Cohering health law in China: Lessons from an American debate*

* This chapter is based on a published paper. Alternations have been made for the sake of integrality.

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ABSTRACT

Aim: This chapter mainly focuses on assessing current effective legal norms and their role in governing China's healthcare system and system reform. Thus, the question is framed as follows: *to what extent is the performance of the Chinese healthcare system tied to China's health law and how do we form a coherent health law that will best meet China's new health reform initiatives?*

Background: The Healthy China 2030 Blueprint points out that the Chinese healthcare system reform should be approached following the people-centred integrated care model. As a consequence, current fragmented legal norms in the sphere of health in China cannot face the challenge posed by this new reform initiative, which in turn is a practical requirement calling for a unified law-making model.

Methods: Classic legal analysis is used to evaluate laws and regulations on both national and international levels that are effective in governing health and healthcare in China. Furthermore, this chapter also adopts theoretical analysis on a heated debate over the coherence of health law.

Findings: In health and healthcare, fragmentation is an attribution of legal norms. In China, the fragmented health law is likely to aggravate the inefficiency of reform efforts. New reform measures, such as the nationwide implementation of general practitioner services and encouraging the involvement of private actors in healthcare, need to be assessed and supported by a sufficiently coherent legal framework. All meaningful points raised by the debate over the coherence of health law deserve to be taken into account by lawmakers in China.

Keywords: Health law, fragmentation, coherence of health law, recommendations

6.1 INTRODUCTION

Along with the ageing population and the increasing burden of non-communicable diseases, the traditional hospital-based model of healthcare delivery in China encounters great challenges. Prominent problems include: (1) the current division of labour is not clear causing an awkward situation in which large tertiary hospitals are overwhelmed with patients while many primary medical institutions are underutilised (Li & Xie, 2013); (2) a substantial geographic disparity exists in health facilities and health personnel; (3) the performance of the referral system is relatively poor; (4) people have limited access to claim their health benefits because the responsibility of each involved government agent is not clearly defined; (5) the dual problem of overprescription of certain drugs (e.g. antibiotics) and the defensive behaviour of doctors (or, defensive medicine). In order to solve these problems and increase the accessibility of high-quality healthcare, Healthy China 2030 (WB et al., 2015) was issued by the Chinese government under the guidance of the World Health Organization and the World Bank Group.

Healthy China 2030 points out that the Chinese healthcare system reform should be approached following the people-centred integrated care model, that is, reform efforts should be taken to integrate the current fragmented healthcare delivery. The integration direction of healthcare delivery calls for a coherent health law to secure the consistency of concrete policy measures. Given that there is no specific section of Healthy China 2030 devoted to analysing health law in China, this paper intends to fill the gap by discussing the necessity of cohering health law in China and how to consolidate the fragmented laws and regulations. Useful lessons will be drawn from an American debate on the coherence of health law.

6.2 HEALTH LAW IN CHINA

6.2.1 International health law that applies to China

China plays an active role in the international community, not only as a co-founder of many international governmental organisations (IGOs) but also as a state member of numerous multilateral international treaties and conventions. China has signed and ratified nearly all international treaties and conventions that protect people's health benefits (Table 6.1).

Among all international health regulations, the first section of Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) affirms the general accountability of the state in protecting and promoting the right to health while the second section lists four steps towards protecting the right to health (Box 6.1).

Box 6.1 The second section of the Article 12 of ICESCR: The Right to Health
The steps to be taken by the State Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

From the list above, it is easy to see that the state accountability is mainly addressed in the following spheres: protecting maternal and infant health, preventing and curing special diseases, and creating supportive conditions. In these regards, China, as a signatory country of ICESCR, endeavours to meet the state accountability by enacting special laws and regulations, such as the Law of Maternal and Infant Health Care (2009), the Law of the PRC on Prevention and Treatment of Infectious Diseases (2013 Amendment), and the Law of the PRC on the Prevention and Control of Occupational Diseases (2016 Amendment).

Considering that Article 12 of ICESCR is a very general stipulation, the Committee on Economic, Social and Cultural Rights issued General Comment No. 14 to provide state members with a more detailed explanation on the right to health. Although state members are not legally obligated to comply with international documents like General Comments, they still provide authoritative guidance on how state members should fulfil their accountability.[73] According to General Comment No. 14, state members should 'respect, protect and fulfil' the right to health of their citizens. Given that state members have different levels of development, General Comment No. 14 allows its state member to take steps towards achieving the 'availability, acceptability, accessibility, and quality' (AAAQ) of healthcare.

Besides ICSECR, many other international conventions and treaties that are signed and ratified by China have stipulations regarding health and healthcare (Table 6.1). For instance, Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination (1969), Article 6, Article 7, Article 9 and Article 10 of the International Covenant on Civil and Political Rights (1976), Article 1, Article 12 and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (1981), Article 24 of the Convention on the Rights of the Child (1990), Article 25 of the Convention on the Rights of Persons with Disabilities (2008), and the Framework Convention on

73 FXB Center for Health and Human Rights, *Health and Human Rights: Resource Guide*. (2013). p. 5. Retrieved from https://cdn2.sph.harvard.edu/wp-content/uploads/sites/5/2013/09/HHRRG-master.pdf (last accessed 24 March 2019).

