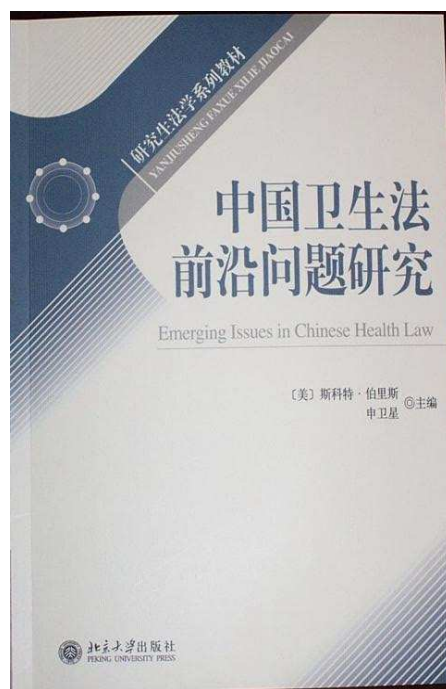


# EMERGING ISSUES IN CHINESE HEALTH LAW

Manuscript Overview



*Peking University Press*

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## Preface I

### 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. Moreover, 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” (2) – 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.” (3)

This ideal professional becomes is 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 a advancing a 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 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.

## **Acknowledgements**

The work leading to this book has been supported by grants from the Bureau of Democracy, Human Rights and Labor of the Department of State and the U.S.-China Legal Cooperation Fund. The editors, authors and I would also like to thank Dean Wang Chenguang of Tsinghua Law School, Dean Yang Yunpeng of Yunnan Law School and Temple Dean Robert Reinstein. Adelaide Ferguson, Professor Zhang Mo and John Smagula of Temple provided invaluable advice and support throughout the project. Finally, we wish to acknowledge Senator Arlen Specter, who has been an unfailing champion of Temple's China work.

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## Preface II

### **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 a subject 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 a modern world. Human being would request more about life beyond some basic needs. 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 questions like how the baby can be protected from maternal or a third part violation; How the “right to give birth to a child” should be defined by law, which means who will be eligible to be the decision maker concerning giving birth to a child; who are the intended or bioethical parents if a baby is delivered via artificial reproduction technology such as surrogate motherhood or tube cultivation? What is the legal efficacy of the surrogate motherhood contract and what is the legal status of the surrogate mother? While after birth, more problems exist, which include not only the one concerning patient-physician relationship that we had already further studied as one of the important topics in Contract Law, but also problems when human body acts as the object of medical experiment during the process of new drug development, as well as the legal disputes arising from human organ donation and transplantation and so forth. When it comes to death, there are ceaseless debates over the choice between traditional death criteria of non-heartbeat and the new brain death, and the legitimacy of euthanasia...

These tough issues in health and medicine are so vital for life of our human being that could not be ignored. I would like to cite one of the famous arguments of Ronald M. Dworkin, changing a little bit so as to summarize my point: we should “take the legal issues in medical practices seriously”.

This book is a mirror of this argument. Prof. Scott Burris from Temple University has initiated an important research and training project with an aim of helping ameliorate the health law system in China, to which he himself has been personally dedicated for long time. Law professors from famous Chinese universities have participated in this program. They were trained systemically the American health law for one month in Temple University, Philadelphia. During the training session, these scholars were offered the chance to visit the US National Ministry of Justice and Ministry of Health. They came back to China, applied to what they have learned in US into domestic research on certain specific topic which they are interested most within health law, and thereby developed there respective papers with different topics. Participants exchanged their research papers with American delegation composed of health law specialists on the International Health Law Symposia held in Tsinghua University and Yunnan University successively in the end of 2004. The discussions have inspired an innovative idea of collecting these papers into one volume. Then after almost one year hard work and collaboration between American and Chinese scholars, this book is now getting published.

As one of the authors of this book, I feel proud to be part of this great team. The writing of my paper provides me with a taste of hardship as well as pleasure of wandering along the edges of two quite different disciplines -law and medicine. The creation of this book has made me more confident to go further.

I hope this book is inspiring and illuminating.

