24⁸ for the realization of the equal right to health of women, pursuant to Article 12 of the Convention. Unless the right to health is inclusive, targeted and attuned to systematic inequality, it has little prospect of facilitating the achievement of substantive equality, especially for vulnerable groups. Several regional instruments have complemented United Nations' instruments in acknowledging the right to health.⁹

About this volume

Against this backdrop, this volume contains a selection of published English-language essays that address the challenges of realizing health and human rights. The essays were selected on the basis of the following criteria:

- Analytical depth and theoretical insights
- Generalizability beyond the specific issue or country
- Contribution to the overall coherence of the volume
- Potential impact on subsequent public and academic debates on health and human rights.

Scholarship at the intersections of health and human rights is growing. For reasons of space and coherence, there were many excellent essays that had to be excluded, including essays

⁴ CESCR, General Comment No. 14, *The Right to the Highest Attainable Standard of Health* (2000), E/C.12/2000/4..

⁵ Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

⁶ Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

⁷ Article 24 of the Convention of the Rights of the Child.

⁸ CEDAW, General Recommendation No. 24 (1999).

⁹ See, for example, Articles 11 and 13 of the European Social Charter (1961); Article 16 of the African Charter on Human and People's Rights (1981) read especially with Articles 5, 14 and 18 of Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003); Article 10 of the Additional Protocol to the American Convention on Rights in the Area of Economic, Social and Cultural Rights (1988).

that surpassed the desired length. Some of the essays chosen for this volume might appear dated but they were included nonetheless because they provide important perspectives. Essays that focus on particular countries may seem parochial. They were chosen not only to show how they apply human rights in the context of that country, but also because the insights they provide are generalizable. Essays that focus on a particular area of health were chosen because of the lessons they teach on how human rights can be applied in that area, and also for their implications for applying human rights to promote other areas of health or to address determinants of ill-health.

The short bibliography at the end of this Introduction gives further references not only to topics already covered, but also to topics excluded due to lack of space. The bibliography makes no claim to be comprehensive, but rather is suggestive of further readings.

To facilitate coherence and develop a systematic approach to the discourse on health and human rights, the essays have been subsumed under the following categories:

- Understanding the determinants of health
- Applications of human rights to promote health
- Applications of human rights to promote self-determination in health
- The role of courts in determining access to health services
- Perspectives and methodologies
- Globalized dimensions of health and human rights.

Understanding the Determinants of Health

Understanding the determinants of health and ill-health is an important preliminary step in the effective application of human rights to promote health (see, for example, Marmot and Wilkinson, 1999). Determinants of health are multiple. They can be common to a community, or they can exist across communities. They can be specific to physical conditions, such as age-related determinants, or they can be broad, such as social or economic determinants of health. The essays in Part I of this volume address some of the broader determinants of ill-health, including poverty, gender, violence, sexuality and stigma.

Davidson Gwatkin *et al.* (Chapter 1) examine how the inequities in health systems perpetuate lower health outcomes of poor groups by providing more and higher-quality services to advantaged groups. The authors explore how health systems might be changed to remedy inequities, such as by establishing goals for improved coverage of health services for poor communities and using those goals to direct planning towards their needs. Lesley Doyal (Chapter 2) argues that gender equity requires the identification of the unique health needs of both men and women, and the allocation of health resources accordingly. In addition, health policies are needed that address the gendered obstacles that women and men face in realizing their potentials for health. Nikki Naylor (Chapter 3) uses Southern Africa as a case study to explore how sexual violence fuels the HIV/AIDS epidemic and how HIV exacerbates violence against women, especially upon disclosure of women's positive status. Naylor advocates moving beyond patriarchy and discrimination to implement policies that respect women's dignity and rights.