Tobacco Control. Furthermore, there are many international organisations (e.g. the United Nations, the United Nations Educational, Scientific and Cultural Organizations, and the World Health Organization) that have their own standards regarding health and healthcare; China needs to comply with these standards to which it is a state party (Table 6.1). For instance, as a permanent member of the United Nations, China needs to comply with Article 3, Article 5 and Article 25 of The Universal Declaration of Human Rights; as a state party of the United Nations Educational, Scientific and Cultural Organizations, China needs to follow Article 14 of the Universal Declaration on Bioethics; as a state member of the World Health Organization, China needs to obey the international health regulations.

In principle, these international documents are legally binding for state members once they have ratified them. However, there is no explicit provision on how to implement them domestically and to what extent these international provisions impact the existing domestic legal systems. The domestic implementation of these international treaties is a rather complicated issue and they differ from one another due to diverse economic-political-legal contexts (Tamanaha, 2004).[74] In China, ratifying international treaties should follow a special legal procedure regulated by the Law of the People's Republic of China (PRC) on the Procedure of the Conclusion of Treaties (1990) (Xue & Jin, 2009). Based on the procedure, the international treaties, except the Articles with reservations[75] have – in principle – had a binding force in domestic China. However, there is no explicit provision affirmed by the Legislative Law of the PRC (2015 Amendment) on the substantive enforcement. As a consequence, the substantive enforcement of these international treaties is likely to be more intricate. Furthermore, implementing international treaties concerning protecting health as a human right may encounter an extra obstacle, because the human rights discourse is easily misunderstood as an imposition of Western ideology, which Eastern countries hesitate to adopt domestically (Cerna, 1994).

6.2.2 Domestic health-related laws and regulations

The Legislation Law of the PRC (2015 Amendment) affirms that the Chinese legal system has a multi-tier structure. There are mainly three official sources of law in China: statutory law (e.g. laws, administrative regulations, local regulations, administrative rules, and military regulations), judicial interpretations, and treaties (Zhang, 2011). Influenced by the decentralisation reform of the administrative system, the central government, its State Council department and local governments have the power to issue legally binding rules and regulations (Yang, 2003).

74 Tamanaha, B. Z. (2004). *On the rule of law: History, politics, theory.* Cambridge University Press.

75 A reservation in international law refers to 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in application to that State.' For more analysis, please refer to Hylton (1994).

Table 6.1 The international health-related documents joined by China

Documents	Related Articles	Date in Force	China
Binding Documents			
Convention on the Rights of the Child	Article 24	02/09/1990	Effective: 01/04/1992
Convention on the Elimination of All Forms of Discrimination against Women	Preamble, Article 1, Article 12, Article 16	03/09/1981	Signed: 17/07/1980 Ratified: 04/11/1980
Convention on the Rights of Persons with Disabilities	Article 25	Signed: 30/03/2007; Effective: 03/05/2008	Signed: 30/05/2007 Ratified: 01/08/2008
Framework Convention on Tobacco Control		Adopted: 21/05/2003	Signed: 11/2003 Ratified: 01/2005
International Convention on the Elimination of all Forms of Racial Discrimination	Article 5	04/01/1969	Accession: 29/12/1981 Effective: 28/02/1982
International Covenant on Civil and Political Rights	Article 6, Article 7, Article 9, Article 10	23/05/1976	Signed: 05/10/1998
International Health Regulations		Adopted: 2005 Entered into Force: 15/06/2007	State Member of WHO
International Covenant on Economic, Social and Cultural Rights	Article 12	03/01/1976	Signed: 27/10/1997 Ratified: 27/05/2001
Non-Binding Documents			
General Comment No. 20 (1992) replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7)			
General Comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child, Committee on the Rights of the Child			
General Recommendation No. 24 (20th session, 1999) (Article 12: Women and Health)			
General Comment No. 3 (2003) HIV/AIDS and the rights of the child, Committee on the Rights of the Child			
Recommendation No. R (1998) 71 of the Committee of Ministers to Member States concerning the ethical and organisational aspects of health care in prison			
The Right to the Highest Attainable Standard of Health: General Comment No. 14 (2000) on Health; 11/08/2000. E/C 12/2000/4.			
Declaration on the Rights of Mentally Retarded Persons		Proclaimed: 20/12/1971	State Member of UN
International Declaration on Human Genetic Data		Proclaimed: 16/10/2003	State Member of UN
Madrid Declaration on Ethical Standards for Psychiatric Practice (Declaration of Madrid)		Approved: 25/08/1996 Last Enhanced: 21/09/2011	State Member of World Psychiatric Association (WPA)

Table 6.1 The international health-related documents joined by China (continued)

Documents	Related Articles	Date in Force	China
Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care		Adopted: 17/12/1991	State Member of UN
Standard Minimum Rules for the Treatment of Prisoners	Rules 22–26, Rules 82–83	First Adopted: 30/08/1955 Most Recently Adopted: 17/12/2015	State Member of UN
The Universal Declaration of Human Rights	Article 3, Article 5, Article 25	Adopted and Ratified: 10/12/1948	State Member of UN
Universal Declaration Bioethics UNESCO	Article 14	Adopted: 19/10/2005	State Member of UNESCO
United Nations Rules for the Protection of Juveniles Deprived of their Liberty	Chapter H - Medical Care (Rule 49–55)	Adopted: 14/12/1990	State Member of UN

Source: Please refer to Den Exter (2011), Wan (2007). Originally from the International Human Rights Instruments, please refer to http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx last accessed 24 March 2019). Human Rights Library, University of Minnesota, please refer to https://www1.umn.edu/humanrts/research/ratification-china.html (last accessed 24 March 2019).