# Abstracts of Articles

## The History and Current State of Public Health in China

ZHAN Siyan, LI Liming

Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and mental health and efficiency through organized community efforts toward a sanitary environment; the control of community infections; the education of the individual in principles of personal hygiene; the organization of medical and nursing service for the early diagnosis and treatment of disease; and the development of the social machinery to ensure to every individual in the community a standard of living adequate for the maintenance of health (CEA Winslow, 1932). The mission of public health is to fulfill society's desire to create conditions so that people can be healthy (Institute of Medicine, 1988).

The traditional thought of public health can be traced back to the ancient Chinese. In 1920s and 1930s, the early public health practice was conducted in Ding County of Hebei Province, China. During the past 50 years, based on the guideline of “prevention first,” China has made great achievements in controlling infectious diseases and improving the public's health and hygiene. For example, the fulminating infectious diseases that greatly affected public health, such as smallpox, cholera, plague, recurrent fever, typhus, and visceral leishmaniasis have been eradicated or effectively controlled. Through expanded planned immunization programs, the infectious diseases of poliomyelitis, diphtheria, pertussis (whooping cough), and measles have been controlled. Most kinds of endemic and parasitic diseases have been controlled for the most part. Despite several floods and earthquakes, no great epidemics of infectious diseases have occurred. The total mortality rate of China's population has dropped from 20/1000 in 1949 to 6.42/1000 in 2004. The infant mortality rate has dropped from 200/1000 in 1949 to 25.5/1000 in 2003. The maternal mortality rate has dropped from 150/10,000 in 1949 to 51.3/100,000 in 2003. The average life expectancy has increased from 35 years in 1949 to 71.4 years in 2000. Using 1% of the total world health expenses, China has ameliorated the health problems of 22% of the total world population.

However, in the twenty-first century, owing to the negative effects brought on by aging of the population and the burdens of diseases, urbanization, industrialization, and globalization, Chinese public health workers are encountering greater difficulties than ever. In particular, the SARS epidemic in China in 2003 fully uncovered the weaknesses of this field. Old operating models of public health cannot meet present requirements. The main problems are poor capacity to respond to public health emergencies, severe inequality of health care services, and lagging development of public health information systems, as well as insufficient ethical consideration.

Public health in China can gradually meet the requirements of social development and the increasing public demand for health care services only when the public health is directed by informatization, globalization, technification, and humanization.

## COMMUNICABLE DISEASES CONTROL OF CHINA:

### Legal framework, Legal thinking and legal practice

SHEN Shouwen

After analyzing the Chinese Legal Framework for Communicable Disease Control, the author discovered that, like other legal fields in China, the Chinese Law for Communicable Disease Control follows an obvious path, that is, it develops from super to lower, from abstract to concrete and from inoperable to operable.

Under this developing path, many problems of executive power, judicial power and political power in reacting to the emergency have been thoroughly exposed in 2003 SARS event. Since a lot of concrete rules and norms for communicable diseases control need to be formulated and enforced by administrative organ, the executive power played a key role in controlling the disease. Compared with the administrative organ it seems that the judicial organ made a marginal role in the SARS event. But it can be clearly seen that the judicial organs tried to be more active in participating in fighting against the monster from the Joint Judicial Interpretation-*several issues of application of law on dealing with those criminal cases jeopardizing the prevention and control communicable diseases* (May 14<sup>th</sup>, 2003)-by the Chinese Supreme Court and the Chinese Highest Procuratorate. In this Interpretation the Judicial Organ enlarged the punitive scale to those enumerated behaviors which are possible to jeopardize SARS control. Therefore the reaction of Judicial Organ, esp. the Supreme Court showed that they were strongly influenced by the social atmosphere and worked for the so-called the Nation's Core Task. Based on this facts the author worried much about whether the public's rights, esp. the patients' rights can be properly protected by the Judicial Organs.

The 2003 SARS event indicates that even compared with other social norms the laws play an unreplaceable role in controlling communicable diseases. The laws were actually used as a tool to bind the executive power, judicial power and other social powers together in controlling SARS and then those bound powers formed a huge of rights and liabilities in dealing with the communicable diseases. But because of the loopholes in this net, there is much doubt if it is effective to prevent and control communicable diseases by law itself. Therefore legal force, at least in 2003 SARS event, actually is not omnipotent. Instead, the most useful measure seems to come from the administrative power and political power.

