

2006

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### Recommended Citation

John Balzano & Jia Ping *Coming out of Denial: An Analysis of AIDS Law and Policy in China (1987-2006)*, 3 Loy. U. Chi. Int'l L. Rev. 187 (2006).

Available at: <http://lawcommons.luc.edu/lucilr/vol3/iss2/6>

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# COMING OUT OF DENIAL: AN ANALYSIS OF AIDS LAW AND POLICY IN CHINA (1987-2006)

By John Balzano<sup>†</sup> and Jia Ping<sup>††</sup>

## I. Introduction

As the story goes, AIDS came to China in 1985. Since then it has gone from an unacknowledged disease, or one perceived as limited to foreigners, to a national disaster with serious implications for the rest of the world. The statistic most often cited by the Chinese government, press, and even the foreign media is that if China does not seriously combat the spread of the AIDS virus, 10 million people could become infected by the year 2010.<sup>1</sup> This statistic is certainly symbolic of the severity of China's AIDS problem, but, as this article will argue, exact numbers regarding AIDS in China are difficult to calculate and vary from study to study.

Although the government at first refused to deal with the problem, and perhaps more so in the wake of SARS and other public health crises, the body of central AIDS policy, regulations, and local rules and regulations has grown significantly in the last eighteen years. Building upon these last two decades, legislation from the lower levels of the governmental framework has recently culminated in the enactment of the 2006 Administrative Regulations for the Prevention and Treatment of AIDS ("2006 State Council Regulations"),<sup>2</sup> which the State Council announced in February of 2006. The goal of this article is to provide an appropriate and fair context in which to view and analyze AIDS law and regulations in the People's Republic of China ("PRC"). This article argues that, although the 2006 State Council Regulations represent progress in the area of AIDS law, the current state of government and legal institutions in the PRC may be an obstacle to the effective implementation of the 2006 State Council Regulations. This article will also very briefly argue that the nature of the AIDS problem in China demands that the government support and encourage social organizations to reach out to those infected with AIDS.

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<sup>†</sup> Fellow, Yale Law School, China Law Center. The opinions expressed in this article are those of the authors and do not represent those of the China Law Center or Yale Law School. I would like to thank my co-author for his guidance during this process and my colleagues at the China Law Center: Paul Gewirtz, Jamie Horsley, Jeffrey Prescott, Keith Hand, Tom Kellogg, Aaron Halegua, Concetta Fusco, Katherine Pothin, and Amanda Tian for sharing information and for support. For my part, this article is dedicated to Julie Balzano.

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<sup>1</sup> *Ten Million HIV Carriers in 2010 If No Strong Measure Taken*, XINHUA NEWS AGENCY (P.R.C.), Oct. 26, 2005, <http://www.china.org.cn/english/null/146562.htm>.

<sup>2</sup> See generally *Aizibing fangzhi tiao li* [AIDS Prevention and Treatment Regulations] (promulgated by the State Council, Jan. 29, 2006, effective Mar. 1, 2006), available at <http://www.china-aids.org/english/aidsreg-2006.htm> (last visited Mar. 26, 2006) (P.R.C.) [hereinafter 2006 State Council Regulations].

Part II of this article will provide a brief introduction to the circumstances surrounding the development and spread of HIV/AIDS in China. Part III will explain the relevant legal background necessary to understand the development of AIDS legislation in China. Part IV of this article will discuss the history of AIDS law and regulations, including an overview of the content of selected local regulations. Part V of this article will introduce and analyze the new 2006 State Council Regulations. Part VI of this article will examine and highlight potential obstacles to the implementation of the new policy and its probability of success.

## II. AIDS in China: A Historical Overview

This article focuses on the development of AIDS policy and law in China from the 1980s onward. Because of this legal focus, we provide here only a brief discussion of the situation surrounding AIDS and how it has impacted and been shaped by AIDS laws. We are cognizant of, and our summary here relies heavily upon studies that have examined on-the-ground conditions of areas particularly affected by AIDS as well as the nation of China as a whole.<sup>3</sup>

### A. Spread of the Disease and Consciousness

The first known case of AIDS in China was discovered in 1985 in a foreigner.<sup>4</sup> At that time, and for many years after, many in China considered AIDS a “foreign disease.” The early law and policy discussed below reflects this conception by the government, and studies show that most believed, and perhaps still believe, that AIDS is a foreign disease.<sup>5</sup> Laboring under this misconception, the government and medical personnel with little knowledge about AIDS endeavored to contain it and prevent it from penetrating into China.<sup>6</sup> Xia Guomei illustrates this phenomenon through the story of the first foreign man infected with AIDS, who became very sick while traveling on the mainland.<sup>7</sup> At first no one knew that the man had AIDS, but when the news reached the hospital that this man was an AIDS patient he was quickly quarantined.<sup>8</sup> His room was sealed and two nurses in special suits were the only personnel that the hospital permitted to attend to him.<sup>9</sup> When he died, the hospital burned everything associated with the man, the nurses’ clothes, and even the medical instruments.<sup>10</sup> Lack of knowl-

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<sup>3</sup> See generally MINISTRY OF HEALTH, PEOPLE’S REPUBLIC OF CHINA JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS WORLD HEALTH ORGANIZATION, 2005 UPDATE ON HIV/AIDS EPIDEMIC AND RESPONSES IN CHINA (Jan. 24, 2006); HUMAN RIGHTS WATCH, LOCKED DOORS: THE HUMAN RIGHTS OF PEOPLE LIVING WITH HIV/AIDS IN CHINA (Sept. 2003); XIA GUOMEI, HIV/AIDS IN CHINA (2004).

<sup>4</sup> GUOMEI, *supra* note 3, at 5.

<sup>5</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 14.