In health and healthcare, numerous laws and regulations from different levels of authority have been enacted in China. Due to the vast spectrum of laws and regulations that govern healthcare in China, Table 6.2 merely lists the laws that were enacted by the National People's Congress and its standing committee. As shown in Table 6.2, the National People's Congress has enacted several special statutes for governing particular health spheres, including the Law of the PRC on Blood Donation (1998), the Law on Practising Doctors of the PRC (2009 Amendment), the Law of Maternal and Infant Health Care (2009), the Law of the PRC on the Red Cross Society (2009 Amendment), Frontier Health and Quarantine Law of the PRC (2009 Amendment), the Mental Health Law of the PRC (2013), the Law of the PRC on Prevention and Treatment of Infectious Diseases (2013 Amendment), the Pharmaceutical Administration Law of the PRC (2015 Amendment), the Law of the PRC on Population and Family Planning (2015 Amendment), the Law of the PRC on the Prevention and Control of Occupational Diseases (2016 Amendment), and the Law of the PRC on Traditional Chinese Medicine (2017).[76] The eleven special statutes listed draw greater

76 Before the enactment of the Law of the PRC on the Traditional Chinese Medicine (2017), scholars largely agree that there are eleven special health laws governing healthcare in China. According to this view, the Food Safety Law of the PRC (2015 Amendment) should be regarded also as one special health law. However, the author disagrees with this category by arguing that only certain Articles of the Food Safety Law of the PRC (2015 Amendment) are correlated to health and healthcare.

Table 6.2 The domestic health-related legal regulations in China

Laws (People's Republic of China – PRC)	Related Articles	Date Issued/ Effective	Health-related Aspect
Administrative Litigation Law of the PRC (2014 Amendment)	Article 57 (advance enforcement on the social insurance for medical treatments) Article 21, Article 36, Article 45, Article 111, Article 119	Issued: 01/11/2014; Effective: 10/05/2015	Judicial Remedy
Anti-domestic Violence Law of the PRC	Article 7 (medical records), Article 9, Article 14/ Article 35 (medical institutions' responsibility to report and liability)	Issued: 27/12/2015; Effective: 01/03/2016	Domestic Violence
Atmospheric Pollution Prevention and Control Law of the PRC (2015 Amendment)	Article 8, Article 78, Article 95	Issued: 29/08/2015; Effective: 01/01/2016	The Right to Health and Living Surroundings
Animal Epidemic Prevention Law of the PRC (2015 Amendment)	Article 13, Article 67	Issued and Effective: 24/04/2015	Public Health and the Right to Health of Employees
Agricultural Law of the PRC (2012 Amendment)	Article 83–84	Issued and Effective: 28/12/2012	Health Protection in Rural China
Advertising Law of the PRC	Article 10/ Article 40 (minors and disabled persons), Article 15–16/Article 18–19 (forbidden content in health-related advertising), Article 46, Article 55–59, Article 62, Article 68–69	Issued: 24/04/2015; Effective: 01/09/2015	Health-related Advertising, Minors and Disabled Persons
Constitution of the PRC (2004 Amendment)	Article 21, Article 36, Article 45, Article 111, Article 119	Issued: 14/03/2004 Issued: 01/11/2014; Effective: 10/05/2015	General Regulation
Criminal Procedure Law of the PRC (2012 Amendment)	Part Five (Chapter IV: Procedures for Involuntary Medical Treatment of Mental Patients Legally Exempted for Criminal Liability)	Issued and Effective: 14/03/2012	Mental Patients
Criminal Law of the PRC (1997 Revision) (Revised with Nine Amendments)	Article 18 (Mental Patients), Section 1. (Crimes of Manufacturing and Selling Fake and Shoddy Goods): Article 141–148, Article 290 (Crimes of Disturbing Medical Order), Section 5. (Crimes of Endangering Public Heath): Article 330–336, Article 339, Article 409	Issued: 14/03/1997; Effective: 25/12/1999	Health-related Crimes and Liability
Charity Law of the PRC	Article 63	Issued: 16/03/2016; Effective: 01/09/2016	Health and Charity
Counterterrorism Law of the People's Republic of China	Article 65	Issued: 27/12/2015; Effective: 01/01/2016	Victims and Relatives' Right to Health

Table 6.2 The domestic health-related legal regulations in China (continued)

