International Journal of Law in Context, 7,3 pp. 271–272 (2011) Cambridge University Press
doi:10.1017/S1744552311000206

Introduction: health and human rights

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Over recent years there has been a growing awareness of the relevance of human rights to health and the provision of health care. While human rights are seen as universal in nature, and all of humanity shares the need for good health as a precondition of human flourishing, the articulation of shared goals, values and policies has proven to be a complex matter. This special issue of the *International Journal of Law in Context* brings together international scholars to analyse and explore the relationship between health and human rights.

The adoption of the Universal Declaration of Bioethics and Human Rights by UNESCO in 2005 represented a major step in the quest of articulating universal values for human rights in the context of health. In the opening article for this issue the Hon. Michael Kirby AC CMG reflects on the achievements of the Universal Declaration urging us to see the Declaration as part of 'the emerging new international legal order' (p. 275). As Kirby argues, that order has developed in the decades following World War II and builds upon the universal values articulated in the Universal Declaration of Human Rights. One important aspect of the Bioethics Declaration is that it has broadened the focus of international bioethics from individualised medical issues to 'to one that engages the individual, society and community, members of the human family, and all living beings and the biosphere' (p. 278). A key challenge for any declaration that claims to be universal is the extent to which the values underpinning the Declaration are in fact truly universal. Kirby acknowledges the claims to recognition of cultural values but concludes by asserting that 'Increasingly, and correctly, human rights is a universal discourse about human beings everywhere and their claim to equal rights' (p. 282).

The themes identified by Kirby in his article on international approaches to pressing health concerns, and the role of culture in developing legal responses, are themes explored through other articles in this special issue. In their article, Oscar Cabrera and Lawrence Gostin analyse the role of international human rights law to support tobacco control. Cabrera and Gostin acknowledge the importance of the WHO's Framework Convention on Tobacco Control (FCTC) in establishing standards for tobacco control and in linking tobacco control and human rights. Cabrera and Gostin argue that although there are few references to human rights in the FCTC, 'the treaty can be used to promote human rights in tobacco control if argued creatively' (p. 291). Cabrera and Gostin draw upon international examples of tobacco control in areas such as smoke-free places, and restrictions on advertising, promotion and sponsorship, to highlight contemporary legal developments in tobacco control and the growing international jurisprudence linking tobacco control and human rights.

In their article, Udo Schüklenk and Sean Philpott remind us of the need for law and policy to keep pace with changing medical knowledge and treatments. Their article examines developments in the knowledge and treatment of HIV/AIDS, particularly through the provision of antiretroviral treatments, which have reduced the risk of transmission and have reduced the risk of death from HIV/AIDS. Schüklenk and Philpott analyse the evolution in debates over testing for HIV, noting that voluntary, rather than mandatory, approaches to testing ultimately came to be accepted. However, they argue that with the availability of treatments which can reduce the risk of death and prevent transmission, it is time to revisit the debates about testing. They also argue that it is

https://doi.org/10.1017/S1744552311000206 Published online by Cambridge University Press

time to revisit laws and policies which criminalise sexual activities, arguing that current approaches run counter to public health goals and fail to recognise the significance of advances in treatment.

The universality of values and the relevance of culture for law reform are explored in the next article in this issue. Terry Carney's article examines the proposal for a regional disability rights tribunal in Asia and the Pacific. While recognising the universality of human rights, Carney also expressly recognises the relevance of cultural values for the setting of regional priorities. Carney argues that the stigmatisation of disability and the strong role of the family as the carer of family members with mental illness within many Asian societies also pose practical challenges to the success of a tribunal approach to disability. For Carney, 'Capacity building and programme leadership by a regional body is a higher priority than the establishment of any tribunal' (p. 329), with a focus on soft law and deliberative democracy being more immediate priorities for the region.

In her article, Danielle da Costa Leite Borges considers the tension between individual and communitarian values within the context of health-care policy within the European Union. Borges analyses the international and European human rights texts in terms of their recognition of a right to health and a right to access health care, and argues that while a human rights approach to health care reflects communitarian values such as equality of access, the European Union approach adopts an individualistic approach to health care by focusing on individual entitlements. Borges argues that the focus on individuals' entitlements undermines the principles of equal access to health care and interferes with resource allocation and priority setting within national health systems.

The right to health care is also explored in Sylvie da Lomba's article on the rights of irregular migrants to access health care within the European Union. Da Lomba compares the approaches taken to irregular migrants and health care in the UK and in France, arguing that irregular migrants are seen as lacking entitlements to health care because they lack formal membership of the national community, and because they are perceived as a threat to national sovereignty. Analysing the approaches taken in the UK and in France, da Lomba argues that the restrictions on access to health care by irregular migrants 'jeopardises the realisation of their human right to health care' (p. 372) with da Lomba advocating the development of a human rights approach to health care in this area.

Access to health care is also analysed in the final article. Daniel Sperling explores the concept of 'procreative liberty' and the right to access assisted reproductive technologies (ART), particularly by men. While acknowledging that the right to procreate has been recognised in case-law in the US, Sperling argues that conceptual difficulties remain in terms of the content and scope of the right to procreate, the values underlying the right, and the role of courts, legislators and others in shaping and interpreting rules. Drawing on international examples and analysis of case-law from the US, Canada and Israel, Sperling illustrates the complexity of the principle of equal access to ART, particularly for men.

As the articles in this special issue show, there are often complex legal, ethical and cultural dimensions to the relationship between health and human rights. The articles challenge us to analyse these dimensions, to think beyond national boundaries and to be part of the emerging global dialogue about health, human rights and the law.

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