<sup>6</sup> *Id.*

<sup>7</sup> GUOMEI, *supra* note 3, at 75.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 76.

edge surrounding HIV and AIDS first led people to believe that they could seal China off from this strange, foreign disease.<sup>11</sup>

Gradually the government has become more knowledgeable about AIDS and its vigorous spread through various regions and populations in China. There are now several “high-risk” populations that the government and, to some extent the media, focus on.<sup>12</sup> These populations include: intravenous drug users,<sup>13</sup> men who have sex with men (sometimes broadly referred to as “homosexuals” or “*tongxinglianzhe*”),<sup>14</sup> and sex workers or prostitutes.<sup>15</sup> Another population that the government realizes is particularly affected in China and still accounts a good deal of those infected, is those who have contracted the disease through selling their blood or through blood transfusions.<sup>16</sup>

Although the government and society still consider the above populations and groups the most affected by AIDS, there is now a growing realization that powerful forces have and will continue to spread the disease beyond these groups.<sup>17</sup>

## B. Education, Awareness, and Anti-Discrimination

The government and population are now coming to the realization that AIDS is not a foreign disease and is spreading extremely rapidly throughout China. Others also realize a pressing need to raise the level of knowledge about AIDS,<sup>18</sup> in an effort to prevent the spread of AIDS and to ensure that those already infected with HIV or full-blown AIDS would receive the necessary care and not suffer societal rejection. Currently, much of the Chinese population understands very little about AIDS, its spread, and methods of prevention.<sup>19</sup> A 2004 poll, which was published in the *People's Daily*, showed that 67.7% of the respondents believed they could contract AIDS by kissing, 42.8% by use of communal restrooms, 14.9% by communal dining, and 1.6% by everyday chat.<sup>20</sup> Perhaps

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<sup>11</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 14.

<sup>12</sup> See GUOMEI, *supra* note 3, at 28-66.

<sup>13</sup> See *infra* Part IV.B.

<sup>14</sup> Men who have sex with men or MSM is a complex term, which may or may not include homosexuals. GUOMEI, *supra* note 3, at 61.

<sup>15</sup> This term in most studies refers to the rise in female prostitution since the beginning of the reform era. It would be a mistake, however, not to consider “money boys” or male prostitutes under this high-risk population. It seems that much less work has been done on “money boys” by researchers, but Zhang Beichuan, a prominent medical researcher dedicated to AIDS and the gay men’s health crisis in China, has done work on “money boys.” See Zhang Beichuan, *Jinjin zhize he piping shi bu gongzheng de [Only Blame and Criticism are Unfair]*, NANFANG RENWU ZHOUKAN [SOUTHERN PEOPLE WEEKLY] (P.R.C.), Sept. 5, 2005.

<sup>16</sup> *Falu zuji aizibing de qianli shangdai wajue [Still Unearthing Law’s Potential to Attack and Prevent AIDS]*, FAZHI RIBAO [LEGAL DAILY] (P.R.C.), Dec. 1, 2005, available at [http://www.legaldaily.com.cn/bm/2005-12/01/content\\_227712.htm](http://www.legaldaily.com.cn/bm/2005-12/01/content_227712.htm).

<sup>17</sup> See GUOMEI, *supra* note 3, at 101-02.

<sup>18</sup> *Id.*

<sup>19</sup> See Jiang Dongliang, *Fangzhi tiaoli shishi zhimian san da nanti [Three Challenges for the Prevention and Treatment Regulations]*, FAZHI RIBAO [LEGAL DAILY] (P.R.C.), Mar. 3, 2006.

<sup>20</sup> Yang Wujun, et al., *Aizibing fangzhi wuqu you by shao [There are Numerous Misconceptions about AIDS]*, RENMIN RIBAO [PEOPLE’S DAILY] (P.R.C.), May 16, 2004.

even more disturbing is that few people are using the growing number of free government testing and information centers because, in some cases, they have not even heard of AIDS.<sup>21</sup>

Not only has this lack of awareness led to the continued rapid spread of the disease throughout China, it has also caused those infected to face immense social and even governmental obstacles to seeking treatment. A 2004 People's Daily poll also revealed that if one learned that a family member had contracted HIV or had AIDS, 58.9% of respondents would only speak with that person via telephone and only see them on holidays.<sup>22</sup> Other studies indicate that many of those with HIV or AIDS are forced to live out their days in seclusion away from their family and are not treated by the medical community.<sup>23</sup> Those who are not shunned by their families may face severe societal discrimination, including loss of their jobs, refusal of medical treatment, denial of access to public accommodations, and rejection of marriage registration.<sup>24</sup>

The families of those who have contracted AIDS often face a social death as well. Sons and daughters of persons with AIDS have been forced to quit school, and spouses have felt pressure to quit their jobs.<sup>25</sup> While some of this discrimination is inflicted by colleagues, neighbors, and classmates, some of it is actually written into local regulations.<sup>26</sup> The sections below discuss this phenomenon in more detail.

The media and government are aware of this discrimination and have condemned it, but the media has also reported heavily on cases of AIDS patients who have turned their anger on society and intentionally inflicted others with HIV.<sup>27</sup> In reality, researchers have observed that this behavior is not characteristic of those infected with AIDS in China,<sup>28</sup> but it has, nonetheless, received media attention. In 2005, the Legal Daily, in an article on the need for an anti-discrimination law for the protection of homosexuals, stated that such a law is necessary to prevent gay men with AIDS from harming society.<sup>29</sup> The article quoted a gay man as saying: "I would spread the disease [if I found out I had AIDS]. If everyone has HIV/AIDS, then we are equal. We will not be discriminated against."<sup>30</sup> A little over a month later, the Legal Daily ran another article telling the story of a man infected with HIV/AIDS who had threatened to, and

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<sup>21</sup> See Dongliang, *supra* note 19.

<sup>22</sup> Yang et al., PEOPLE'S DAILY, *supra* note 20.

<sup>23</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 24.

<sup>24</sup> *Id.* at 34-37.

<sup>25</sup> GUOMEI, *supra* note 3, at 78-79.

<sup>26</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 34.

<sup>27</sup> GUOMEI, *supra* note 3, at 85.