Laws (People's Republic of China – PRC)	Related Articles	Date Issued/ Effective	Health-related Aspect
Civil Procedure Law of the PRC (2012 Amendment)	Article 73 (deposition exempted), Article 106, Article 206	Issued and Effective: 31/08/2012	Judicial Remedy
Construction Law of the PRC (2011 Amendment)	Article 47	Issued and Effective: 22/04/2011	Occupation Health
Coal Industry Law of the PRC (2013 Amendment)	Article 8	Issued and Effective: 29/06/2013	Occupation Health
Employment Promotion Law of the PRC (2015 Amendment)	Article 30	Issued and Effective: 24/04/2015	Occupation Health
Education Law of the PRC (2015 Amendment)	Article 45 (health facilities), Article 46/ Article 53 (governmental responsibility)	Issued and Effective: 27/12/2015	Children
Environmental Protection Law of the PRC (2014 Revision)	Article 39, Article 47	Issued: 24/04/2014; Effective: 01/01/2015	Public Health
Frontier Health and Quarantine Law of the PRC (2009 Amendment)		Issued and Effective: 27/08/2009	Public Health
Food Safety Law of the PRC (2015 Revision)	Article 10 (healthy lifestyle), Article 14, Article 24, Article 26, Article 45, Article 104, Article 123/Article 126 (sanctions and liability)	Issued: 24/04/2012; Effective: 01/01/2015	Healthy Lifestyle
General Principles of the Civil Law of the PRC (2009 Amendment)	Section 4 (Personal Rights: Article 98. Citizens shall enjoy the right of life and health)	Issued and Effective: 27/08/2009	The Right of Life and Health
Insurance Law of the PRC (2015 Amendment)	Article 91	Issued and Effective: 24/04/2015	Medical Fees and Occupation Health
Law of the PRC on Regional National Autonomy (Revised)	Article 11 (religious), Article 40/Article 42/ Article 50 (self-government organs' responsibility)	Issued: 31/05/1984; Effective: 28/02/2001	Ethnic Minority
Law of the PRC on the Protection of Disabled Persons (Revised)	Article 17/Article 18/ Article 48 (local governments' responsibility)	Issued: 24/04/2008; Effective: 01/07/2008	Disabled Persons
Law of the PRC on the Protection of Minors (2012 Amendment)	Article 11 (parents' responsibility), Article 19/Article 22 (schools' responsibility), Article 27/Article 32/ Article 33/ Article 38/ Article 41 (social and governmental responsibility), Article 68/Article 71 (liability)	Issued: 26/10/2012; Effective: 01/01/2013	Children

Table 6.2 The domestic health-related legal regulations in China (continued)

Laws (People's Republic of China – PRC)	Related Articles	Date Issued/ Effective	Health-related Aspect
Law of the PRC on the Protection of Women's Rights and Interests (2005 Amendment)	Article 17 (female adolescents), Article 26 (employers' responsibility), Article 28 (governmental responsibility), Article 38 (women's right to life and health), Article 51 (reproductive right)	Issued: 28/08/2005; Effective: 01/12/2005	Women and Children
Labour Law of the PRC (Revised)	Article 41/Article 42 (the limited working hours of employees and its exceptions), Chapter 6 (labour safety and sanitation), Chapter 7 (special protection for female staff and workers, and juvenile workers)	Issued: 05/07/1994; Effective: 27/08/2009	Occupation Health, Women and Children
Labour Law of the PRC (Revised)	Article 41/Article 42 (the limited working hours of employees and its exceptions), Chapter 6 (labour safety and sanitation), Chapter 7 (special protection for female staff and workers, and juvenile workers)	Issued: 05/07/1994; Effective: 27/08/2009	Occupation Health, Women and Children
Law of the PRC on Maternal and Infant Health Care		Issued: 27/10/1994; Effective: 27/08/2009	Women and Infants
Law of the PRC on the Protection of the Rights and Interests of the Elderly (2015 Amendment)	Article 15, Article 29–31, Article 34, Article 37, Article 49–50, Article 53, Article 56 (the elderly first as the principle of priority setting), Article 61, Article 69	Issued and Effective: 24/04/2015	The Elderly
Law of the PRC on Population and Family Planning (2015 Amendment)		Issued and Effective: 27/12/2015	Public Health and Reproductive Rights
Law of the PRC on Promoting the Transformation of Scientific and Technological Achievements (2015 Amendment)	Article 12 (government supports the advanced technology in health)	Issued and Effective: 29/08/2015	Health Technology
Law of the PRC on Tobacco Monopoly (2015 Amendment)	Article 5 (children), Article 17	Issued and Effective: 24/04/2015	Tobacco Control and Children

Table 6.2 The domestic health-related legal regulations in China (continued)

