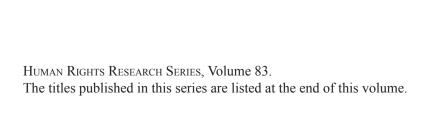
Advancing the Right to Health Care in China: Towards Accountability



Advancing the Right to Health Care in China: Towards Accountability

Intersentia Ltd

Sheraton House | Castle Park

Cambridge | CB3 0AX | United Kingdom

Tel.: +44 1223 370 170 | Fax: +44 1223 370 169 Email: mail@intersentia.co.uk www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International

Airport Business Centre, 10 Th ornbury Road

Plymouth, PL6 7 PP

United Kingdom

Tel.: +44 1752 202 301 | Fax: +44 1752 202 331

Email: orders@nbninternational.com

Distribution for Europe and all other countries:

Intersentia Publishing nv Groenstraat 31

2640 Mortsel

Belgium

Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21

Email: mail@intersentia.be

Distribution for the USA and Canada:

Independent Publishers Group

Order Department

814 North Franklin Street

Chicago, IL 60610

USA

Tel.: +1 800 888 4741 (toll free) | Fax: +1312 337 5985

Email: orders@ipgbook.com

Advancing the Right to Health Care in China: Towards Accountability

© Yi Zhang 2019

Cover photograph © alexmlx - Adobe Stock

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-677-6 (paperback) ISBN 978-1-78068-678-3 (PDF) D/2019/7849/10 NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

ACKNOWLEDGEMENTS

To my family

I sometimes hear that doing a PhD can be as tough as training for a marathon. I abandoned jogging many years ago and I would not have finished this lonely and tough PhD journey if I did not meet and work with these amazing people, to whom I am deeply grateful for their trust, encouragement, support, friendship and love.

First and foremost, I would like to extend my heartfelt gratitude to my supervisors Prof. Brigit Toebes and Prof. Marcel Brus for their excellent guidance throughout the entire process of my PhD. Being given the opportunity to do a PhD at the University of Groningen was definitely one of the best opportunities of my academic career.

My sincere appreciation also goes to the members of my reading committee, Prof. Aart Hendriks, Prof. Chenguang Wang and Prof. Hans Hogezeil for their thoughtful review and their approval of this thesis.

A special thank you to my colleagues at the International Law Department. It has been a great pleasure and privilege to be part of the team over the years.

I am endlessly grateful to my officemate, my language editor, my paranymph and most importantly, my best friend, Lottie Lane. I cannot imagine that I could have completed this project without her. My deep gratitude goes to Erna, Ira, Katrina, Lucia, Marlies, Marie Elske and Veronika, not only for the interesting academic discussions, but also for their company. I am also grateful for the time spent with my Chinese friends, especially Huanlin Lang, Bin Jiang, Yu Sun and Hao Cui. I will cherish all the fun and adventures we have had in Groningen.

I gratefully acknowledge the Chinese Scholarship Council for funding me to do this PhD project.

Last but certainly not least, I would like to express my deepest gratitude to my family for their unconditional support. I dedicate this book to them.

Yi Zhang April 2018 Groningen

Contents

Ackı	nowledge	ements		V	
List	List of Abbreviations				
Cha	pter 1	General 1	Introduction	1	
1.1	Backg	round and pr	roblem	1	
1.2	Resear	ch questions	s and structure	9	
	1.2.1	Research q	uestions	9	
	1.2.2	Research s	tructure	10	
1.3	Metho	dology		13	
1.4	Termin	nology		16	
1.5	Concl	ıding summa	ary	18	
Part	r 1		EMENTATION OF THE RIGHT TO HEALTH (CARE) LYSIS OF CHINA'S PRACTICE		
Cha	pter 2	The Righ	nt to Health Care as a Human Right	21	
2.1	Introd	action		21	
2.2	Defini	ng the right t	to health care	23	
	2.2.1	The meani	ng of the terms 'health' and 'health care'	23	
		2.2.1.1	Definition of 'health'	23	
		2.2.1.2	Definition of 'health care'	25	
	2.2.2	The emerg	ence of health as a human right	26	
		2.2.2.1	The right to health in international human rights law	27	
		2.2.2.2	The right to health in regional human rights law	32	
		2.2.2.3	The right to health in national constitutions	32	
	2.2.3	The meani	ng of the right to health care	35	
2.3	Norma	tive content	of the right to health care	37	
	2.3.1	The scope	of the right to health care	38	
				vii	