<sup>28</sup> *Id.* at 87.

<sup>29</sup> Xiaoyiu Ren, et al., *Mianlin xuduo nanti buli shehui wending [Facing Many Problems and Not Conducive to Social Stability]*, FAZHI RIBAO [LEGAL DAILY], Oct. 17, 2005.

<sup>30</sup> *Id.*

subsequently did, bite another man as part of a robbery.<sup>31</sup> When the attacker was identified as an AIDS patient by local medical authorities, the victim was forced to wait to take an AIDS test to find out he was infected.<sup>32</sup> The article quoted local officials who complained of the need to have more concrete laws and regulations to punish those with AIDS who intentionally infect or attempt to infect others.<sup>33</sup> This fear of persons with AIDS intentionally infecting others has also found its way into regulations.

### C. The Impossible Numbers

Often at issue in a discussion of AIDS in China is the validity of the numbers. This article does not in any way attempt to resolve this debate, but rather, notes that there are many different studies which indicate that a significant number of people are currently infected with HIV/AIDS in China.<sup>34</sup> That number is growing year by year<sup>35</sup> in the face of a lack of education or awareness in the general population.<sup>36</sup> This article has already mentioned the government statistic that, if appropriate measures are not taken, the number of those infected with AIDS could reach 10 million by the year 2010.<sup>37</sup> But an official from the Chinese government recently stated publicly that it would only be 1.5 million by the year 2010.<sup>38</sup> Whether these statistics are completely accurate or not, the spread of AIDS in China is a serious problem, and the country currently lacks public health personnel, medicine, and equipment, which makes it difficult, but not impossible, to deal with the problem and treat all of those who are and will be infected.<sup>39</sup> Moreover, the lack of awareness and fear of discrimination discussed above suggest that many do not know their status or are hiding it. In short, the exact numbers surrounding AIDS in China may be in doubt, but the severity of the problem is not.

Despite this reality of differing statistics, the Chinese government has enacted and released an increasingly more aggressive law and policy on HIV/AIDS in order to combat this problem at both the central and local levels of government.<sup>40</sup>

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<sup>31</sup> Zheng Jianfeng, *Shouhaizhe weiquan zaoyu falu mangqu* [Protection of Victim's Rights is a Legal Blind Spot], FAZHI RIBAO [LEGAL DAILY] (P.R.C.), Nov. 29, 2005.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> The Chinese government in its 2005 AIDS Report recently reduced its estimate of AIDS infections in China from 840,000 to 650,000. MINISTRY OF HEALTH, *supra* note 3, at 1. Two years ago, Human Rights Watch estimated the number at over 1 million. HUMAN RIGHTS WATCH, *supra* note 3, at 3.

<sup>35</sup> GUOMEI, *supra* note 3, at 6-13.

<sup>36</sup> See Wujun, *supra* note 20.

<sup>37</sup> *Ten Million HIV Carriers in 2010 If No Strong Measure Taken*, *supra* note 1.

<sup>38</sup> *Zhongguo aizibing ganren pinggu renshu xijiang 19 wan* [Estimated Number of People with AIDS Declines 190,000], XINHUA NEWS AGENCY (P.R.C.), Jan. 25, 2006, [http://news.xinhuanet.com/politics/2006-01/25/content\\_4099189.htm](http://news.xinhuanet.com/politics/2006-01/25/content_4099189.htm) (quoting the health minister as saying the number by 2010 would be 1.5 million).

<sup>39</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 3-4.

<sup>40</sup> *Id.* at 15.

The following sections discuss this law and policy in the context of the strengths and weaknesses of the emerging Chinese legal system.

### III. AIDS Law in the Context of the Chinese Legal System

The development of AIDS law and policy in China must be viewed in the context of China's emerging legal system, which has developed considerably over the last twenty-five years from almost nothing. The government, scholars, and legal professionals have worked to strengthen important institutions such as central and local legislative bodies, the courts, and law schools.<sup>41</sup> Still, significant obstacles to the functioning of this system exist and create problems today. These problems occur mainly in the implementation of the growing body of legislation in various areas, such as, for purposes of this article, HIV/AIDS law and regulation. The following subsections examine some of the more significant areas that may present a problem in the enforcement and revision of AIDS law and regulation.

#### A. Gaps and Conflicts in Legislation

Although the Chinese government has enacted numerous statutes and regulations over the last twenty-five years, significant gaps and conflicts remain, which can lead to inaction on important issues, abuse of discretion by local officials, corruption, and, in contrast, sometimes positive innovation. With regard to AIDS legislation, this state of affairs has resulted and will continue to result in various problems. For example, the state of legality of homosexual behavior under Chinese law is somewhat unclear at present.<sup>42</sup> No specific provision of Chinese law has ever officially outlawed homosexual behavior, and, although the provision on "hooliganism," which was used to prosecute homosexuals in the past,<sup>43</sup> has been removed from the Criminal Law, some of the same type of broad language of the original hooliganism provision still exists under different headings in other parts of the Criminal Law.<sup>44</sup> Thus, it is unclear as to whether or not homosexual sex may continue to be prosecuted under Chinese law. Various AIDS regulations identify men who have sex with other men as a high-risk group and empower local communities to reach out to these men.<sup>45</sup> With little direction as to the outreach measures local governments should take, it is possible that localities could construe this as a mandate to prosecute homosexuals for their sexual behavior.

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<sup>41</sup> See generally RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARDS THE RULE OF LAW (2002); STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999).

<sup>42</sup> See e.g. *Zuigao renmin fayuan guanyu chengnianren jian ziyuan jijian shifou fanzui wenti de pifu* [Reply on Legality of Consensual Anal Sex Between two Male Adults], Apr. 29, 1957.

<sup>43</sup> ZHANG BEICHUAN, TONGXINGAI [HOMOSEXUALITY] 633 (1994).

<sup>44</sup> *Id.*

<sup>45</sup> See GUOMEI, *supra* note 3.