Groups that are stigmatized because of their sexual orientation, HIV/AIDS or some other socially discredited status, generally experience discrimination (Link and Phelan, 2001). For the labelled group, stigma leads to diminished access to health care services and information. Arvind Narrain (Chapter 4) addresses how a combination of factors in India, including politics, culture and law, has merged to stigmatize 'queer' sexualities and so exacerbate the spread of HIV/AIDS. Scott Burris (Chapter 5) explores how stigma is used as a decentralized method of social control, operating through the attitudes and behaviour of elites to marginalize those with stigmatized traits. Drawing from the American public health experience in HIV/AIDS, the author suggests strategies for resisting and overcoming stigma, including embarking on research to demonstrate how laws and policies can be deployed to resist stigma.

Applications of Human Rights to Promote Health

Essays in Part II consider various ways of applying human rights to address some of the different determinants of health and to reduce maternal mortality, HIV/AIDS and mental disabilities. Alicia Yamin (Chapter 6) examines how human rights can be applied to broad socioeconomic and sociocultural determinants of health. She urges human rights groups to rethink their adversarial modes that focus on the violation of an individual right, to work more strategically through partnerships among actors directed to all failures in health and other systems that lead to the premature deaths of women.

Leslie London (Chapter 7) examines the ways in which power structures and legal systems affect the spread of HIV/AIDS. The author asks whether the language of human rights represents an unattainable vision that hampers, rather than realizes, human well-being in countries where resources are increasingly constrained. Using HIV/AIDS in South Africa as a case study, London proposes a framework for determining whether particular policies integrate public health and human rights. Lisa Kelly (Chapter 8) shows how the practice of polygyny in Southern Africa and elsewhere can be a vector for HIV. Kelly contends that, as part of combating HIV/AIDS, governments have an obligation to create environments that improve women's ability to negotiate safer sexual activity. She argues for the application of human rights that protect equality in marriage to eliminate the institution of polygyny as a step towards improving women's bargaining power.

The advent of effective antiretroviral therapy in recent years has led many to suggest that it is now time to revisit how we conceive and apply voluntary HIV testing and counselling. In his essay, Michael Kirby (Chapter 9) questions whether past strategies of voluntary testing and counselling should be replaced with routine testing with 'opt out' provisions. Kirby considers whether the educational and voluntary nature of previous strategies should give way to a more paternalistic approach, to increase the use of antiretroviral treatments, especially in Africa.

Paul Hunt and Judith Mesquita (Chapter 10) explore how General Comment No. 14 of the Committee on Economic, Social and Cultural Rights can be applied to improve the health of persons with mental disabilities. The authors advocate the application of rights that support participation, autonomy and dignity of persons with mental disabilities and suggest that monitoring and accountability procedures be applied in all policy initiatives in mental health. Lance Gable *et al.* (Chapter 11) reinforce the human rights dimension of mental health care by exploring infringements of the rights to liberty and dignity of those compulsorily detained in psychiatric institutions. The authors urge the use of the 1991 UN Principles for the Protection

of Persons with Mental Illness and the Improvement of Mental Health Care to interpret human rights conventions to strengthen the protection of mental health and hold states accountable for their negligent treatment of people with mental disabilities.

Applications of Human Rights to Promote Self-determination in Health

The essays in Part III focus on respect for the dignity, autonomy and agency of individuals which remains contested in the health context, despite many battles and the development of laws, standards and ethical codes on free and informed decision-making. There is a long history of compromising the rights of marginalized patients, such as adolescents and those on welfare support. Compromises of personal choice, especially in the reproductive health sphere, are further exacerbated by traditions of paternalism, patriarchy and the imposition of religious doctrines on others.

Erin Nelson's point of departure (in Chapter 12) is that, despite a marked shift from paternalism towards an increasing recognition of the autonomy of patients in health care ethics and law, regressive and coercive attitudes of health-care practitioners and the courts persist. Women's choices are not always respected, as is apparent, for example, in forced medical interventions in pregnancy that are performed in the name of benefiting the pregnant woman or the foetus. Nelson argues that, in order to check this regression and coercion, we need to adopt a new approach that is built around unmasking the meaning of 'choice' so that we understand more about how women make autonomous choices in pregnancy. Nelson advocates the adoption of an 'expressive theory of choice' as a theoretical paradigm that has the potential positively to contribute to a nuanced understanding and application of autonomous decision-making in pregnancy.