	2.3.2	The core	content of the right to health care	41
		2.3.2.1	The evolution of the 'core' concept	43
		2.3.2.2	Limitations of the Committee on Economic, Social and Cultural Rights' interpretation of 'core obligations'	48
		2.3.2.3	Scholarly debate over the core concept	52
		2.3.2.4	Summary	56
	2.3.3		l elements of the right to health care: AAAQ-AP	57
	2.3.3	2.3.3.1	Availability	57
		2.3.3.1	Accessibility	58
		2.3.3.3	Acceptability	62
		2.3.3.4	(Good) quality	62
		2.3.3.5	Accountability	63
		2.3.3.6	Participation	64
2.4	States'		as arising from the right to health care	64
∠.¬	2.4.1	_	ive realisation	64
	2.4.2	•	ons of immediate effect	66
	2.4.3	•	igations to respect, protect and fulfil and violations	00
	2. 1.3		obligations	68
		2.4.3.1	Core obligation to respect the right to health care	69
		2.4.3.2	Core obligation to protect the right to health care	70
		2.4.3.3	Core obligation to fulfil the right to health care	71
	2.4.4	General	obligations under the right to health care	72
2.5	Conclu	uding sum	mary	72
CI.	. 2	CI. A		
Cnap	oter 3	Health	s Legislative Commitments towards the Right to Care	75
3.1	Introdi	uction		75
3.2	The ba	_	of China's human rights protection and health care	76
	3.2.1		political and legal system	76
		3.2.1.1		76
		3.2.1.2	China's health administration and health service	, 0
		- ·-·	delivery system	79
		3.2.1.3	China's legal system	82
		3.2.1.4	China's judicial system	83

	3.2.2	China's i	ideology of human rights	84
		3.2.2.1	The conception of human rights	84
		3.2.2.2	Legal protection of human rights	87
3.3	The do	mestic ap	plication of international (human rights) treaties	88
	3.3.1		legal doctrines of domestic application of	
		internation	onal (human rights) treaties	89
		3.3.1.1	Internal effect	89
		3.3.1.2	Direct effect	91
		3.3.1.3	Precedence	92
		3.3.1.4		93
	3.3.2	Applicat	ion of international (human rights) treaties in China	94
		3.3.2.1	Application of international treaties: general practice	95
		3.3.2.2	Application of international human rights treaties	98
3.4	The le	gislative in	mplementation of the right to health care in China	99
	3.4.1	General	introduction and methodology	99
	3.4.2	The Chi	nese Constitution and the right to health care	101
		3.4.2.1	'The State respects and preserves human rights'	101
		3.4.2.2	Constitutional provisions concerning non- discrimination and equality	103
		3.4.2.3	Constitutional provisions concerning health and health care	104
		3.4.2.4	Non-direct applicability of constitutional provisions	106
	3.4.3	The Chi	nese health legislation	108
		3.4.3.1	An overview of China's health law system	108
		3.4.3.2	Provisions concerning non-discrimination and	
			equality	112
		3.4.3.3	Provisions concerning elements of other non-	
			derogable core obligations	114
3.4	Conclu	ading sum	mary	118
Chaj	pter 4	China'	s Policy Commitments towards the Right to	
		Health	Care	131
4.1	Introd	uction		131
4.2	An app	oraisal of C	China's policy commitments to the right to health care	134
	4.2.1	The scop	be of health policy in the Chinese context	135
	4.2.2	Human rights-related documents		