In addition to these types of gaps, laws and regulations often conflict,<sup>46</sup> and the courts are not always empowered to resolve the conflicts effectively.<sup>47</sup> Consider the provisions in the new 2006 State Council Regulations that require localities to reach out to intravenous drug users.<sup>48</sup> These provisions may conflict with provisions of administrative and criminal law and policy that require local authorities to crack down on those who engage in intravenous drug use.<sup>49</sup> A recent article noted that this type of conflict in law and policy could lead to the ineffectiveness of the provisions of the 2006 State Council Regulations.<sup>50</sup>

## B. Weakness of Legal Institutions and Problematic Bureaucratic Coordination

China has been reforming its courts and its central and local bureaucracies since the 1980s, but despite these reforms, these institutions and their place in the legal system remains problematic.<sup>51</sup> For the courts, the lack of power to interpret law along with the legislative gaps and conflicts can result in less than perfect enforcement of laws and regulations, especially when the provisions are vague or the legislation lacks definitions or procedures.<sup>52</sup> The courts, however, can also be centers of innovation at times and do not always fail to enforce rights under the law. For example, courts have granted compensation to those who contracted AIDS through hospital negligence.<sup>53</sup> These rulings on compensation found their way into the 2006 State Council Regulations.<sup>54</sup>

Overlapping scopes of authority also cause problems in various policy areas.<sup>55</sup> Lack of coordination among departments of the central government, or among local departments, or departments at the same level can also impede implementation of law and policy.<sup>56</sup> As mentioned above, many have posited that the implementation of the 2006 State Council Regulations will come into conflict with other central and local government entities over disparate goals with regard to intravenous drug users in the PRC.<sup>57</sup>

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<sup>46</sup> LIU XING, GUONEI FALU CHONGTU YU LIFA DICE [DOMESTIC LEGAL CONFLICTS AND LEGISLATIVE POLICY] 3-5 (2003).

<sup>47</sup> Zhonghua renmin gonghe guo lifa fa [Legislation Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective Jul. 1, 2000), ch. 2, sec. 4 (P.R.C.) [hereinafter Legislation Law] (stating that the Standing Committee of the National People's Congress has the power to interpret law).

<sup>48</sup> 2006 State Council Regulations, *supra* note 2, arts. 63, 27 (P.R.C.).

<sup>49</sup> Fangai tiaoli ruhe huajie "kongzhi yu daji" de maodun [How to Reconcile the Control Versus Attack Conflict in the AIDS Provisions], NANFANG DUSHI BAO [SOUTHERN METROPOLITAN] (P.R.C.), Feb. 13, 2006.

<sup>50</sup> *Id.*

<sup>51</sup> LUBMAN, *supra* note 41, ch. 9.

<sup>52</sup> *Id.*

<sup>53</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 55.

<sup>54</sup> 2006 State Council Regulations, *supra* note 2, art. 60.

<sup>55</sup> Bian Yongmin, *The Challenges for Food Safety in China: Current Legislation is Unable to Protect Consumers from the Consequences of Unscrupulous Food Production*, CHINA PERSPECTIVES, No. 53, 4 (June 2004).

<sup>56</sup> *Id.*

<sup>57</sup> See Fangai tiaoli ruhe huajie "kongzhi yu daji" de maodun, *supra* note 49 and accompanying text.



C. Central Local Issues

The lack of an institutionalized mechanism to deal with conflicts between the central and provincial levels within China creates problems in the implementation of central policy because localities will often adapt the central policy and law to their own circumstances, thereby altering the main tenants of the center's policy. At points, the conflicts can be severe, such as charging two different fines for the same administrative offense.<sup>58</sup> Sometimes the localities will simply refuse or thwart the enforcement of central policy.<sup>59</sup> For example, in the early 1990s the central government discovered that many people were becoming infected with AIDS through the blood banks in Henan Province.<sup>60</sup> The government issued an order to the localities to take action to stop this phenomenon.<sup>61</sup> The provincial authorities refused, however, denying that any problem existed and allowed the blood banks to stay open and carry out their work.<sup>62</sup> The result was more infections.<sup>63</sup>

Local protectionism and local corruption are also serious problems in China that have resulted in the distortion of policies and laws.<sup>64</sup> Local officials may pay more attention to advancing their careers than to the development and stability of the local economy and society. As such, local officials may still be unwilling to release harmful, yet necessary information, on outbreaks to the central government. Cover-ups, both at the central and local levels of government, have been major issues with regard to the control of infectious diseases in China. The cover-up surrounding the SARS epidemic<sup>65</sup> and the blood donation disasters in Henan Province<sup>66</sup> are two prime examples of this phenomenon and demonstrate how tensions and poor communication between the central and local bureaucracies can lead to problems in the enforcement of AIDS policy.

Although the factors listed above are by no means a comprehensive list of all of the institutional obstacles to the effective enforcement of AIDS law and policy in China, they provide an important guide to more a specific analysis of AIDS law and legislation.

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<sup>58</sup> See Wang Zhenzi, *Guanyu xingzheng fagui yu defangxing fagui guiding buyizhi shi de shiyong de wenti* [Problems of Legal Application in Cases Where Central Administrative Regulations and Local Regulations Conflict], XINGZHENG ZHIFA YU XINGZHENG SHENPAN [ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW], vol. 2, 26-29 (2003) (describing a judicial interpretation which stated that in the case of a conflict between a central regulation and a local regulation the court should apply the central regulation according to the Legislation Law).

<sup>59</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 64.

<sup>60</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 61, 64.

<sup>61</sup> *Id.* at 60-65.

<sup>62</sup> *Id.* at 65.

<sup>63</sup> *Id.*

<sup>64</sup> See generally XIAOBO LU, CADRES AND CORRUPTION (2000).

<sup>65</sup> Chenglin Liu, *Regulating SARS in China: Law as an Antidote?*, 4 WASH. U. GLOBAL STUD. L. REV. 81, 89-95 (2005).