The abortion debate may reduce women's agency unless the discourse respects the human rights components of law. Eileen Fegan and Rachel Rebouche (Chapter 13) argue that the Northern Irish abortion law reinforces dominant cultural norms in policy, practice and procedure. They stress that a reconceptualization of the debate from the perspective of women's agency is needed in order to open a meaningful dialogue about rights. Charles Ngweni (Chapter 14) argues that 'rights talk' is a necessary instrument for challenging the state in regard to abortion laws that infringe on the reproductive rights of women and cause them to seek unsafe abortions. Restrictive abortion laws militate against the realization of the human rights of women, including the achievement of substantive equality.

Bernard Dickens and Rebecca Cook (Chapter 15) address the rights of adolescents to make decisions about whether to consent to reproductive health services. They explain that the Convention on the Rights of the Child recognizes adolescents' independent capacity to make decisions about their health, based not on a specific age but on ability or capacity to understand. Access to reproductive and other health services for adolescents are therefore not restricted by the preferences and values of parents where the adolescents themselves have the capacity for self-determination.

The Role of the Courts in Determining Access to Health Services

The capacity of human rights to promote health depends, in part, on the vision of national courts to interpret and apply human rights under constitutions and national laws in a manner that advances health. An increasingly important theme in health and human rights concerns decisions of the courts on access to care. One of the challenges that courts face when adjudicating issues of access to care is reconciling traditional judicial restraint in matters impacting on governmental or executive policy, in deference to the doctrine of separation of powers, with a constitutional duty to determine the possible breach of a legal right which, on account of its inherent nature, may implicate an executive preference.

The first two essays of Part IV examine the judicial role in ensuring general governmental accountability. Against the backdrop of decisions of Canadian, English and South African courts, and the traditional reluctance of courts to intervene in cases that turn upon the allocation of scarce health-care resources, Keith Syrett (Chapter 16) contends that courts have an important deliberative role to play. The author argues that in a democracy it is necessary for decisions affecting the rationing of care to have legitimacy and that, to establish the legitimacy of governmental decisions on rationing, courts need to require governments to provide reasoned justifications for their allocation decisions. Syrett sees the importance of the deliberative role of courts in stimulating debate about the rationing of health-care resources. Rebecca Cook and Charles Ngweni (Chapter 17) consider ways in which the law acts as both a barrier and a tool in ensuring women's effective access to health services. They explore how courts in various countries have held governments accountable to ensure that women's access to health services is evidence-based, transparent and equitable.

The remaining essays in Part IV focus on the role of particular national courts in determining the types of treatment covered under national health services, the rationing of care and decisions about access to care. Through an examination of court cases pertaining to the Canadian health system, Colleen Flood (Chapter 18) questions the legitimacy of judicial reluctance to investigate the justifications for the rationing of health-care resources. She argues that deference to governmental decision-making about what services are publicly funded is neither required nor deserved. She explains that Canadian courts miss the opportunity to provide procedural principles that promote transparency and fairness.

Joanna Manning and Ron Paterson (Chapter 19) examine whether rationing health care in New Zealand is equitable, where the New Zealand Bill of Rights Act specifically permits rationing. They conclude that, where rationing results in indirect discrimination on such grounds as age or disability, governmental authorities should be prepared to justify this effect. Lisa Forman (Chapter 20) explores the role of national courts in reviewing health policies from a human rights perspective regarding South African HIV/AIDS policy. She argues that the courts have an important role in enabling access to health services and in remedying governmental policy defects.

Through a case study of Venezuela, Enrique González MacDowell (Chapter 21) shows how litigation on the right of access to HIV/AIDS treatment has played a major role in the progressive interpretations of *amparo* actions (court actions to vindicate a constitutional right). These interpretations have enabled court judgments to be applied to a broader class of persons than just the petitioners. The author underscores the importance of social participation and collective action in the fight for legal recognition of human rights of access to health services

for those with HIV/AIDS and the potential such action may have to expand access to services more generally.