		4.2.2.1	Human Rights White Papers	137	
		4.2.2.2	National Human Rights Action Plans	139	
	4.2.3 Health-related documents				
	4.2.4		arative normative analysis of Universal Health e and the right to health care	146	
		4.2.4.1	The changing definitions of Universal Health Coverage	146	
		4.2.4.2	Evaluating progress towards Universal Health Coverage	153	
		4.2.4.3	Universal Health Coverage anchored in the right to health care	154	
		4.2.4.4	Reconciling core obligations under the right to health care with Universal Health Coverage	160	
4.3		The evaluation of progress towards the realisation of the right to health care in China			
	4.3.1	Major he	ealth care reforms	162	
		4.3.1.1	Phase one: Before China's reform and opening- up in 1979	163	
		4.3.1.2	Phase two: 1980s to 2006	164	
		4.3.1.3	Phase three: 2006 to the present	165	
	4.3.2	Basic me	edical insurance system	166	
		4.3.2.1	The Urban Employees' Basic Medical Insurance	167	
		4.3.2.2	The Urban Residents' Basic Medical Insurance	168	
		4.3.2.3	The New Rural Cooperative Medical Scheme	168	
		4.3.2.4	The issue of health equity	169	
	4.3.3	The prov	rision of essential medicines	171	
		4.3.3.1	Current reform of China's National Essential Medicines System	172	
		4.3.3.2	The impact of China's Essential Medicines Policy	173	
4.4	Conclu	ıding sumı	mary	175	
Part An A		al Framev	WORK FOR RIGHT TO HEALTH-BASED ACCOUNTABILITY		
Chap	oter 5	An Ove	erview of Right to Health-based Accountability	189	
5.1	Introdu	action		189	
5.2	Conce	otualising	accountability	191	

	5.2.1	Accountability in different discourses	192	
	5.2.2	The principal-agent theory		
	5.2.3	Answerability and enforcement: two sides of the same coin	198	
		5.2.3.1 Answerability	199	
		5.2.3.2 Enforcement	201	
		5.2.3.3 Ex ante and ex post accountability	202	
	5.2.4	Summary	203	
5.3	Types	of accountability	203	
	5.3.1	The prevailing view of vertical, horizontal and diagonal accountability	204	
	5.3.2	Another school of thought on vertical, horizontal and diagonal accountability	206	
5.4	Right	to health-based accountability: a conceptual framework	208	
	5.4.1	Defining right to health-based accountability	208	
	5.4.2	Constituent elements of right to health-based accountability	211	
		5.4.2.1 Responsibility	212	
		5.4.2.2 Answerability	212	
		5.4.2.3 Enforcement	213	
5.5	A cons	structive accountability process	214	
	5.5.1	Monitoring	216	
	5.5.2	Judgement	217	
	5.5.3	Consequences	218	
	5.5.4	Remedies	218	
5.6	Conclu	uding summary	218	
Chaj	pter 6	Accountability Mechanisms for the Realisation of the Right to Health	221	
6.1	Introd	uction	221	
6.2	An ov	An overview of accountability mechanisms		
	6.2.1	Accountability and accountability mechanisms: a conceptual clarification	222	
	6.2.2	Analytical framework for right to health-based accountability	228	
		6.2.2.1 Components of the analytical framework	228	
		6.2.2.2 An overview of findings	232	
6.3	Dome	nestic accountability mechanisms		

Contents

	6.3.1	Judicial a	accountability mechanisms	234	
	6.3.2	Quasi-ju	dicial accountability mechanisms	238	
	6.3.3	Political	accountability mechanisms	239	
	6.3.4	Adminis	trative accountability mechanisms	242	
	6.3.5	Social ac	ecountability mechanisms	243	
6.4	The m	edia's role	dia's role in exerting accountability		
6.5		ational med o health	chanisms for monitoring the implementation of the	250	
	6.5.1	UN Char	rter-based accountability mechanisms	250	
	6.5.2	UN treat	y-based accountability mechanisms	251	
		6.5.2.1	State reporting	252	
		6.5.2.2	Inter-State communications	253	
		6.5.2.3	Individual communications	254	
		6.5.2.4	Inquiries	255	
6.6	Conclu	uding sumi	mary	256	
	pter 7	Accour	TO HEALTH CARE IN CHINA - TOWARDS ACCOUNTABILIT INTERPOLATION TO THE REALISATION OF THE OF HEALTH CARE IN CHINA	261	
7.1	Introd	uction		261	
7.2	Overse	eeing and a	accountable actors in China's health sector	262	
	7.2.1	Overseei	ng actors	263	
	7.2.2	Accounta	able actors	263	
7.3	Judicia	al accounta	ability	265	
	7.3.1	Constitut	tional accountability mechanisms	266	
		7.3.1.1	Constitutional review of legislation	266	
		7.3.1.2	Constitutional litigation – the ' <i>judicialisation</i> ' of the Constitution	268	
	7.3.2	General	judicial accountability mechanisms	271	
		7.3.2.1	Civil proceedings	271	
		7.3.2.2	Administrative proceedings	273	
7.4	Quasi-	judicial ac	countability	275	
	7.4.1	'Letters a	and visits'	275	
	7.4.2	Mediation			