<sup>66</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 60-67.

#### IV. The Development of AIDS Policy and Law 1987-2005

There has been rapid and significant development of AIDS policy and law in China over the last fifteen years. As the sections below will show, the government's policies on AIDS have gone through several phases. First, in the 1980s, the government viewed AIDS as a "foreign disease" and structured its policies around keeping AIDS out of China.<sup>67</sup> This outward-directed policy lasted until the early 1990s, when the government finally realized that the disease had spread in the country.<sup>68</sup>

Unfortunately, the realization was not strong enough because there was still denial on the part of government officials about incidents like the Henan blood donation incident and the spread of the disease through other provinces. Awareness about the disease and its effects in China has been continuously growing since the early 1990s.<sup>69</sup> Now in the twenty-first century, more liberal AIDS policies and legislation have emerged.<sup>70</sup> The public, scholars, and activists have gained more of a voice in the policy process as the spread of the virus through China seems to grow more intense by the year.<sup>71</sup> The government has also increased its efforts to spread knowledge about HIV/AIDS and has encouraged communities to take part in efforts to curb the spread of the virus and deal with its treatment.<sup>72</sup>

##### A. National Policies and Government Plans Regarding AIDS

At the top of the policy and law pyramid are major policy documents that the central government, sometimes jointly with the Chinese Communist Party, issues in an area of particular concern or development.<sup>73</sup> These policy documents, sometimes referred to as "red header documents" (*hongtou wenjian*), are not officially a form of legislation, although they certainly can pave the way for legislation in the form of central laws, administrative regulations, administrative rules, or various forms of local regulations.<sup>74</sup>

Over the last eighteen years the central government has issued four major policy documents regarding HIV/AIDS.<sup>75</sup> Each document contemplates a more aggressive strategy than the next and reflects a development of understanding about

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<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 14, 15.

<sup>69</sup> *Id.* at 15.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 16.

<sup>72</sup> See generally 2006 State Council Regulations, *supra* note 2.

<sup>73</sup> The structure of the Chinese legislation system is laid out in the Constitution and the Legislation Law. See Legislation Law, *supra* note 47, ch. 1 (P.R.C.). The Legislation Law does not include red-character or state issued documents, but it does include the following hierarchy, i.e. laws, administrative regulations, local regulations, ministerial rules, and local rules. Legislation Law, *supra* note 47, ch. 5 (P.R.C.).

<sup>74</sup> *Id.*

<sup>75</sup> See *infra* Part IV and accompanying notes.

the circumstances surrounding the spread of the disease in China during each respective period.<sup>76</sup>

The Ministry of Health issued the first National Plan for the Prevention of HIV/AIDS in 1987 (“1987 Plan”).<sup>77</sup> The 1987 Plan stated that AIDS was a worldwide phenomenon that had already appeared in 100 countries around the world, and, “[a]s China continued to increase its contact with the rest of world, preventing against the introduction, occurrence, and spread of HIV/AIDS has already become one of the main focal points of the healthcare work of the country.”<sup>78</sup> Further emphasizing the point that the work of the Ministry was primarily to prevent the foreign disease from entering China, the document stated that one of the measures the Ministry had taken to prevent AIDS was to ban foreign blood products from the PRC.<sup>79</sup> Still, the purported goals of the 1987 Plan were to prevent the introduction, occurrence, and spread of HIV/AIDS in China.<sup>80</sup>

Despite the foreign-oriented bias of the 1987 Plan, it does lay out the basic features of the government’s methods for preventing and controlling AIDS, namely education, awareness, and training, testing, quarantine (i.e. border control), research, and international cooperation and study.<sup>81</sup> These methods have remained the core basic structure of the government’s policy for preventing and controlling AIDS. As the sections below will demonstrate, these methods make up most of the structure of the 2006 State Council Regulations.<sup>82</sup>

In addition to this structure, the 1987 Plan also identified, somewhat implicitly, the high-risk groups that the Ministry of Health felt could present a problem with regards to AIDS. The Plan stated that the government would “increase management of the social order and strictly prohibit prostitution, lascivious activities, homosexuality, and drug use.”<sup>83</sup> These groups have remained the main high-risk class, on which the Chinese government has and will continue to focus its prevention efforts. The 1987 Plan also acknowledges the potential danger in contamination of the blood supply, but lays out little more than a weak command for screening of the blood supply<sup>84</sup> and the blockage of blood products from other countries.<sup>85</sup>

One final note on the budget is necessary here for the purposes of comparison. The 1987 Plan delegates the budgetary responsibility for experimental testing, education and awareness work, training, and research to the central govern-

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<sup>76</sup> *Id.*

<sup>77</sup> Quanguo yufang aizhibing guihua 1987-1991 [National Plan for the Prevention of AIDS 1987-1991] (promulgated by Ministry of Health Aug. 17, 1987) (P.R.C.) [hereinafter 1987 Plan].

<sup>78</sup> *Id.* ch. 1.

<sup>79</sup> *Id.* ch. 1(2).

<sup>80</sup> *Id.* at Overview.

<sup>81</sup> *Id.* ch. 4(2).

<sup>82</sup> See *infra* Part V and accompanying notes.

<sup>83</sup> 1987 Plan, *supra* note 77, ch. 1(6).

<sup>84</sup> *Id.* ch. 4(2)-2.

<sup>85</sup> *Id.*

ment.<sup>86</sup> The local governments were, under the 1987 Plan, responsible only for the costs of testing and control work.<sup>87</sup> However, the localities have become responsible for more extensive work in the area of HIV and AIDS.<sup>88</sup> One of the complaints of local cadres about the 2006 State Council Regulations is that they impose too great of a budgetary burden on the localities.<sup>89</sup>

The 1987 Plan is basically a highly general outline of the situation surrounding AIDS in China and the government's efforts, past, present, and future, to deal with the problem. It lays out, however, only a broad timetable and very few, if any, procedures for carrying out this work. On the face of the text, the 1987 Plan does not indicate a strong commitment to carrying out aggressive AIDS work.