Laws (People's Republic of China – PRC)	Related Articles	Date Issued/ Effective	Health-related Aspect
Law of the PRC on the Protection of Consumer Rights and Interests (2013 Amendment)	Article 45, Article 49, Article 51, Article 55	Issued and Effective: 25/10/2013	Consumer's Health-Related Rights
Law of the PRC on Prevention and Treatment of Infectious Diseases (2013 Amendment)		Issued and Effective: 29/06/2013	Public Health
Labour Contact Law of the PRC (2012 Amendment)	Article 32, Article 40, Article 42	Issued and Effective: 28/12/2012	Occupation Health
Law of the PRC on Prevention of Juvenile Delinquency (2012 Amendment)	Article 3, Article 30–32, Article 52–54	Issued and Effective: 26/12/2012	Children
Law of the PRC on the Prevention and Control of Occupational Diseases (2016 Amendment)		Issued and Effective: 07/02/2016	Public Health and Occupational Health
Law of the PRC on Traditional Chinese Medicine		Issued: 25/12/2016; Effective: 01/07/2017	Medicine
Law on Practising Doctors of the PRC (2009 Revision)	The main body of the law remains the same as 1998 version except a minor change of Article 40	Issued and Effective: 6/26/1998	Medical Professionals
Law of the PRC on Blood Donation		Issued: 29/12/1997; Effective: 01/10/1998	Public Health
Law of the PRC on the Red Cross Society (2009 Amendment)		Issued and Effective 27/08/2009	Humanitarian and Public Health
Law of the PRC on Protecting Against and Mitigating Earthquake Disasters (2008 Revision)	Article 50	Issued 27/12/2008; Effective: 01/05/2009	Public Health
Mine Safety Law of the PRC (Revised)	Article 31 (employers' responsibility)	Issued: 07/11/1992; Effective: 27/08/2009	Occupation Health
Mental Health Law of the PRC		Issued: 26/12/2012; Effective: 01/05/2013	Mental Health
Military Service Law of the PRC (2011 Amendment)	Article 21, Article 53, Article 57	Issued and Effective: 29/10/2011	Military
National Security Law of the PRC	Article 29, Article 31	Issued and Effective 01/07/2015	Public Health

Table 6.2 The domestic health-related legal regulations in China (continued)

Laws (People's Republic of China – PRC)	Related Articles	Date Issued/ Effective	Health-related Aspect
National Defense Mobilisation Law of the PRC	Article 45 (a medical rescue and healthcare system which is applicable to both peacetime and wartime)	Issued: 26/02/2009; Effective: 01/07/2010	Public Health
Organic Law of the Villagers' Committees of the PRC (2010 Revision)	Article 7 (subcommittees for public health)	Issued and Effective: 28/10/2010	Health-related Organisation in rural China
Prison Law of the PRC (2012 Amendment)	Article 53, Article 54	Issued: 26/10/2012; Effective: 01/01/2013	Prisoners
Pharmaceutical Administration Law of the PRC (2015 Amendment)		Issued and Effective: 24/04/2015	Pharmaceutical Regulations
Social Insurance Law of the PRC	Article 38, Article 42, Article 48, Article 64, Chapter III (Basic Medical Insurance), Chapter VI (Maternity Insurance)	Issued: 28/10/2010; Effective: 01/07/2011	Medical Insurance
State Compensation Law of the PRC (2012 Amendment)	Article 34 (compensation on the infringements of citizen's right to life and health)	Issued: 26/10/2012; Effective: 01/01/2013	Remedy
Tourism Law of the PRC	Article 6, Article 15 (tourists' responsibility), Article 26, Article 66	Issued: 25/04/2013; Effective: 01/10/2013	Public Health and Tourists' Responsibility
Tort Law of the PRC	Chapter VII (Liability for Medical Malpractice)	Issued: 26/12/2009; Effective: 01/07/2010	Patient's Rights

Source: pkulaw, please refer to http://en.pkulaw.cn/ (last accessed 24 March 2019). Also, please refer to http://www.cdpf.org.cn/special/6dh/2013-09/15/content_30451989.htm (in Chinese, last accessed 24 March 2019).

attention to protecting vulnerable groups and expanding the accessibility and availability of healthcare services for all residents of China.

All in all, health-related laws and regulations in China have a characteristic of fragmentation. In some circumstances, the characteristic of fragmentation is designed for the sake of checks and balances. For instance, in some Western countries where goals suggested by policies are always achieved through enforcing related laws and regulations (Bledsoe & Prosterman, 2000, p. 3; Parmet, 2016), the fragmentation of health law may enhance the performance of health policies because the disparate parts of health law are likely to be more specific than a general legislation for governing the different aspects of healthcare issues. However, the goal of achieving checks and balances may be hard to attain in China because China maintains a tradition of launching new policies, instead of enforcing law, to reach the target of previous policies. Furthermore, the Chinese government issued a new reform plan,

Healthy China 2030, with a main goal of integrating the fragmented healthcare delivery. The integration direction of healthcare delivery calls for a coherent health law to secure the consistency of concrete policy measures.

6.3 THEORETICAL ARGUMENTS: AMERICAN DEBATE ON COHERING HEALTH LAW

In academia, much literature is centred on questioning and justifying the coherence of health law (Kennedy & Grubb, 2005; Bloche, 2003, 2009; Hervey & McHale, 2004; Elhauge, 2006; Parmet, 2009; Gatter, 2016). Arguments raised by American scholars are relatively straightforward and appealing, which generates advantages in practical applications. Prominent proposals include the law and economic approach from Clark Havighurst (1988, 1995), a trust-based paradigm from Mark Hall (2002), a rescue-oriented framework from Maxwell Bloche (2003), an international human rights framework from Wendy Mariner (2009), and the social justice perspective proposed separately by Rand Rosenblatt (1988) and Lindsay Wiley (2014, 2016).

