

研究生法学系列教材  
YANJIUSHENG FAXUE XILIE JIAOCAI

# 中国卫生法 前沿问题研究

Emerging Issues in Chinese Health Law

〔美〕斯科特·伯里斯 主编  
申卫星

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# 中国卫生法前沿问题研究

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# Preface

Scott Burris

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Like many other countries, China faces serious challenges to public health. People are breathing air and drinking water that is not clean enough. Too often food and drugs are adulterated. Serious communicable diseases, including HIV/AIDS and tuberculosis, are not fully controlled. The SARS outbreak revealed serious deficiencies in the public health infrastructure. Behavioral illness, particularly substance abuse, is a growing problem. Health, mental health and substance-abuse care are unavailable or insufficiently available to hundreds of millions of people. China faces these health challenges in the midst of and in significant part because of its economic transition to a market economy. Health care, one thought of as a public good, is now treated as a commodity (*shangpin*). The dogma of "market individualism" is hard on public health, rendering many important public health goods "invisible" and de-emphasizing the collective responsibility of a society to create the conditions in which people can be healthy. ①

Of course, the flowering of the Chinese economy and the significant loosening of state oversight over individual activity has been beneficial to millions of Chinese in a wide range of ways including, most likely, personal health. Moreo-

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① Burris S., "The invisibility of public health: population-level measures in a politics of market individualism", *American Journal of Public Health* 1997;87(10):1607—10.

ver, China's public health challenges, though magnified by the size and diversity of the nation, are hardly unique, and China faces its health problems armed with formidable resources of money, expertise and social capital. The battle to create a just social system in which health is not primarily a function of wealth is one that China has the capacity to win.

China's leaders have so far managed to conduct a sustained effort at engineering fundamental changes in Chinese society without the loss of social stability, but the shift to a market economy has brought some changes in the structure of de facto governance. Key health decisions are now being made by consumers and producers through markets, and powerful players in the market are influencing decisions within government. Least developed in China in this regard is civil society—the set of institutions, organisations and behaviour situated between the state, the business world, and the family<sup>①</sup>—and more particularly the profession.

The sociologist Eliot Friedson has suggested that the profession can play a crucial mediating role between the government and the market. Friedson defines the profession not only in terms of its possession of esoteric special knowledge, but also its control over the market for its services—i. e. , control of training, the division of labor and the labor market—and an ideology in which the profession is conceived as serving some “transcendent value.”<sup>②</sup> This ideal professional becomes a private actor, but one who has public duties, a player in the market for whom profit maximization is not the highest value.

The potential for professions to support the improvement of public health in China underscores the importance of this volume. A collection of essays about current health issues in Chinese law will be a useful tool for students, scholars and policy makers. But the book is more than that. It is an advancing process of building health law as a distinct field within a profession of legal scholarship. The scholars represented in this volume are representatives of a new health law profession in China. Through teaching, scholarship, professional exchange and

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① London School of Economics, “What is civil society?” Available at [http://www.lse.ac.uk/collections/CCS/what\\_is\\_civil\\_society.htm](http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm) (visited May 2, 2005).

② Freidson E. *Professionalism, the Third Logic*, Cambridge: Polity; 2001.

professional organization, this emerging profession can help China in the urgent cause of alleviating the public ills in its rapid economic development. China now accepts the fact that markets are not inherently wrong or harmful, but it is dangerous to believe that markets will, left alone, bring health and prosperity for all. Like every other country with a market-based economy, China will have to find a way to balance the advantages of free markets with their serious costs, placing limits and altering results as necessary to assure a decent way of life and level of opportunity for the mass of the people. This is a formidable challenge on all levels, political, technological, and cultural. Professions, with aspirations both of expertise and of service, can play a useful role in meeting this challenge.

This book marks an important step in the development of one essential profession. It began in the Summer of 2004, when a dozen young Chinese law professors and government officials attended a month long workshop on health law teaching and scholarship at Temple Law School in Philadelphia. It continued at health law conferences in December 2004 at Tsinghua University and Yunnan University, which Temple co-sponsored. I, and Temple University, are proud to have had a role in this exciting process of professional development.