However, those measures were carried out at the cost of enormous unnecessary administrative resources. So after SARS the Chinese Government took great efforts to amend *1989 Law on Preventing and Controlling Communicable Diseases* in 2004. The 2004 Amendment set up five concrete systems. However, due to our traditional way of legal thinking, there are still many problems needing further clarification.

## On the Framework of HIV/AIDS Legislation in China

XIA Guomei Scott BURRIS

In order to effectively implement AIDS prevention policies, regulations and responsive measures, it is necessary to establish a suitable legal system. This article proposes that an appropriate HIV/AIDS legislative framework must be comprised of three elements. One element is, in the process of carrying out health work to combat the disease, to improve standards of health for the general public. The second element is to create a social environment amenable to the control of HIV/AIDS, so that while the threat of HIV/AIDS remains somewhat unclear, the possibility of those who suffer social humiliation and moral condemnation being infected with or coming into contact with the threat of HIV will be reduced to the barest minimum. The third element is to reconsider laws and policies that, while not explicitly aimed at HIV, have the effect of increasing the spread of disease or interfering with prevention interventions. The aim of this article is to provide a broad theoretical framework to China's HIV/AIDS legislation.

### AIDS Legislation in SHANGHAI: Considerations and Suggestions

Song Qing

Nowadays, there is still no cure and no vaccine for AIDS, while the relentless spread of HIV and the epidemics devastating impact on the public health and on social development. In China, the infected rate by AIDS has still been controlled in low level□ but in recent years, it has appeared increased trend year by year. The main trend of epidemics of AIDS in the world and the experiences of preventing and controlling the AIDS prove that it's an arduous task with complexity and a long term, which should be participated and implemented by the whole society. While among the participants, legislator plays a very important role, and legislative work is the key to the safeguarding of effective response and financial support as well as resources from society being together. Furthermore, it will be benefit for protecting the legal rights and interests of AIDS patients, fighting discrimination from society and preventing AIDS disease to adopt and implement the rules and laws effectively and timely by the legislator.

Following the above consideration, Shanghai Municipal People's Congress has put the project of AIDS legislation into annual legislative plan both of 2004 and 2005 as a research project.

In this article, it takes the basic research on the historical background on AIDS legislation and emphasize on the analysis for *The Shanghai Municipal Government on AIDS Prevention and Control*. Meanwhile, it reviews the survey of AIDS legislation both from national level and from local level, and takes some advanced legislative experience of other countries for reference. All these efforts focus on the key point, that is, how to perfect the AIDS legislation in Shanghai during the process of legislation by SMPC. To this point, there are several suggestions given by the author: First, we should define the legislative aims clearly,

which include at least three aspects: being people-centred and emphasis on prevention and education, meeting the needs of social and economic development, as well as adhering to the rules of scientific development. Second, we should adhere to the principle of legal system unification. Third, we should perfect the provisions on the rights of AIDS patients and use the advanced experience of other countries for reference. For instance, to stipulate the content about the anti-discrimination, to define the protection on the right to privacy and to specify the content of the access to antiretroviral treatment etc. Last but not least, we could add some new content into legislation. To the author's point of view, two aspects as following could be considered to add to the bill: one is to establish Epidemic Report System in case of emergency, the other is to emphasize on the AIDS prevention and control for work place.

### **Public Health, Patent and Access to Medicines**

YANG Hanhui

Infectious diseases kill over 10 million people each year, more than 90 percent of whom are in the developing world. The leading causes of illness and death in Africa, Asia, and South America--regions that account for four-fifths of the world's population--are HIV/AIDS, respiratory infections, malaria, and tuberculosis.

In particular, the magnitude of the AIDS crisis has drawn attention to the fact that millions of people in the developing world do not have access to the medicines that are needed to treat disease or alleviate suffering. The reasons for the lack of access to essential medicines are manifold, but in many cases the high prices of drugs are a barrier to needed treatments. Prohibitive drug prices are often the result of strong intellectual property protection. Governments in developing countries that attempt to bring the price of medicines down have come under pressure from industrialized countries and the multinational pharmaceutical industry.