Perspectives and Methodologies

Part V considers different perspectives on contributions of human rights to health and various methodologies to apply human rights to health systems in order to achieve more just outcomes. Gerald Oppenheimer *et al.* (Chapter 22) explain how coercive public health policies that drove those most in need of protection away from programmes to contain the spread of HIV were replaced with policies protecting the rights of individuals affected by HIV/AIDS. They review the historical development of understandings of socioeconomic determinants of health and how such understandings evolved into the field of social epidemiology. They urge a renewed application of human rights to resolve inequities that condition social and economic vulnerabilities to disease.

In examining health equity, Amartya Sen (Chapter 23) argues for a broad, inclusive human rights framework that covers the capacities to achieve health, the distribution of health care and the procedures for ensuring non-discrimination in delivery of care. He contends that, beyond considering means of delivery of health care, health equity is central to an understanding of broader issues of social justice, and vice versa. Paula Braveman and Sofia Gruskin (Chapter 24) examine how equity and human rights can be applied to improve all health sector actions. They suggest strengthening and extending public health functions that affect conditions necessary for health. They also argue for implementing equitable health-care financing, for more effective responses to major causes of preventable ill-health, and for an examination of health equity implications of policies extending beyond the health sector, such as in education and employment.

Lawrence Gostin and Madison Powers (Chapter 25) claim that socially just public health systems require more than the fair distribution of resources in public health emergencies; they require systematically addressing the multiple causes of the public's ill-health. The authors contend that the policy imperatives of a social justice perspective on public health compel a sustained commitment to create public health infrastructures that address the determinants of ill-health and ensure fair treatment of the disadvantaged.

A crucial and still evolving contribution to realizing the right to health has been the development of indicators and benchmarks to determine whether governments are meeting their obligations under their own laws and international human rights law or other global undertakings.¹⁰ Indicators and benchmarks translate duties on which the right to health

¹⁰ See, for example, Programme of Action of the International Conference on Population and Development of 1994; UN General Assembly (2000), *Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, Supp. no. 3 (A/S-23/10/Rev.1). Overall Review and Appraisal of the Implementation of the Programme of Action of the International Conference on Population and Development of 1999; the Platform of Action and the Beijing Declaration of the Fourth World Conference on Women of 1995; UN General Assembly (2000), *Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, Draft Resolution II: Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action Supp. no. 3 (A/S-23/10/Rev.1); UN Millennium Development Goals of 2000.

depends into specific qualitative and quantitative targets. The next two essays explain that indicators and benchmarks are more than guidelines for determining violations of the right to health. They are also means by which policy-makers can demonstrate whether their laws, policies and programmes comply with the right to health.

Norman Daniels *et al.* (Chapter 26) develop 'benchmarks of fairness' for assessing health system reform in developing countries. The benchmarks include financial and non-financial barriers to needed services, the efficacy, efficiency and equality of health care, and autonomy and accountability in the health-care system. Lynn Freedman (Chapter 27) focuses on ensuring that the design and implementation of essential obstetric services comply with human rights. She encourages the use of human rights audits to facilitate respectful, non-discriminatory treatment of patients, providers and staff, and procedures of accountability to improve the functioning and responsiveness of services in order to avert maternal death and disability.

Globalized Dimensions of Health and Human Rights

This volume concludes by examining, in Part VI, the international implications and responsibilities that arise from a globalized notion of health. 'Global' health has become increasingly significant as infections and other risks to health have become international in scope and require worldwide cooperation for the protection of populations. Human rights form the normative basis on which global health can be discussed as both a moral and a preventative or therapeutic issue.

Allen Buchanan and Matthew Decamp (Chapter 28) argue that if there is to be significant reduction of the most serious health problems of the world's most vulnerable people, abstract notions of improving global health must be translated into material responsibilities for action. This must be accomplished through a more comprehensive understanding of the range of public and private institutions and should focus on the abilities of poorer, as well as of wealthier, countries to help themselves achieve a higher standard of living that makes better health possible. Allyn Taylor (Chapter 29) explores the crucial role of the World Health Organization in addressing the challenges of achieving globalized health and the implications for global public health governance. She concludes that effective global health governance requires an institution to ensure collective and cooperative supervision and development of the field of global health.