6.3.1 Clark Havighurst's law and economic approach

Respecting and protecting individual choices are the core values underpinning Havighurst's framework. According to him, it is of great importance to consider the effects of market factors in reforming healthcare systems. Efficiency should be given priority because the instrumental value of health law is to maximise medical benefits. Yet, as Robert Gatter (2016, p. 1138) observes, Havighurst's law and economic approach is rational and practical, which provides sufficient justification for spheres such as health insurance and certain clinical decision-making processes, but it is unable to account for the entire scope of health law. For example, vaccination against rare diseases where beneficiaries are normally small groups of people. From a cost-effective point of view, this kind of vaccination has a low efficiency and should be abandoned no matter how desperate people are when suffering from those rare diseases. It is cruel and has been criticised by many scholars, such as Jonathan Montgomery (2006, p. 14) who argues in favour of legitimating health law by its potential function in preserving morality, and Maxwell Gregg Bloche who is strongly against abandoning patients by emphasising that the prime goals of health law should include 'rescue, support and comfort, personal dignity' (Bloche, 2003, p. 256) besides promoting and restoring health. As a response, Clark Havighurst (1988) defends his framework by denying that the missing parts are the essential elements of health law. Nevertheless, neglecting the missing parts, such as public health, is a major defect that devalues the whole framework in cohering health law.

6.3.2 Mark Hall's trust-based paradigm

According to Hall and Schneider (2004), the coherence of health law cannot be proved by one or more basic principle(s) but the disparate parts of health law can be integrated by sharing a thematic factor. In this regard, Hall proposes that the focus of lawmaking efforts should return to the core of healthcare services: the doctor-patient relationship. Restoring the trust between doctors and patients should be the key point for the coherence of health law. Addressing the importance of restoring trust is derived from 'therapeutic jurisprudence' developed by David Wexler and Bruce Winck (1992, p. 9; 1996, p. xvii). Therapeutic jurisprudence is an analytical framework with a main focus on analysing how the legal system affects the emotion, behaviour and mental health of people. Hall intends to implement and extend the therapeutic jurisprudence paradigm by exploring the role of trust in structuring health law. Therapeutic jurisprudence addresses the importance of caring for patients' feelings and clinical experience. Accordingly, Hall argues that lawmaking efforts should also take the performance of healthcare services into account. Compared with commercial activities, the fragile and insecure feelings of patients highlights the instrumental value of trust to the performance of healthcare services. Nevertheless, critics claim that trust cannot be used to justify the inherent coherence of health law because trust is also the essential element of other department laws.

6.3.3 Maxwell Bloche's rescue-oriented framework

Argued by Bloche (2003, p. 306), rescue should be one of the essential aims of healthcare delivery (and health law). He strongly criticises the argument that lawmaking activity should mainly focus on population-wide health maximisation regardless of the possibility of overriding any identified individual health interests (Bloche 2003, p. 306). The limited recognition capacity of human beings and the uncertainty of diagnosis and treatments would make it difficult to identify 'welfare maximisation' which would in turn impede the effectiveness of health law. Thus, he claims that healthcare lawmaking should be clear about the following issues: 'medical uncertainty, people's cognitive constraints and emotional needs, and persisting moral disagreements limit the possibilities for rational health policymaking' (Bloche, 2003, p. 254). He addresses that healthcare lawmaking should reflect people's real hopes and expectations and, more important, build a rich empathic relationship with people (Bloche, 2003, p. 304). Specifically, besides the goal of protecting and promoting health, healthcare lawmaking must carefully consider the following four goals: rescue, support and comfort, regard for the dignity of the vulnerable, and universal access to basic medical services (Bloche, 2003, p. 256, p. 304). Admittedly, curing and caring should be the essential aims of health services. Yet, lawmaking efforts for cohering health law should adopt a boarder perspective, otherwise it may neglect some indispensable parties in healthcare delivery, such as pharmaceutical companies and health insurance companies.

6.3.4 Wendy Mariner's international human rights framework

Notably, public health has a close relationship with human rights (Gostin, 2004, p. 511; Hervey & McHale, 2004, p. 234). In this regard, the international human rights law framework may perform the best in organising health law as a coherent legal field. Developed by the scholar Wendy Mariner (2009, pp. 70–78), this framework borrows three concepts from the international human rights law to set the scope of health law. These three concepts are actually three aspects of the state accountability in protecting and promoting the right to health: respect, protect and fulfil. This framework is designed to make health law clearer by acknowledging the norms shared with other legal fields (Gatter, 2016, p. 1137). However, the human rights discourse is incompatible with the market dimension of the healthcare system, such as for-profit medical institutions. As a consequence, health law based on human rights needs to be confined to a limited scope (Montgomery, 2006, p. 10). Recognising the limitation, Wendy Mariner (2014, 2016a, 2016b) defends her framework by narrowing her attention to the sphere of public health and social determinants in her recently published research. Nevertheless, there exists another defect. She previously agreed with Einer Elhauge (2006, p. 371) in terms of admitting that heath law is a legal field dependent on tailoring the doctrines of other legal fields. Although both Einer Elhauge and Wendy Mariner hold the position that health law should be a coherent legal field, tailoring the doctrines of other legal fields de facto denies the legitimacy of the coherence and independence of health law.

