Abstract

Human rights law has much to contribute to efforts to articulate and advance global health. Applying human rights principles to health standards and practices helps to place health within a broader context of political, social and economic determinants. A human rights approach also makes the powerful language of legal entitlement available to health advocates and provides a means of countering inequalities associated with generic, universalizing approaches to health. However, the monitoring capability of a human rights framework has important limitations. Its operation focuses only on nation states, leaving the activities of private actors to be scrutinized primarily by the relatively autonomous domestic legal systems of states. Further, the legalism and individualism of the human rights paradigm may impede progressive change by decontextualizing and atomizing human experience. Its usefulness as a legal framework depends largely on turning rhetoric into a reality which relies on real participation and self-determination at the local level. Thus, legal discourse has the potential to make a powerful contribution and is one of the several complementary strategies necessary to promote health.

La ley de los derechos humanos tiene mucho que contribuir a los esfuerzos por articular y avanzar la salud global. Aplicar los principios de los derechos humanos a los estandares y la practica de la salud ayuda a ubicar la salud en un contexto mas amplio de determinantes politicas, sociales y economicas. Un enfoque con base en los derechos humanos tambien permite que el poderoso lenguaje de apropiacion legal quede al alcanze de los defensores de los derechos humanos y provee una manera de contrarestar desigualdades que con frecuencia se ven asociadas con el manejo generico y universalizante de la salud. Sinembargo, la capacidad de monitoreo de un marco de derecjos humanos tiene limitaciones importantes. Sus operaciones se enfocadan solamente en estados de la nación, permitiendo que las actividades de los actores privados sean sometidas pricipalmente al escrutinio de sistemas legales relativamente autónomos de éstos mismos estados. Aun más, el legalismo y el individualismo del paradigma de los derechos humanos puede impedir el cambio progresivo, descontextualizando y atomizando la experiencia humana. Su utilidad como marco legal depende en gran parte de convertir la retorica en una realidad que descanse en una participación real y en auto-determinación al nivel local. Por lo tanto, el discurso legal tiene el potencial de hacer una contribución muy poderosa y es una de las varias estrategias complemetarias que son necesarias para promover la salud.

La législation sur la question des droits de l'homme peut contribuer grandement à l'élaboration du concept de la santé globale ainsi qu'à sa promotion. L'application des principes des droits de l'homme aux standards et aux pratiques de santé aide à la situer dans un contexte plus large de déterminants politiques, sociaux et économiques. L'abord de la santé à partir des droits de l'homme donne également accés au langage propre au législateur fournissant ainsi les moyens de lutter plus efficacement contre les inégalités générées par les approches universalistes et uniformes de la santé. Cependant, la capacité de surveillance d'un réseau des droits de l'homme est fortement limitée. Ses interventions s'effectuent au niveau des états-nations, ce qui laisse les activités des intervenants se dérouler sous le seul contrôle des systèmes législatifs des états. En outre, le côté légaliste et individualiste du concept des droits de l'homme peut faire obstacle au changement progessif en atomisant l'expérience individuelle et en la sortant de son contexte. Son utilité en tant que cadre législatif dépend essentiellement de la capacité de passer de la rhétorique à une réalité qui repose sur une véritable participation et une autodétermination au niveau local. Le discours légal peut apporter une contribution majeure à la promotion de la santé globale et figure donc parmi les stratégies complémentaires essentielles pour atteindre cet objectif.

LINKING HEALTH AND HUMAN RIGHTS: A Critical Legal Perspective

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The potential of human rights discourse to contribute to efforts to articulate and advance global health objectives has only recently begun to be assiduously explored.[1] As a result of past neglect, the idea of health as a human right is undeveloped, despite consistent reference to rights associated with health in international human rights declarations and treaties. Linkages between health and human rights are also apparent in international health instruments. Of particular relevance, the 1946 constitution of the World Health Organization (WHO) refers to "the enjoyment of the highest attainable standard of health" as one of the "fundamental" human rights.[2]

Only in a few specific areas of health has the language of rights been articulated sufficiently to have practical consequences, notably, in medical experimentation and in the treatment of psychiatric patients.[3] In these areas, utilization of a rights paradigm has generally been in reaction to civil and political rights violations associated with health care, rather than as a means of advocating a "right to health."