Building on the 1987 Plan, in 1990 the State Council issued a more comprehensive plan to deal more effectively with HIV/AIDS and implement many of the strategy areas laid out in the 1987 Plan. The 1990 Plan,<sup>90</sup> which covers a three year period (1990–1992), presents a more in-depth analysis of the circumstances surrounding AIDS and infectious disease in general in China, and contains more specific strategies for treatment of those infected and the prevention of sexual transmission, transmission through blood transfusion or donation, and transmission from mothers to their children.<sup>91</sup> The 1990 Plan seems to reflect a much deeper understanding of the disease in general and an increase in guidance from other countries and international organizations, such as the World Health Organization.

The 1990 Plan is important because it represents, not only an improvement in terms of detail and knowledge, but also a more conscious realization on the part of the government that AIDS has infiltrated China and is not merely a foreign disease to be contained at the border.<sup>92</sup> Moreover, the plan promotes, albeit not strongly, important concepts that are playing a larger role in current AIDS regulations in China, such as voluntary testing, confidentiality, and the protection of privacy rights.<sup>93</sup>

Still, the 1990 Plan has its weaknesses. For example, the plan links the concepts of safe sex and morally acceptable sex, and discusses AIDS in strong moralistic language.<sup>94</sup> The evaluation of AIDS in moral terms in China has led to difficulties in raising the level of consciousness and tolerance surrounding the disease. The 1990 Plan also displays an overly positive attitude towards the state

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<sup>86</sup> *Id.* ch. 5(2).

<sup>87</sup> *Id.* ch. 5(2).

<sup>88</sup> *See infra* Part IV.6.

<sup>89</sup> *See* Dongliang, *supra* note 19.

<sup>90</sup> Zhonghua renmin gongheguo aizibing yufang he kongzhi zhongqi guihua (1990-1992) (on file with author) [Intermediate Plan for Prevention and Control of AIDS in China] [hereinafter 1990 Plan].

<sup>91</sup> *Id.* at Criticism Section-Goals-B.

<sup>92</sup> *Id.* at AIDS Section-A.

<sup>93</sup> *Id.* at Decreasing Social Influence Section, HIV/AIDS Monitoring Section-Policy Subsection.

<sup>94</sup> *Id.* at Sexual Transmission Section-B.

of the safety of the blood supply, and it was weak in the area of public participation.<sup>95</sup>

The 1990 Plan was followed by a more long-range plan, the 1998-2010 Plan (“1998 Plan”),<sup>96</sup> which the government then supplemented with a shorter term 2001-2005 Plan (“2001 Plan”).<sup>97</sup> These two plans reflect a larger, more cooperative strategy amongst many departments in the central government. The 1998 Plan again represented progress in that it acknowledged and pledged to fix problems with the safety of the blood supply.<sup>98</sup> Still, one should note that even this 1998 Plan built upon the basic framework laid out in the 1987 Plan in terms of the issues discussed and the targeted work. For example, the 1998 Plan again focused more on the high-risk groups mentioned in the 1987 Plan than on the spread of HIV/AIDS in the general population, which was a problem at that time.<sup>99</sup> It stated that the government will focus its efforts on high-risk populations, such as prostitutes and intravenous drug users.<sup>100</sup> The 1998 Plan did, however, set a goal for introducing more education into the prisons<sup>101</sup> and reaching out to drug users.<sup>102</sup>

The 2001 Plan, which is the last of the major plan documents that this article discusses, can only be described as reflective of the government’s increasing nervousness in the face of the surge of the AIDS epidemic in China through the late 1990s and into the twenty-first century.<sup>103</sup> The 2001 Plan did not lay out any true concrete measures for increasing the effectiveness of public health measures, but instead, it merely stated that the situation was growing more serious and officials should take steps to increase supervision and monitoring of AIDS as it spreads.<sup>104</sup> The 2001 Plan noted that the blood supply remains unsafe and that illegal collection of blood was continuing.<sup>105</sup> The 2001 Plan perhaps represents the government’s official acknowledgement of the severity that the AIDS epidemic in China had reached at that time. Since 2001, the number of central government regulations, ministerial rules, joint notices, and normative documents has increased greatly in comparison to the 1990s. Local regulations also have begun to increase.

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<sup>95</sup> *Id.* at Preventing Blood Transmission Section-A.

<sup>96</sup> See generally Zhongguo Yufang Yu Kongzhi Aaizibing Zhongchangqi Guihua (1998-2010)[*China Intermediate/Long Range Prevention and Control Plan for AIDS*], The State Council Issue No: [1998] 38, available at <http://www.casy.org/docandstaement.htm> (1998) [hereinafter 1998 Plan].

<sup>97</sup> See generally Zhongguo ezhi yu fangzhi aizibing xingdong jihua (2001-2005) [*China Plan for Restraining and Preventing and Treating AIDS*], State Council Office Document 2001-40, available at <http://www.youandaids.org/unfiles/china.pdf> (2001) [hereinafter 2001 Plan].

<sup>98</sup> 1998 Plan, *supra* note 96, art. 4(2)(ii).

<sup>99</sup> See e.g. 1998 Plan, *supra* note 96, art. 4(2).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* art. 4(2)(iv).

<sup>102</sup> *Id.* art. 3.

<sup>103</sup> See generally 2001 Plan, *supra* note 97.

<sup>104</sup> 2001 Plan, *supra* note 97, at Introduction.