Contents

7.5	Political accountability 2				
7.6	Admir	Administrative accountability			
	7.6.1	The cadre responsibility system	283		
	7.6.2	General oversight mechanisms	286		
7.7	Social	accountability	288		
	7.7.1	Society-led social accountability	289		
		7.7.1.1 The role of the media	290		
		7.7.1.2 The role of CSOs	297		
	7.7.2	State-led social accountability	298		
	7.7.3	Implications and limitations	300		
7.8	Conclu	uding summary	302		
Cha	pter 8	Conclusions	307		
8.1	Introd	uction	307		
8.2	Concl	usions	308		
8.3	Recon	nmendations	315		
Anni	EXES				
Anno	ex 1	The OPERA Framework	321		
Ann	ex 2	The Evolving Conceptions of 'Weisheng', 'Yiliao' and 'Jiankang'	323		
1	Weish	eng	323		
2	Yiliao		330		
3	Jianka	ng	332		
Ann	ex 3	Comparison of Chinese basic medical insurance schemes	335		
List	of Instru	ments	337		
Unit	ed Natio	ns Documents	341		
List	of Tables	s and Figures	343		
Sam	envatting		345		
Sele	cted Bibl	liography	355		
Curr	iculum V	Vitae	367		
Hum	uman Rights Research Series				

LIST OF ABBREVIATIONS

AAAQ-AP Availability Accessibility Acceptability Quality Accountability

Participation

AIDS Acquired Immune Deficiency Syndrome

APL Administrative Procedure Law of the People's Republic of China

Art Article

BMI Basic Medical Insurance

CDC Centre for Disease Control and Prevention

CEDAW Convention on the Elimination of All Forms of Discrimination against

Women

CERD International Convention on the Elimination of All Forms of Racial

Discrimination

CFDA Chinese Food and Drug Administration

CPC Communist Party of China

CRC Convention on the Rights of the Child

CRMW International Convention on the Protection of the Rights of All

Migrant Workers and Members of Their Families

CRPD Convention on the Rights of Persons with Disabilities

CSOs Civil Society Organisations

CteeEDAW United Nations Committee on the Elimination of Discrimination

against Women

CteeESCR United Nations Committee on Economic, Social and Cultural Rights

CteeRC United Nations Committee on the Rights of the Child

ECHR Convention for the Protection of Human Rights and Fundamental

Freedoms

ECOSOC Economic and Social Council
ECtHR European Court of Human Rights
Eg Exempli gratia (for example)

ESCR Economic, Social and Cultural Rights

EU European Union GP General Practitioner

GPCL General Principles of Civil Law of the People's Republic of China

HIV Human Immunodeficiency Virus

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IPCD Insurance Programme for Catastrophic Diseases

List of Abbreviations

MFA Medical Financial Assistance
MOCA Ministry of Civil Affairs
MOF Ministry of Finance
MOH Ministry of Health

MOHRSS Ministry of Human Resources and Social Security NDRC National Development and Reform Commission NHFPC National Health and Family Planning Commission

NHR New Round of Health Care Reform
NHRI National Human Rights Institution
NGOs Non-governmental Organisations
NPC National People's Congress

NPCSC Standing Committee of the National People's Congress

NRCMS New Rural Cooperative Medical Scheme

OECD Organisation for Economic Cooperation and Development

OHCHR Office of the United Nations High Commissioner for Human Rights

OOP Out-of-pocket
OP Optional Protocol
PHC Primary Health Care

SARS Severe Acute Respiratory Syndrome SDGs Sustainable Development Goals TCM Traditional Chinese Medicine

UDHR Universal Declaration of Human Rights
UEBMI Urban Employees' Basic Medical Insurance

UHC Universal Health Coverage

UK United Kingdom UN United Nations

UNAIDs United Nations Programme on HIV/AIDS UNDP United Nations Development Programme

UNICEF United Nations General Assembly UNICEF United Nations Children's Fund

URBMI Urban Residents' Basic Medical Insurance

USA United States of America

VCLT Vienna Convention on the Law of Treaties

WHA World Health Assembly
WHO World Health Organisation