Yet, every abuse of human rights can be characterized as a health threat to individuals and communities. Likewise, all public health activities have human rights dimensions. In fact, as Mann and colleagues so aptly assert, "health and human rights

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are complementary approaches to the central problem of advancing human well-being."[4] This perspective grounds health within a broad context of political, social, and economic determinants, and fundamentally challenges its traditional conceptualization as a relatively autonomous sphere of scientific investigation, medical expertise, and specialist application.

While affirming the broad paradigm promoted by Mann *et al*, it is important to counsel caution, from a legal perspective, in embracing a human rights approach. For, while the rights discourse has proved powerful and empowering in many circumstances, there are also problems associated with engaging the legal system in the pursuit of social justice goals.

For the purpose of this article, an identifiable, legally binding "right to health" is assumed and used as shorthand for the detailed health principles set out in international treaties and other documents.[5] These provisions can be interpreted to support a broad, integrated approach to health rights although, because of their present lack of specificity and the malleability of the rights concept, this perspective cannot be assured.[6]

This article briefly assesses precipitating factors for recent interest in health as a human rights issue. Potential contributions of a rights perspective to embryonic discussions about the content and scope of a "right to health" are considered. Finally, while acknowledging that much is to be gained from pursuing the linkages between health and human rights, some of the limitations inherent in such a strategy will be discussed.

Precipitating Factors

The recent surge of interest in the potential of human rights discourse to assist in global health advancement is due to several factors. Most importantly, the end of the Cold War has created an opportunity to move beyond the previous polarization of human rights into civil/political rights and social/economic rights (including health).[7] This polarization, a symbol of the differing Cold War priorities of the East and the West, dominated United Nations (UN) human rights activity, despite many developing countries' arguing the interdependence of all rights. In the West, questionable status was accorded social and economic rights, leaving them largely unarticulated. Now, for the first time, a united, global endeavor to enunciate the content of economic and social rights has become possible. It is also fi-

nally possible to explore the detailed content and meaning of the concepts of human rights "indivisibility" and "interdependence," which could ultimately radically alter the ways in which all human rights are understood.[8]

A second factor prompting increased activity in the health and human rights arena is the proliferation of challenges to human rights orthodoxy. These challenges derive from perspectives informed by the developing world, post-colonial, race, gender, sexuality, indigenous, and environmental concerns, and are expanding and deepening human rights discourse.[9] Challenges to "eurocentrism" and individualism of liberal human rights concepts emphasize collective rights associated with economic development and distribution of the world's wealth.[10] Feminists are concerned with exposing the gendered foundation of many human rights standards, and environmentalists argue for extension of the rights framework to include the rights of future generations.[11,12]

A third factor, more directly triggering interest in health as a human right in the West, is the growing influence of economic rationalism in the formulation of public health policies and health services delivery.[13] Expanding privatization of certain public health services is restricting health service access to those privileged enough to enter and participate in the health marketplace. The idea that the guarantee of basic health services may be a necessary component of a universal human "right to health" assumes an increasingly utopian complexion in the face of such economic developments. In response, rights discourse is being engaged, at least in the West, in an effort to counter or soften economic rationalist arguments by applying legal standards based on protecting and promoting human dignity.[14]

A fourth factor contributing to the growing influence of a rights approach in the area of health is the global HIV/AIDS strategy. The WHO response to the HIV/AIDS pandemic has emphasized measures based on participatory, empowering, rights-based principles that seek to respect the dignity of those who have, or are at risk of contracting, the virus, and to promote individual responsibility in arresting its spread.[15] This is dramatically different from the utilitarianism and coercion that previously shaped WHO communicable disease strategies, reflecting a medical paradigm largely incompatible with considerations of human rights. The global, national, and community response to the HIV/AIDS

pandemic has the potential to fundamentally alter the global health regime.[16]