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# 序

斯科特·伯里斯

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天普大学 Beasley 法学院

宾夕法尼亚·费城·美国

与其他许多国家一样,中国在公共卫生领域也面临着严峻的挑战。人们每日呼吸的空气和饮用的水,都不够清洁。食品与药品中的以次充好现象也屡见不鲜。一些严重的传染性疾病,诸如艾滋病和肺结核,并没有得到有效控制。SARS 疫情的爆发,揭示出中国公共卫生基础设施的严重不足。行为性疾病,特别是药物滥用,已经成为一个日益严重的问题。对于成千上万的普通老百姓而言,针对身体及精神健康和药物滥用问题的医疗保健,要么根本就没有,要么服务效率非常低下。中国所遇到的这些公共卫生问题,既是在向市场经济转型的过程中出现的,也部分地是由于这种经济转型所造成的。一向被认为是公共产品的卫生保健,现在开始受到商品化的威胁。“市场经济下的个人主义”信条,对于公共卫生而言是非常有害的,它会将许多重要的公共卫生产品变成“无形”的东西,降低了社会在创造有利于人民健康的生活条件上的共同责任和使命。<sup>①</sup>

当然,中国经济的繁荣和政府对个人行动监督的放松,在很多方面都有利于中国人民,特别是在个人健康方面。而且,虽然中国公共卫生领域所遇到的挑战由于地域广袤、各地区呈现多样性发展而被放大了许多,但中国所遇到的问题绝不是独一的,面对这些问题和挑战,中国政府表现出了巨大的勇气和智慧,投入了巨大的财力、智力和社会资本。这场战斗催生了一个公

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<sup>①</sup> 斯科特·伯里斯:《公共卫生的无形性:在市场自由主义的政治制度下的人口水平测度方法》,载《美国公共卫生杂志》1997;87(10):1607—1610。

正的社会系统,健康不再被认为主要是财富的一种功能,这也是中国有能力取得的战果。

中国领导人至今一直做着不懈的努力,在确保社会稳定的前提下实现中国社会的转型,但是向市场经济的转型给事实上的治理结构带来了某些变化。现在一些重要的卫生决策都可以通过市场机制由消费者和生产者做出,而这些市场中的强大交易者会影响政府内部的决策。中国在这方面最为欠缺的是市民社会——介于政府、商界和家庭之间的一套制度、组织和行为<sup>①</sup>——特别是其中的专业人士。

社会学家埃利奥特·弗里德森(Eliot Friedson)认为,市民社会中的专业人士能够在社会与市场之间扮演相当关键的协调者的角色。弗里德森曾对专业人士进行过界定,他认为这不仅是意味着要具有相当深奥的专业知识,而且还包含对市场所提供服务的控制力——譬如,控制培训,劳动力及劳动市场的分工——以及一种理念,即专业人士被认为要服务于某种“超然的价值”。<sup>②</sup> 这种理想化的专业人士可以是一个私人活动家,但他必定是一个具有社会责任感的人,一个在市场交易中不以利润最大化为最高价值的交易者。

专业人士在帮助改善中国公共卫生状况中的巨大潜力,更加突出了上述看法的重要性。一本关于当今中国健康问题的法学论著的合集,对于学生、学者和政策制定者而言都是一个很有用的工具。但这本书的意义不止于此。本书旨在确立和推动卫生法作为一个法学研究者关注的独特领域的价值。这本书中的作者是新一代中国卫生法学领域的代表。通过教学、学术、专业交流和专业组织,这个新兴的专业团队可以帮助中国在经济的快速发展中缓解公共疾病等社会问题的发生。中国现在已经接受这一事实,即市场机制本身并不是错误的或者有害的,但是如果认为单独一个市场机制就可以给每一个人带来健康和富裕,那么就非常危险了。与其他的市场经济国家一样,中国也不得不努力寻求在自由市场之优势与其高昂的社会成本、局限性和不断变化的结局之间的平衡之道,以便保证广大民众过上体面的生活,并获得一定的机会。这是一个社会在所有层面上的巨大变革,无论是政治,技术还是文化层面。专业人士可以凭借其深厚的专业知识和服务

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① 伦敦经济学院:《什么是市民社会?》,载 [http://www.lse.ac.uk/collections/CCS/what\\_is\\_civil\\_society.htm](http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm)。(浏览时期:2005年5月2日)。

② 利奥特·弗里德森:《专业主义:第三逻辑》。剑桥:政治组织,2001。

意识,在迎接这场挑战中承担重任。

本书是一个极为重要的专业群体的形成的标志。其形成始于2004年的夏日,当时12位年轻的中国法学教授及政府官员在位于费城的天普大学法学院参加为期一个月的研习班,学习卫生法教学和专业知知识。随后2004年12月天普大学先后与北京的清华大学和昆明的云南大学共同举行了卫生法国际研讨会。我本人及天普大学,为在这一专业发展的令人感到欢欣鼓舞的过程中贡献了微薄之力而感到荣幸之至。