<sup>105</sup> *Id.*

One final policy deserves mention here for the purposes of understanding the central policies that made their way into the 2006 State Council Regulations. That policy is the policy of “Four Frees and One Care,” which the State Council issued in 2004.<sup>106</sup> Increasingly concerned over rural poverty, the rights of mothers and children, and the increasing spread of AIDS, the central government offered free medicine and treatment to farmers or those in the cities without social insurance, free voluntary counseling and testing from the Chinese Center for Disease Control, free medicine for pregnant mothers and free testing for infants, and free education for children orphaned because of AIDS.<sup>107</sup> The “Care” part of the policy referred to government subsidies for those living with AIDS and their families in order to help improve their living conditions.<sup>108</sup> Although this policy reflected a change in the attitude of the Chinese government from one of fear to one of compassion, there remains doubt as to the effectiveness with which such a policy can be implemented considering the legal and institutional constraints discussed above.<sup>109</sup>

## B. Official AIDS Legislation

To say that the Chinese government’s and society’s understanding and realization about AIDS grew over the course of many years, is not to say that there is any shortage of legislation<sup>110</sup> on HIV/AIDS. There are over 130 regulations, both central and local, that mention AIDS by name, and there are surely hundreds more that relate to AIDS or affect the treatment and prevention work that the above policies lay out.<sup>111</sup> This mess of legislation was perhaps best described in a recent article on AIDS and the law:

On the desk of Qinghua University professor Li Mei there are various laws, policies, and documents on AIDS promulgated by different departments over the course of different periods in a stack so thick it made this reporter stare in wonder. “Amidst this pile of over three hundred regulations, there are more than a few regulations and documents from the same department with different features. So many regulations on the one hand claim to do away with discrimination, while on the other hand actually including [sic] discriminatory provisions,” Professor Li said. Professor Li Mei says: “right now we desperately need to clean through the legislative

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<sup>106</sup> See generally Guowuyuan guanyu qieshi jiaqiang aizibing fangzhi gongzuo tongzhi [State Council Notice on Effectively Increasing AIDS Prevention and Treatment Work], State Council Document 2004-7, available at <http://www.casy.org/engdocs/state%20council%20notice%20march0.pdf> (2004) [hereinafter Four Frees, One Care].

<sup>107</sup> *Id.* art. 2.

<sup>108</sup> *Id.* art. 6.

<sup>109</sup> See *supra* Part III and accompanying notes.

<sup>110</sup> Legislation refers to everything that is under the Legislation Law. See Legislation Law, *supra* note 47. It also should be understood to include “normative documents” (*guifanxing wenjian*), which are issued by all levels of government, but are not given de jure legal effect under Chinese law. They do, however, have quasi-legal effect or sometimes even de facto legal effect.

<sup>111</sup> See Yongchao, *supra* note 16.

concepts in and logical structure of the scope of China's laws and regulations on AIDS."<sup>112</sup>

As the sections below will show, Professor Li's characterization of AIDS legislation is extremely accurate in that much of the legislation does display progressive thinking on the issues, but fails to design a plan to adequately implement that thinking or undermines that thinking in the implementation details.

### 1. *Infectious Disease Law*

There is no one comprehensive national-level law in China that deals with AIDS. But, there are several laws that consider the disease, some of which have undergone significant revisions during the course of various public health law scandals, like SARS. These revisions have resulted in progress on AIDS issues.

The first law is the PRC Law on Prevention and Treatment of Infectious Diseases ("the Infectious Disease Law"), which the government revised in 2004 in the wake of the SARS disaster and growing uneasiness by the public and the government over the potentially destabilizing effects of future public health issues.<sup>113</sup> Under the Infectious Disease Law, the government breaks infectious diseases into three categories: A, B, and C.<sup>114</sup> AIDS is a category B disease along with SARS (*feidian feiyan*) and the Avian Flu (*qinliugan*).<sup>115</sup> Category A diseases require the strictest measures and are equivalent to plagues.<sup>116</sup> For SARS and certain forms of Avian Flu, however, the government allows the authorities to take prevention and control measures associated with Class A diseases because of their highly contagious nature.<sup>117</sup> The Infectious Disease Law states that all other Class B diseases need special official approval to use Class A measures,<sup>118</sup> so AIDS has not been singled out for special treatment like SARS and the Avian Flu. Also, under the 2004 revisions, authorities can no longer isolate those with AIDS for treatment,<sup>119</sup> which they could do previously.<sup>120</sup> As described above, one of the first foreign AIDS patients in China was quarantined and the nurses attending him were required to wear special suits and burn all equipment and attire used after the patient died.<sup>121</sup> These provisions in the 2004 law thus reflect the new thinking about AIDS that the policy documents above also exhibit.

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<sup>112</sup> *Id.*

<sup>113</sup> The policy and law emerging from the SARS epidemic is best described by Chenglin Liu. See Liu, *supra* note 65.

<sup>114</sup> Zhonghua renmin gongheguo chuanran bing fangzhi fa [PRC Law on the Prevention and Treatment of Infectious Diseases], art. 3 (2004) (on file with author) [hereinafter Infectious Disease Law].

<sup>115</sup> *Id.* art. 3.

<sup>116</sup> *Id.* arts. 3-4.

<sup>117</sup> *Id.* art. 4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* art. 24 (stating only that authorities should take steps to prevent and control AIDS).

<sup>120</sup> *Id.* arts. 3, 24.

<sup>121</sup> See *supra* Part II.b and accompanying notes.

The 2004 Infectious Disease Law is progressive in other ways as well. For example, it contains provisions for the protection of the privacy of individual patients, stating, "Centers for disease control and medical treatment organs must not release private information or materials relating to individual persons."<sup>122</sup> While there were no procedures or criteria in the Law that can be implemented to carry out this guarantee effectively, the inclusion of it in a national law perhaps represented a significant step in understanding infectious diseases and the importance of individual privacy in general.