The World Trade Organization ("WTO") Trade-Related Aspects of Intellectual Property Rights Agreement, which sets out the minimum standards for the protection of intellectual property, including patents for pharmaceuticals, has come under fierce criticism because of the effects that increased levels of patent protection will have on drug prices. While TRIPS does offer safeguards to remedy negative effects of patent protection or patent abuse, in practice it is unclear whether and how countries can make use of these safeguards when patents increasingly present barriers to medicine access.

The Fourth WTO Ministerial Conference, held in 2001 in Doha, Qatar, adopted a Declaration on TRIPS and Public Health which affirmed the sovereign right of governments to take measures to protect public health. Public health advocates welcomed the Doha Declaration as an important achievement because it gave primacy to public health over private intellectual property, and clarified WTO Members' rights to use TRIPS safeguards. Although the Doha Declaration broke new ground in guaranteeing Members' access to

medical products, it did not solve all of the problems associated with intellectual property protection and public health.

This paper discusses the compatibility between intellectual property rights and the right to health regarding AIDS drugs etc. in developing countries. It examines the inevitable conflict between the rights to health and intellectual property protection, and looks at ways in which the TRIPS agreement might be construed to allow for protection of the right to health. Part I discusses the conflicts between public health and intellectual property rights protection. Part II examines the right to health and how it historically has been interpreted, and how it applies to the provision access to medicines in developing countries. Part III introduces the definition of access to the medicines, examines the rationality of pharmaceutical patent protection and discusses the balance between access to medicines and pharmaceutical patent protection. Part IV introduces some WTO dispute cases referred to pharmaceutical patent protection and examines the potential effects that the enforcement of TRIPS and intellectual property rights will have on access to medicines in developing countries through interpretation of TRIPS. Part V introduces the negotiations history from Seattle to Doha, analyses of the legal status of the TRIPS and Public Health Declaration under international law discloses at least three possibilities, discusses the understanding of this Declaration and achievements of TRIPS and Public Health negotiation under Doha Round.

## **China's Social Medical Insurance System**

XU Xinyan

Protection of citizens' health is one of the duties of a state, which is explicitly prescribed in the constitutions of many countries. To fulfill the duty, many states provide different types of medical insurance to citizens to provide and finance medical treatment when they are ill and supply out-of-hospital recovery services. This is an important part of social security measures that a state offers in order to keep the state stable and sound. The main topic of this essay is the medical insurance system of China. It focuses on the reform of the urban basic medical insurance system, which is divided into 4 parts: brief introduction to medical insurance and medical insurance system, the establishment of China's medical insurance system and its relating issues, suggestions for perfecting China's basic medical insurance system and the concluding words.

The first part sets out different definitions to medical insurance. Although there is no single definition accepted by all the scholars, the core of the medical insurance is to finance or compensate medical expenses for such medical services as prevention, treatment and recovery. To regulate this practice, a state makes a policy and system on it, i.e. the medical insurance system. Different states adopt different systems fit for their own situation, which may be categorized into four models, German, British, Singaporean and American models. Each has its unique features, but there is something in common. These systems are statutory, binding, of mutual support to each participant and nation-wide.

The second part discusses the establishment and the problems of China's medical insurance adopted in the 1950s after New China was founded. The government adopted state-funded free medical care system in accordance with *the Direction on Implementing Free Preventive Medical Care for Employees of All Levels of People's Government, Parties, Groups and Auxiliary Institutions*. The employees of the state-owned enterprises enjoyed labor medical insurance system under *the Regulations on Labor Insurance*, which was financed by their own employing enterprises. In rural countries, there was a special type of insurance system, called mutual medical system, in which farmers pooled and made use of the pooling funds with the collective economic units.

These systems played a very important role in protecting the health and life of Chinese people in the past. However, with time passing by, there happened many problems with interfered with the implementation of the system. The medical fee was increasing at a speedy rate so as to be a great burden on the finance of both the State and the enterprises due to the individual's lack of self-protection sense and low efficiency of the usage of the medical resource. Another main problem is that the coverage of the medical services is still low and weak in preventing the risks.