Political conflict may also have detrimental effects on health, especially for women. Chris Beyrer (Chapter 30) provides an example of human rights abuses that occur in times of conflict, including rape, other sexual violence and increased vulnerability to suffer trafficking into prostitution. Such consequences increase exposure to HIV/AIDS and other sexually transmitted infections (STIs) for abused women. Rights violations in the Shan states of Myanmar (Burma) are discussed, along with the need for approaches to prevent trafficking, empower women already in the sex industry and reduce exposure to HIV and other STIs among women and girls.

The final essays consider specific processes already in effect that exemplify the globalized nature of health and human rights, including intellectual property laws and laws on access to pharmaceuticals. Audrey Chapman (Chapter 31) outlines a human rights perspective on the requirements for protection of intellectual property and then discusses potential conflicts between current developments in intellectual property law and the potential for placing patents

and other intellectual property interests within a broader context to promote equitable access to health-care products. Zita Lazzarini (Chapter 32) examines the international agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement), and the situation in Brazil for accessing HIV/AIDS pharmaceuticals under exceptions to the TRIPS Agreement. She delineates the ways in which Brazil exemplifies possible strategies that developing countries can employ to balance the protection of intellectual property rights with satisfaction of public health and human rights requirements.

References

- Alfredsson, G. and Tomasevski, K. (1998), *A Thematic Guide to Documents on Health and Human Rights*, The Hague: Martinus Nijhoff.
- Beyrer, C. and Pizer, H.F. (eds) (forthcoming 2007), *Public Health and Human Rights: Evidence-Based Approaches*, Baltimore, MD: Johns Hopkins University Press.
- British Medical Association (2001), *The Medical Profession and Human Rights*, London: Zed Press and British Medical Association.
- Cahill, K.M., (ed.) (1999), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters*, New York: Routledge.
- Chafkin, W. and Chesler, E. (eds) (2006), *Where Do Human Rights Begin? Health, Sexuality, and Women in the New Millennium*, Piscataway, NJ: Rutgers University Press.
- Cook, R.J., Dickens B.M. and Fathalla, M.F. (2003), *Reproductive Health and Human Rights*, Oxford: Clarendon Press. Update at: <http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html>.
- den Exeter, A. and Hermans, H. (1999), *The Right to Health Care in Several European Countries*, The Hague: Kluwer.
- Eriksson, M.K. (2000), *Reproductive Freedom*, The Hague: Martinus Nijhoff.
- Farmer, P. (2003), *Pathologies of Power: Health, Human Rights and the New War on the Poor*, Berkeley, CA: University of California Press.
- Freeman, M. (ed.) (2006), *Children's Health and Children's Rights*, The Hague: Martinus Nijhoff.
- Gevers, J.K.M., Hondius, E.H. and Hubben, J.H. (2005), *Health Law, Human Rights and the Biomedicine Convention*, The Hague: Martinus Nijhoff.
- Gostin, L.O. (2004), *The AIDS Pandemic*, Chapel Hill: University of North Carolina.
- Gostin, L.O. and Lazzarini, Z. (1997), *Human Rights and Public Health in the AIDS Pandemic*, New York: Oxford University Press.
- Gruskin, S., Grodin, M., Annas, G.J. and Marks, S.P. (eds) (2005), *Perspectives on Health and Human Rights*, New York: Routledge.
- Malinowska-Sempruch, K. and Gallagher, S. (2004), *War on Drugs, HIV/AIDS, and Human Rights*, New York: International Debate Education Association.
- Mann, J.M., Gruskin, S., Grodin, M.A. and Annas, G.J. (eds) (1999), *Health and Human Rights: A Reader*, New York, NY: Routledge.
- Marks, S. (ed.) (2004), *Health and Human Rights, Basic International Documents*, Boston, MA: Harvard University Bagnoud Center for Health and Human Rights.
- Packer, C.A.A. (2002), *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa*, Antwerp: Intersentia.
- Petchesky, R.P. (2003), *Global Prescriptions: Gendering Health and Human Rights*, London: Zed Press.
- Roscam Abbing, H.D.C. and Bopp, K.-F. (eds) (2004), *Health, Ethics and Human Rights – The Council of Europe Meeting the Challenge*, The Hague/Strasbourg: Council of Europe.
- Toebes, B. (1999), *The Right to Health as a Right in International Law*, Antwerp: Intersentia.