The Content of a Rights Perspective

The "right to health" is one of many international human rights obligations that exist as statements of principle not yet crystalized into identifiable and specific legal obligations, able to be monitored and assessed. However, although the precise content of a "right to health" is still largely undetermined, this should not cloud recognition of the significant advances that have been made toward enunciation of this right.[17]

Unlike other human rights conventions, when it was adopted in 1966, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) did not establish a committee to monitor the compliance of ratifying states. This reinforced the Cold War era neglect of economic and social rights. In 1987, a Committee on Economic, Social and Cultural Rights was finally established by the UN's Economic and Social Council (ECOSOC), to monitor the implementation of the ICESCR.[18] The Committee is currently working towards providing specific content for the rights covered by the ICESCR. A General Comment on article 12 of the ICESCR is expected to be finalized in 1995. Initial discussions have emphasized the following components: the areas mentioned in article 12, goals and indicators developed by WHO, and, most importantly, principles associated with the protection and promotion of human rights.[19,20] This suggests commitment to a broad approach, like that suggested by Mann *et al.*[21]

Perhaps the most important outcome of conceiving health as a human right is that it makes human rights principles applicable to health standards and practices. A human rights framework provides new tools for challenging and reimagining the utilitarian and technical approaches to health that have been preferred by WHO and the conservative professional medical community.[22]

A second consequence of embracing a human rights paradigm is the assumption that universal health standards, which are legally cognizable and enforceable, can be identified. That is, health is constructed as a legal entitlement rather than as a privilege, commodity or result of altruism. Although there is much to be done to articulate the content of a right to health, potentially this opens legal channels for pursuit and defense of the

right, and extends the power of legal discourse to health advocacy.

The third positive aspect of a human rights approach is that it provides a means of countering the inequalities associated with generic, universalizing approaches to health issues. The emphasis of human rights discourse on equality and non-discrimination makes it possible to argue the specificity of health standards as they apply to particular groups of people such as women, children, indigenous peoples, and certain other races and cultures whose health is affected by their positions of subjugation. Human rights analysis has exposed the discriminatory outcomes associated with policies that promote formal equality by treating everyone exactly the same.[23] The emphasis is slowly shifting from universal standards that assume a homogeneity of human experience to standards that acknowledge difference and diversity. It is becoming increasingly possible to argue that the experience of domination is itself related to the ability to achieve good health.[24]

Finally, a human rights framework stresses the interdependence of human rights and, as a result, provides a mechanism for insisting that the right to health cannot be achieved in isolation from the attainment of all other fundamental human rights; that is, a multifaceted and coordinated approach is essential for "the enjoyment of the highest attainable standard of health" to become a global reality. In this view, it is unacceptable for health policies and practices to be developed in isolation from other aspects of people's lives.

Some Cautionary Notes

There are clearly many advantages in using the discourse of human rights to identify and promote health goals. There is no doubt that the language of rights has been empowering, for it enables a naming and an articulation of a social injury that may not otherwise be recognized.[25] Human rights discourse values each individual in contrast to majoritarian principles that prioritize the greater good of the greater number. In addition, the rights framework is often a source of radical critiques and a foundation for egalitarian institutional practices.

However, a human rights framework also has its limitations. The most glaring shortcoming is that it only concerns the obligations of states with respect to individuals within their own

jurisdictions. The tendency toward a diminution of the role of states with respect to individuals in the provision of health services and the funding of research, as a result of free market approaches to health, is accompanied by a decreasing ability of states to fulfill their human rights obligations.