So the reform was necessary and inevitable. The third part is on the reform of the past system. From 1980s, the state has been carrying out the reform from a few cities spreading to the whole countries. In 1998, the State Council adopted *the Decisions of Establishing Basic Medical Insurance System for Urban Employees*, a fruit of the reform. In the Decision, the main task and the basic principle were explicitly set out. The newly adopted basic medical insurance system embraces all the urban employees and their employers. The system was based on the municipality as its pooling level and the fund was of territorial management. Both the employers and the employees are required to pay premium at certain rate to their respective income to the pooling fund, which was put into two independent accounts: the basic medical insurance social pooling fund and the individual account. These two accounts were designed to cover different types of medical fees. The use of the pooling fund should be managed by the social insurance organization, supervised by governmental organs and other organizations. To enforcing the Decision, the reform in the management of the hospitals and pharmacies is carried out at the same time.

Still there is much to be perfected. The coverage of the system should be gradually expanded to cover all Chinese people to promote the features of the social medical insurance: mutual support and risk prevention. At the same time, commercial medical insurance should be encouraged to boom to supplement the system. It is also a must to strengthen the management and supervision of the medical insurance.

To sum up, the state is trying its best to provide best available medical service to the people. With the economic development, the medical insurance system will be improved and ensure the health of the people.

## **Legislative Research on Human Organ Donation and Transplantation**

SHEN Weixing WANG Qi

Organ transplantation is one of the great successes of modern medicine. Advances in medicine have enabled the use of several organs for transplant purposes. It's now possible to harvest from a cadaver the eyes, kidneys, liver, pancreas, small intestine, lungs and heart. From the living donor it is possible to transplant one kidney.

Organ transplantation has long been one of the academic hotspot because quite a lot of tough social, ethical and legal issues are involved in this process. This article is an attempt to combine all these issues with a focus on the role of law in organ donation and transplantation and on the impact of unique Chinese ethical value on it.

Legislative researches have been undertaken for years in many western countries such as UK and USA. But in other countries, especially in most Asian countries, it's less advanced because of the unique ethical and cultural tradition. Chinese legislation in this regard is almost blank till the breakthrough of "The Statute of Human Organ Donation and Transplantation of Shenzhen Special Economic Zone" enacted in 2004.

The general legislations of advanced countries will be introduced and commented and legal guidelines for organ donation and the specific provisions thereof in some countries are summarized thereby. The main focus of this article is the discussion of three internal legal institutions of organ transplantation-organ procurement, organ extirpation and organ transplantation, and the two external legal institutions-organ donation incentive mechanism and organ transplantation ensuring mechanism. The collocation of rights and obligations of the organ donors, receivers, medical institutes and administrative bureaus of organ transplantation related, the protection of donor's rights, the legal essence and character of organ donation contract and will, as well as some special issues relating to anencephalic infants and condemned prisoners will be the main topics for the above five legal institutions for the whole organ transplantation process.

This article aims at providing latest information on legislation of organ donation and transplantation and hopefully, offering a legislative proposal to the long-expected advent of China first unified human organ donation and transplantation statute.

### **Protection of human medical research subjects**

LUO Rong

Medical progress is a bless for all human beings. However, it is based on research which ultimately must rest in part on experimentation involving human subjects. Medical research might be risky and cause damage to human research subjects. Considering the need to protect human dignity and human basic rights, it's obligatory in medical research to respect the rights and benefits of human subjects. When we are faced with the social needs for medical progress and the potential harm to human research subjects, which one should our priority be given to? What is the justification for this kind of medical research? Ever since

World War II, the issue of the protection of human medical research subjects has aroused world-wide attention. The international society has reached a common understanding that the need for medical progress should not outweigh the protection of interests and benefits of human research subjects. In medical research on human subjects, considerations related to the well-being of the human subjects should take precedence over the interests of science and society. Starting with an account of the historical development of human subject protection in medical research, this paper points out that nowadays in China, the present status of laws and regulations related to human subject protection and the existing problems in medical practice justify the practical significance for the research on the interests and benefits of human subjects in medical research. It then carries out a research on the protection of the main rights, benefits and the protection of particular populations among human medical research subjects. By citing related laws and regulations, it analyzes the existing systems on medical research involving human subjects and probes into the participants, independent organizations, governmental administrative department and their duties, experimental conditions and procedures. Finally, this paper presents the rising new problems in the protection of human subjects in medical research and concludes that it is the ultimate aim to fully protect human subjects in medical research.