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本书的出版得到了美国国务院民主、人权与劳工事务局和美中法律合作基金会的大力支持。本书的编辑、作者及我本人还要感谢清华大学法学院院长王晨光教授、云南大学法学院院长杨云鹏教授以及天普大学法学院院长罗伯特·莱斯坦教授。天普大学的阿德莱德·佛古森、张莫教授和桑国亚教授为这个项目提供了极有价值的建议和支持,在此一并致谢。最后,我们衷心感谢阿伦·斯派克特参议员先生,他是天普中国项目的忠实的支持者。

(本序译者为北京天则经济研究所研究人员王琦)

# 认真对待医学中的法学问题

申卫星

大多数法学学者会认为,医学中的问题过于琐碎,过于细小和过于具体,不值得作为法学的研究对象。同时,当下民法学界中也存在着一种明显的宏大叙事的偏好和追求抽象美的倾向。我们认为,法学特别是民法学是一门实践性学科,它必须解决社会问题。面对医学中层出不穷的新问题,法律人应该有一种使命感,也有责任通过权利义务的合理配置来促进医学发展,来解决业已出现的社会问题。所以,我们认为应充分重视并加强我国卫生法学的研究。其重要意义有三:

第一,这将有助于打破医学界和法学界各自的话语霸权,促进知识的融合。

第二,在某种意义上可以说,健康比财产更为重要。随着社会的发展,人们在解决温饱后,会对生活提出更高的要求,难道过上一种健康而有质量的生活不值得我们法律人关注吗?

第三,人的一生从生到死的整个过程,始终都存在许多重要的法律问题。例如,在出生的时候,存在着母亲和胎儿权益冲突的法律问题,存在着日益增多的所谓生育权的争论,存在着胎儿利益如何保护的问题,存在着人工生殖技术引发的法律问题,存在着代孕合同的效力以及代孕母亲的法律地位问题;人出生以后,不仅存在我们已经进行深入研究的包括医疗过失在内的医患关系问题,还有在治疗疾病和药品开发过程中以人体进行药品实验以及通过器官移植来挽救生命等所引发的法律问题;而在死的问题上,又有所谓传统的临床死亡与脑死亡之争、安乐死的合法化等一系列需要法律人必须做出回答的问题。对于这些问题,我们法律人不能够漠视。正是在这样一个背景下,套用德沃金的话,我们说,我们应该“认真对待医学中的法学问题”。

本书正是上述观点的产物。自2004年以来,美国天普大学 Scott Burris 教授发起了一项旨在帮助改善中国医疗卫生方面的立法状况的研究和培训项目。来自国内数十家知名高校的法学学者远赴美国费城,在天普大学参加了为期一个月的培训,系统地学习美国卫生法体系,并与美国联邦最高法院司法部、卫生部等政府部门进行了交流。这些学者回国后,致力于将所学知识运用到对中国卫生法问题的研究当中,并在各自的兴趣领域撰写了专题文章。2004年12月,来自美国和中国的学者先后在清华大学法学院和云南大学法学院举办了中美卫生法国际研讨会上,交流了各自的研究成果,并由此产生了出版一本论文集的想法。在中美学者的共同努力下,作为中美卫生法合作项目的成果之一,本书诞生了。

作为作者之一,我由衷地感到,游走在法学与医学边缘的艰辛与乐趣,并坚定了继续走下去的信心。

惟愿这本小书能够给关心这一领域的读者带来一些启示。



# **Taking Legal Issues in Medical Practices Seriously**

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Most of the legal scholars argue that the issues in medical practices are too trivial to be studied as an object of jurisprudence. While at the same time, there is a very inclination among legal scholars for pursuing topics of magnificent meaning or something with abstract aesthetics. We believe that law in general and civil law in particular should be social-problem-solving oriented. Confronting the endless problems, lawyers should bear the mission of solving the existing social problems and promoting the development of medical undertakings through the configuration of legal rights and obligations. Therefore, the importance of legal research in medical practices should be recognized and strengthened.

The significances of legal research in medical practices, and therefore health issues include: first, it would be helpful to break the voice supremacy between medical and legal circle and facilitate the amalgamation of these two subjects; second, health is in a sense more important than property in modern world. Human being would request more about life other than some basic need. Isn't a healthy and quality life worthy of one of our lawyers' academic focuses? Third, legal problems exist endlessly during the whole life span—from birth to death.

Just take a few examples. When a person is considered by law a "person"? In other words, when life begins? When a baby is delivered, it faces series of