A second problem associated with international human rights law is a conceptual shortcoming analagous to the public/private division in domestic liberal legal systems, which greatly concerns feminists.[26] In the international arena, states closely guard their ability to act autonomously, free from international scrutiny, in their domestic or "private" jurisdictions. As a consequence, human rights abuses which are traditionally characterized as random, individual occurrences rather than structural, endemic violations, fall within the municipal jurisdictions of the state and, at least initially, outside the "public" reach of international law. Many gendered abuses of power fall into this category as a result of their systemic dimensions remaining generally unacknowledged. There may be classic abuses of power in relationships between health consumers and professionals that are similarly characterized and thereby excluded from international redress.

Two other shortcomings (although they also represent advantages) of a human rights framework are its legalism and its individualism. The legal framework constructs social reality through highly artificial procedural and substantive rules of process and evidence.[27] Through this process, social realities and experience are decontextualized and adversarially constructed, such that the legal argument may no longer be recognizable to the victim/survivor of the human rights violation.[28] This is an intensely disempowering situation that can overwhelm and negate certain advantages of the legal approach. The situation may be further exacerbated by the individualism of human rights discourse, which may compound the legal propensity to atomize human experience and mask its social and structural dimensions.

Finally, the discourse of human rights does not necessarily inject a progressive character into egalitarian social change strategies. Its usefulness depends largely on turning its rhetoric into reality, and emphasizing substantive rather than formal measures of progress. Fundamental to such goals is the ability to ensure that real participation and self-determination at the local level inform the gradual evolution of the international "right to

health." In addition, health standards and strategies cannot be effective unless human diversity is valued, and differences in social, economic, and political power are addressed.[29]

Conclusion

A dynamic period of challenge to human rights orthodoxy is currently underway. Without the barriers created by the Cold War, and with the multifarious reassessments of the shape of the global community and the values that unite and guide its development, many new possibilities have emerged. The re-imagining of health as a human right may make critical contributions to a more just and equitable international community. Towards these ends, engaging the power of legal discourse in promoting global health goals is only one, albeit important, of many necessary and complementary strategies.

References

1. Some examples of this recent activity are: the launch of *Health and Human Rights: An International Quarterly Journal* in late 1994 by the François-Xavier Bagnoud Center for Health and Human Rights at the Harvard School of Public Health; the First International Conference on Health and Human Rights, also organized by the François-Xavier Bagnoud Center, held at Harvard University, 22-24 September 1994; the "Health and Human Rights Seminar" run by the Macfarlane Burnet Centre for Medical Research in Melbourne, December 1994. It should be noted that one speaker at the Melbourne seminar, Dr. Ian Anderson, Director of the Victorian Aboriginal Health Service, emphasized that for indigenous peoples the link between health and human rights is not a new idea.
2. "Constitution of the World Health Organization" in World Health Organization, *Basic Documents* (1992, 39th ed.).
3. "Symposium: Legal and Ethical Controls on Bio-Medical Research," *St. Louis University Law Journal* 38 (1993): 1-198; "Declaration on the Rights of Mentally Retarded Persons," G.A. Res. 2856(XXVI), 20 December 1971.
4. J.M. Mann, L. Gostin, S. Gruskin, T. Brennan, Z. Lazzarini and H.V. Fineberg, "Health and Human Rights," *Health and Human Rights* 1 (1994): 7-19.
5. V. Leary, "The Right to Health in International Human Rights Law," *Health and Human Rights* 1 (1994): 25-26.
6. P. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,"*Harvard Civil Rights-Civil Liberties Law Review*, 22(1987): 401; M. Tushnet, "An Essay on Rights," *Texas Law Review* 62 (1984): 1363.
7. The Cold War polarization resulted in two human rights conventions dealing with these categories of human rights separately: the International Covenant on Political and Civil Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