### **On legalization of Euthanasia**

Yu Haiyong ang Zaixiang

Euthanasia is an equivocal term. It can be divide into many types, and every type has different justice in ethics. Nowadays, only the Netherlands, Belgium and Unite States' Oregon accept the legality of euthanasia in the world. Because the development of modern medicine technique, the death without pain is possible. Patients obtain the right of self-determination on death because of the changes in the mode of medical treatment and the notion of death. Moreover, the reform of worldview strips the life's holiness, and one can be free to decide to kill himself. So euthanasia is a modernity problem in nature. As a result, the problem of euthanasia also faces the embarrassment of modernity theory and is in suspense. In fact, there aren't good arguments on the legitimacy/legality problem of euthanasia. Euthanasia has tight connection with one country's basic condition such as popular notion, culture ethos, religion, social welfare and the policy of medical treatment, etc. but the euthanasia researchers scarcely discuss these problems in detail. Therefore, the legislation on euthanasia in China must be deliberative.

### **Legislative Research on Brain Death**

SHEN Weixing ZHANG Long

Death was classically described as the cessation of circulation and respiration. However, as major technological advances in life support, particularly the development of respirators and heart-lung machines continued to explode during the past several decades, the concept of

death as defined by neurological criteria, that is, “brain death,” defined by neuroscience experts as irreversible cessation of all functions of the entire brain including the brain stem, emerged and evolved as a necessary measure for determining death and has gained increasing acceptance within the medical profession and among legislatures and courts in many countries including the United States.

Although the new criteria of death has no direct link with organ donation and transplantation in terms of purpose or effect, it does facilitate the supply of effective donated organs since brain death is a guarantee of fresh organs and physicians are largely allowed to provide organ donation notice service for patients with brain death in countries with concrete legislation in this regard. The author is trying to clarify this key standpoint in this article because such a misunderstanding would be a real impediment for a sound basis for brain death and organ transplantation legislation.

In this article, the authors summarize the most recent evidence-based guidelines for determining brain death. We then analyze the legislations of various countries and stress that although these guidelines reflect generic, scientifically based recommendations, adaptation of certain details may vary across practice settings and states according to variations in institutional policy and local legislation. The author further discusses the possibility and feasibility as well as the possible risks and ethical dilemmas of adopting brain death by law in China combining the status quo of Chinese medical practices and modern technical advancement as well as legislation pilot.

## **Bioethical and Legal Issues concerning Biotechnology**

LIU Yinliang

This chapter discusses mainly bioethical issues and legal controls relevant to genetic manipulations and human clones. It presents firstly the basic principles in Bioethics and the relevant international and local codes; then it discusses the bioethical issues and relevant legal controls over gene therapies concerning somatic cells and germ-lines, respectively, and human clones. It concludes, in the present social contexts, that genetic therapy of somatic cells could be permitted if due cares should be paid, and that of germ-lines should in principle be prohibited, and that human clones should be legally prohibited and strictly controlled. In any cases, essential bioethical measures and legal controls are fundamentally necessary.

## **Health and Human Rights**

Xia Lian

Different concepts of judiciability have different understanding on human rights. As most Western theories define judiciability as enforceable judicial decisions, civil and political rights have been considered as human rights due to their susceptibility to judicial adjudication, while economic and social rights and the right to development are refused as human rights due to their lack of judicial adjudication in character. In the past two decades, with the emergency of public health, it is obvious that the right to health is becoming more important which are displayed through two ways, on the one hand, the States reporting procedures under ICESCR on right to health has obtained something quasi-judicial, and on the other hand, the cases on right to health which enlarge the concept of judiciability in States Parties. Moreover, the durable effects on clarification of right to health from right and obligation dimension not only make it a bridge between different generations of human rights, but also make us realise the sensibless of sharp distinction between different generations of human rights. With the aim of emerging the gap of generations of human rights, the chapter presents and discusses the most important human rights treaty provisions stipulating a right to health. Then, object of this chapter is to offer a framework and a basis for the further analysis of the right to health.