6.3.5 Rand Rosenblatt's social justice perspective

Rosenblatt (1988) categorises the historical development of health law in America into three stages with their own distinct priorities. During the first stage, health law in America was designed and implemented with a focus on the professional autonomy of doctors because doctors, during that time, dominated the healthcare system and had a sort of privilege in deciding healthcare distribution owing to their powerful knowledge. During the second stage, lawmaking efforts gradually took patient rights and social interest into consideration. Health law in this stage gave a special attention to mitigating the conflicts between patients and other parties that arose from information asymmetry and unequal power status. This legislative priority implied that health law in this stage was likely to adopt a 'social contract model'. During the third stage, market forces were addressed for the sake of solving the low-efficiency issue and the infringement of individual rights. There is no better or worse approach, as each one has its own advantages and limitations. Yet, Rosenblatt (1988, p. 491) observes that there are four factors driving the development of health law in America: 'economic behaviour, individual self-determination, social choice, and social justice.' Based on it, Rosenblatt proposes the perspective of social justice as the new distinct priority in conceptualising health law. From the perspective of social justice, the focus of healthcare law-making should include but not be limited to improving the engagement of patients in healthcare, addressing the importance of consumerism in protecting self-determination and protecting the interests of vulnerable groups.

6.3.6 Lindsay Wiley's social justice framework

According to Wiley's (2014, 2016) social justice framework, health law and policy should mainly focus on decreasing health disparity, especially where disparity exists in accessing healthcare. Given that the social determinants of health (SDH)[77] are often regarded as key factors causing health inequalities (Sage, 2017, p. 10), Lindsay advises lawmakers to take SDH seriously when drafting new laws regarding health and healthcare. Considering that social determinants are also the key driving forces behind social justice, there must exist a kind of connection between health law and social justice. In this regard, Wiley (2014, p. 47) argues that health law is an instrument for achieving social justice. Furthermore, she argues that traditional health law often weighs more on protecting and promoting patient rights while inevitably falling short of addressing the protection of the common good (e.g. the sustainability of the healthcare system) (Wiley, 2016). Thus, she claims that healthcare lawmaking needs to be further improved in the following aspects: taking into account public interests when drafting the treatment plan, and securing the sustainability of the healthcare system before expanding the accessibility of certain health services.

Overall, each of the above proposals has appealing aspects and potential limitations. All meaningful points raised by each proposal equally deserve to be taken into account when cohering health-related laws and regulations.

6.4 PRACTICAL IMPLICATIONS FOR ENACTING A BASIC HEALTH LAW IN CHINA

As Porter (2010, p. 3477) argues, having a shared goal that could unite the interests of all involved parties is of great importance for performance improvement in any field. Thus, in healthcare lawmaking, recent literature regarding China's health law largely concentrates on exploring the fundamental value or the unifying theme (Dong, 2014; Wang, 2016; Liu, 2017).

6.4.1 A clear unifying theme for cohering health law in China?

Learnt from the above theoretical arguments, different values can be derived as unifying themes to link the fragmented health law, including efficiency, trust, rescue, human rights and social justice. Are these values, or any one of them, suitable for cohering the fragmented health law in China?

77 Defined by the World Health Organization (WHO), SDH are the conditions in which people are born, grow up, live, work and age, and the systems put in place to deal with illness, For more information on the social determinants of health, please refer to http://www.who.int/social_determinants/thecommission/finalreport/key_concepts/en/ (last accessed 24 March 2019).

Efficiency. If value in healthcare in China is defined with a priority given to cost reduction, then China's fragmented health law should be consolidated encompassing efficiency. However, if taking efficiency as the unifying theme for law coherence, some treatment techniques for a minority population, such as orphan drugs, would be left entirely to the market without legal protection. As a consequence, the health interests of these minority groups would be clearly at stake and lawmaking efforts would be ultimately in vain.

Trust, as an essential attribute of a good physician-patient relationship, plays a vital role in enhancing the quality of healthcare (Hall, 2002, p. 470). Preserving and restoring trust has long been one prominent theme of health laws (Mehanic, 1998). Although restoring trust is of significant importance for reviving the current tense relationship between doctors and patients in China, it is still questionable to use trust to unite China's health law as it is also a central value for laws that govern other areas, such as commercial transactions. In order to defend trust, as the unifying theme, Mark Hall (2002, p. 471) explains the different roles that trust plays in healthcare and in the other areas by arguing that people are likely to have less control over decisions in healthcare than in other areas. This argument is gradually losing its point along with the increasing accessibility of medical information and the people's developing health literacy. As Chinese public hospitals are 'one-stop shops' and patients can access walk-in services, more and more people tend to search for the information about physicians first and then make their choice over the one they want to visit. The original source of trust in healthcare is similar to that in the field of business: patient/client decisions are made based on investigating previous evaluations. Thus, trust lacks a distinguishing force in cohering health law in China.

Rescue. In healthcare, the tension between cost-effectiveness and the 'Rule of Rescue' often raises serious questions for health policymakers, such as how to allocate public funding to competing health technologies, such as costly new cancer drugs versus lifesaving therapies.78 Decisions have to be made explicitly for specific health policies. Yet, a general health law should be framed with a neutral framework, which essentially means that both cost-effectiveness and the Rule of Rescue should be taken into account and equally weighted. Thus, rescue only is not adequate for cohering health law in China.