- Tong, R., Donchin, A. and Dodds, S. (eds) (2004), *Linking Visions: Feminist Bioethics, Human Rights and the Developing World*, Lanham, MD: Rowman and Littlefield.
- Yamin, A.E. (ed.) (2005), *Learning to Dance*, Harvard Series on Health and Human Rights, Boston, MA: Harvard University Bagnoud Center for Health and Human Rights.

Bibliography

- Kinney, E.D. and Clark, B.A. (2004), 'Provisions for Health and Health Care in the Constitutions of the World', *Cornell International Law Journal*, **37**, pp. 285–355.
- Link, B.G. and Phelan, J.C. (2001), 'Conceptualising Stigma', *Annual Review of Sociology*, **27**, pp. 363–70.
- McLean, S. (1999), *Old Law, New Medicine, Medical Ethics and Human Rights*, New York: Pandora.
- Marmot, M.G. and Wilkinson, R. (1999), *Social Determinants of Health*, New York: Oxford University Press.

Contents

<i>Acknowledgements</i>	ix
<i>Series Preface</i>	xi
<i>Introduction</i>	xiii

PART I UNDERSTANDING THE DETERMINANTS OF HEALTH

1 Davidson R. Gwatkin, Abbas Bhuiya and Cesar G. Victora (2004), 'Making Health Systems More Equitable', <i>Lancet</i> , 364 , pp. 1273–80.	3
2 Lesley Doyal (2000), 'Gender Equity in Health: Debates and Dilemmas', <i>Social Science and Medicine</i> , 51 , pp. 931–39.	11
3 N.M. Naylor (2005), "'Cry the Beloved Continent ...': Exploring the Impact of HIV/AIDS and Violence on Women's Reproductive and Sexual Rights in Southern Africa", <i>Journal for Juridical Science</i> , 30 , pp. 52–79.	21
4 Arvind Narrain (2004), 'The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva', <i>Health and Human Rights</i> , 7 , pp. 143–64.	49
5 Scott Burris (2002), 'Disease Stigma in U.S. Public Health Law', <i>Journal of Law, Medicine and Ethics</i> , 30 , pp. 179–90.	71

PART II APPLICATIONS OF HUMAN RIGHTS TO PROMOTE HEALTH

6 Alicia Ely Yamin (2005), 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda', <i>Human Rights Quarterly</i> , 27 , pp. 1200–44.	85
7 Leslie London (2002), 'Human Rights and Public Health: Dichotomies or Synergies in Developing Countries? Examining the Case of HIV in South Africa', <i>Journal of Law, Medicine and Ethics</i> , 30 , pp. 677–91.	131
8 L.M. Kelly (2006), 'Polygyny and HIV/AIDS: A Health and Human Rights Approach', <i>Journal for Juridical Science</i> , 31 , pp. 1–38.	147
9 Michael Kirby (2004), 'The Never-ending Paradoxes of HIV/AIDS and Human Rights', <i>African Human Rights Journal</i> , 4 , pp. 163–80.	185
10 Paul Hunt and Judith Mesquita (2006), 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health', <i>Human Rights Quarterly</i> , 28 , pp. 332–56.	203
11 Lance Gable, Javier Vásquez, Lawrence O. Gostin and Heidi V. Jiménez (2005), 'Mental Health and Due Process in the Americas: Protecting the Human Rights of Persons Involuntarily Admitted to and Detained in Psychiatric Institutions', <i>Pan American Journal of Public Health</i> , 18 , pp. 366–73.	229