8. The need for a framework that recognizes the interdependence and indivisibility of all human rights is also the argument of Mann *et al,* see note 4.
9. See, for example, J. Cobbah, "African Values and the Human Rights Debate: An African Perspective," *Human Rights Quarterly* 9 (1987): 309; R. Williams Jr.,"Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *Duke Law Journal* (1990): 660; V. Spike Peterson, "Whose Rights? A Critique of the `Givens' in Human Rights Discourse," *Alternatives* 15 (1990): 303.
10. S. Sathirathai, "An Understanding of the Relationship between International Legal Discourse and Third World Countries,"*Harvard International Law Journal,* 25 (1984): 395; M. Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meier,1979).
11. C. Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly* 12 (1990): 486; H. Charlesworth, "Has the United Nations Forgotten the Rights of Women?" ACFOA Human Rights Day lecture (1992).
12. L. Gundling, "Our Responsibility to Future Generations," *American Journal of International Law* 84 (1990): 207; E. Weiss, "Our Rights and Obligations to Future Generations for the Environment,"*American Journal of International Law* 84 (1990): 198.
13. This tendency to reduce the scope of universal healthcare provisions is apparent in many western countries including Australia and the United Kingdom. In the United States, healthcare has always been privately organized: Daniel Wikler, "Privatization and Health Care: Notes from the American Experience" in K. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Boston: M.Nijhoff, 1993), p.495. The public healthcare systems of the former communist bloc are being rapidly dismantled: D. J. Rosenberg, "Shock Therapy: GDR Women in Transition from a Socialist Welfare State to a Social Market Economy," *Signs* 17 (1991):129. The "user-pays" principle has increasing influence in the more industrialized of the developing countries.
14. D. Wikler, ibid.
15. K. Tomasevski, "Before AIDS, Beyond AIDS: Human Rights of People with Contagious Diseases" in Mahoney and Mahoney, see note 13, pp. 191-208; C.A. Tauer, "AIDS and Human Rights: An Intercontinental Perspective" in C. Pierce and D. Van De Veer (eds) *AIDS, Ethics and Public Policy* (1991):154-169; "International Consultation on AIDS and Human Rights," Final Document, Geneva, 26-28 July 1989, UN Doc. HR/AIDS/1989/3.
16. One indication of this potential is the appointment of a Special Rapporteur to investigate HIV/AIDS-related discrimination as a test case for the application of a human rights response to disease prevention and control, Commission on Human Rights, Decision 1990/65, 7 March 1990.
17. A. L. Taylor, "Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health," *American Journal of Law and Medicine* 18 (1992): 301.
18. P. Alston, "Out of the Abyss: The Challenge Confronting the New UN Committee on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9 (1981): 332.
19. A.L. Taylor, see note 17.
20. The CESCR organized a Day of General Discussion on the Right to Health, UN Information Service, Press Release HR/3604, 6 December 1993.
21. J.M. Mann *et al,* see note 4.
22. A.L. Taylor, see note 17, p. 303.
23. See, for example, P. A. Cain, "Feminism and the Limits of Equality,"*Georgia Law Review* (1990): 803; J. Scott, "Deconstructing

Equality-Versus-Difference: Or the Uses of Poststructuralist Theory for Feminism,"*Feminist Studies* 14 (1988): 33.
24. See, for example, the Declaration on the Elimination of Violence Against Women adopted by the General Assembly in December 1993 which recognizes in its preamble "that violence against women is a manifestation of historically unequal power relations between women and men..."
25. P. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991).
26. H. Charlesworth,"The Public/ Private Distinction and the Right to Development in International Law,"*Australian Yearbook of International Law* 12 (1992):190; K. Walker, " An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law," *New York University Journal of International Law and Politics* 26 (1994): 173.
27. R. Delgado, "Storytelling For Oppositionists and Others: A Plea for Narrative," *Michigan Law Review* 87 (1989): 2411.
28. D. Fraser, "It's alright Ma, I'm only bleeding: Is it possible to achieve a legal solution to racism?," *Legal Service Bulletin* 14 (1989): 69.
29. A.L. Taylor, see note 17, p. 302, notes that since 1977, when WHO launched its "Health For All" strategy aiming to achieve certain global health targets by the year 2000, the disparity in health standards between industrialized and developing nations has increased and that health spending in developing countries has declined.