Human Rights. To appeal to human rights often happens when there is a strong claim for having one's basic medical needs fulfilled. If the basic health law takes the human rights discourse as its unifying theme, major obstacles may be created for law enforcement. One major obstacle is created by the difficulty in defining 'basic health needs'. From Wilkinson's

78 In literature, the tension between cost-effectiveness and the 'Rule of Rescue' has been extensively discussed in diverse contexts. For detailed analysis, please refer to Hadorn, (1991); Cookson et al., (2007).

(1999, p. 264) analysis about the difficulty of defining the 'social value criterion', defining basic health needs either in a subjective or objective way may raise different but equally hard questions.79 Although the difficulty of defining basic health needs is not unique to China, it is likely to be even greater when taking into account the size of its population. Another related difficulty concerns patients' unlimited health needs. By referring to human rights, patients or their surrogates could argue for accessibility for all services independent of degree of necessity within the population. It is not clear to what extent the unlimited health needs by patients create obligations on others to provide them.80 Taking human rights as the unifying theme of the basic health law is likely to cloud, rather than clarify, its boundary. In most cases, it is the public health law that intertwines with the human rights discourse since it has a focus on protecting and promoting the population's health. Controversial issues may appear when one turns to an individual's focus of healthcare, the field of patient care which is governed by medical law (Mann, 1997). Although some research effort has been put into consolidating medical law and public health law (Ezer & Cohen, 2013; Peled-Raz, 2017), through the lens of human rights principles, more discussions on further justification are still needed. Given that the primary goal of enacting a basic health law in China is to link the Constitution to specific health laws and regulations (Meng et al., 2015, p. 18), the unifying theme should be framed in a broader way than the human rights discourse in order to cover both medical law and public health law. Thus, a human rights approach is likely to be unsuitable for cohering China's health law.

Social justice. According to Lindsay's analysis, health law and social justice have a close relationship through the lens of correcting health disparities. Social justice is a general term which can be extensively interpreted for the sake of covering every aspect of healthcare. Yet, due to the diverse possibilities of interpreting social justice, a context-based standard on what accounts for social justice needs to be developed first. Since the standard would be developed as a kind of context-specific standard, problems may occur when the context changes. Thus, it is likely to be impossible to generalise the approach of law coherence.

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79 If one defines 'basic health needs' as necessities in health, one may easily fall into a 'majority tyranny' situation; that is, the chosen basic health needs are actually reflecting what the majority needs while failing to represent minority views. If one attempts to define basic health needs in the objective way, then one may confront a more controversial issue: procedural justice. Questions, such as who should decide and how to use procedural justice to justify outcomes, remain to be answered.

80 Although the General Comment No. 14, a comment on Article 12 of the ICESCR, specifies the content of the human right to health as containing 'both freedoms and entitlements' and correspondingly addresses the obligation of the state to facilitate its healthcare system towards the AAAQ standard of protection of the right to health, the issue of how to interpret and implement this General Comment is still no easy task, given that state parties to the ICESCR are at different stages of economic development with diverse cultures and values. For more analysis on this argument, please refer to Kinney (2001).

Besides these considerations that are derived from the American debate on cohering health law, are there any other considerations that need to be taken into account when cohering health law in China?

6.4.2 Traditional Chinese ethics as one essential consideration

Ethics has a great impact on the formulation of health law.[81] It would thus generate a great deficiency if China's basic health law was drafted without any concern for traditional Chinese ethics. Greatly influenced by Confucian traditions, China attaches great importance to close family ties and the role of family in its healthcare system (Wong et al., 2009). Taking a new reform measure for example, a family-based general practitioner service has been expanded from pilot areas to the whole nation for the sake of strengthening primary healthcare in China. The GP system in China is designed quite differently from that of Western countries in terms of addressing the role of family. According to the system's design, it is each household rather than the individual patient, which is encouraged to contract with a GP who practises medicine in the neighbourhood. Such a reform measure implies that the role of family has been inherently suggested by reform policies in China. Using policies as instruments to implement themselves is not conformity to the 'rule of law'. The state, under the rule of law, should embody legal rules and regulations in concrete implementation. This is what the Chinese government has been doing and will continue to do. Ethical values, such as preserving the family ties, are not only important for framing health policies but also should be embedded in the basic health law in order to ensure the effectiveness of practical implementation. Lawmakers in China shall take the values of family seriously when drafting basic health law.

6.5 CONCLUDING REMARKS

Cohering health law in China is a complex process requiring careful attention not only to the intrinsic morality of law but also to the special value in healthcare. Before embarking on any substantial legislative actions, it is worth reminding lawmakers in China of at least two points. First, identifying a clear theme to ensure the consistency and coherence of health law. Learnt from the above practical implications, social justice is likely to be a suitable candidate. Yet, lawmakers in China need to develop a context-specific content of social justice. In this regard, family-oriented ethical values need to be well addressed. Second, being aware of the distinction between law and welfare policy in healthcare in China. Considering China's basic conditions, especially its large population, health law in China at the current stage should first fulfil its aim of deterring or reducing future harms rather than being a powerful tool enabling people to claim additional health benefits.

81 In literature, many discussions focus on studying the relationship between health law and ethics, for instance Montgomery (2000), Miola (2007) and Coggon (2012).

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