The government has gradually included privacy protection provisions in regulations specifically directed at AIDS. The early 1988 State Council Regulations on AIDS even included a weak privacy provision.<sup>123</sup> At the local level, the Sichuan Province Regulations for the Prevention and Control of AIDS grant broad protection of privacy and prohibit medical service personnel from releasing information on a patient's medical condition.<sup>124</sup> The sections below will show that the 2006 State Council Regulations also take privacy issues into account, which are at the heart of the problem surrounding the treatment of AIDS in China. Because there is no guarantee of a patient's privacy, people are often reluctant to get tested or go to doctors for treatment.<sup>125</sup>

Related to this problem of seeking treatment, the Infectious Disease Law bars hospitals from discriminating against patients with infectious diseases.<sup>126</sup> Medical treatment facilities are required to provide the necessary treatment and care to patients according to their diagnosis, and if those facilities are not adequate to provide treatment and care, then the medical treatment facility should transfer the patient to a place where they will receive adequate care.<sup>127</sup> Other AIDS regulations also contain these types of provisions<sup>128</sup> because refusal to provide treatment to HIV/AIDS patients is still a significant problem.<sup>129</sup>

Finally, the Infectious Disease Law also punishes officials who fail to report an outbreak of an infectious disease according to law and regulations.<sup>130</sup> Thus, failure to report an outbreak of AIDS, which is a Class B disease under the Law, would result in administrative or even criminal punishments for the officials or personnel responsible.<sup>131</sup> This provision is clearly a response to the cover-ups that have resulted in severe public health consequences and significant public unrest, such as during the SARS outbreak and the Henan blood scandal.

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<sup>122</sup> Infectious Disease Law, *supra* note 114, art. 12.

<sup>123</sup> See *infra* Part IV.B.5.

<sup>124</sup> Sichuan sheng yufang kongzhi xingbing aizibing tiaoli [Sichuan Province Regulations for the Prevention and Control of the AIDS STD], art. 28, Aug. 17, 1995 (on file with author).

<sup>125</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 50-51.

<sup>126</sup> Infectious Disease Law, *supra* note 114, art. 16.

<sup>127</sup> *Id.* art. 52.

<sup>128</sup> 2006 State Council Regulations, *supra* note 2, art. 41.

<sup>129</sup> GUOMEI, *supra* note 3, at 72.

<sup>130</sup> Infectious Disease Law, *supra* note 114, art. 66.

<sup>131</sup> *Id.* art. 65.



Although the Infectious Disease Law represents a change in thinking about how to effectively deal with infectious diseases, that does not mean that the government has revised every law in this area. The Chinese government, for instance, has not amended the Frontier Health and Quarantine Law of the PRC, which was enacted in 1986. This Law and its accompanying implementing administrative regulations allow border control authorities to test for HIV or require proof of an HIV test for those entering or leaving China.<sup>132</sup> This group will, of course, include not only foreigners, but also all those Chinese who have lived outside or traveled outside of the country.<sup>133</sup> In addition, according to the lengthy implementation regulations for this Law, border quarantine authorities should prohibit foreigners who suffer from AIDS from entering China, but not those infected with HIV.<sup>134</sup>

This type of mandatory HIV/AIDS testing is still a feature of Chinese law for various groups. Civil servants, for example, are subjected to mandatory testing<sup>135</sup> and can be dismissed from their jobs for testing positive for AIDS, but not HIV.<sup>136</sup> Other groups, such as policemen,<sup>137</sup> prostitutes,<sup>138</sup> members of the army,<sup>139</sup> and prisoners,<sup>140</sup> may also be subject to mandatory testing. The 2006 State Council Regulations perhaps represent a shift in this respect, because they emphasize the need for voluntary testing.<sup>141</sup> Still, mandatory testing seems to remain a significant tool in PRC infectious disease law to ensure that diseases do not enter into various spheres (e.g., the army) or the PRC itself.<sup>142</sup>

## 2. *Marriage and Family Law*

Another concern that has become amplified over the course of the 1990s is that infected mothers do not pass the AIDS virus onto their children. This concern has been reflected in much of the new marriage and family law that the government has enacted during the last fifteen years. The Law for the Protection

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<sup>132</sup> Zhonghua renmin gonghe guo guojing weisheng jianyi fa shishi xize [Implementation Provisions for the Frontier Health and Quarantine Law], art. 100, Mar. 6, 1989, available at <http://www.chinatoday.com/law/quarantinerules.htm> [hereinafter Frontier Health and Quarantine Law].

<sup>133</sup> See *id.* arts. 99, 102.

<sup>134</sup> *Id.* art. 99.

<sup>135</sup> Gongwuyuan luyong jianti tongyong biao zhun (shixing) [Experimental Standards for the Physical Examinations of Civil Servants], art. 18 (2005) (on file with author) [hereinafter Experimental Standards].

<sup>136</sup> *Id.* art. 18.

<sup>137</sup> Guanyu gongan jiguan luyong renmin jingcha tijian xiangmu he biao zhun ji renmin jingcha tingceping xiangmu he biao zhun de tongzhi [Notice Regarding Physical Examinations and Passing Criteria for the People's Police], art. 13 (2002) (on file with author).

<sup>138</sup> Quanguo renda changweihui guanyu yanjin maiyin piao chang de jue ding [Decision of the Standing Committee on the Strict Prohibition of Prostitution], art. 4 (1991), available at [http://www.casy.org/Chindoc/Laws%20and%20Regs/prostitution\\_1991.htm](http://www.casy.org/Chindoc/Laws%20and%20Regs/prostitution_1991.htm) [hereinafter Prostitution Decision].

<sup>139</sup> Zhongguo renmin jiefang jun nei tiaoli ling [People's Liberation Army Internal Regulations], ch. 16, sec. 1, art. 254 (2002) (on file with author) (discussing infectious diseases (*chuanranbing*)).

<sup>140</sup> See e.g. Prostitution Decision, *supra* note 138.

<sup>141</sup> 2006 State Council Regulations, *supra* note 2, art. 23.

<sup>142</sup> *Id.* art. 24.

of the Rights of Mothers and their Children states that a pre-marriage medical examination must include testing for designated infectious diseases; a category that includes HIV/AIDS.<sup>143</sup> The Marriage Law of the PRC, which was amended in 2001, includes a provision that prohibits those with certain diseases from marrying.<sup>144</sup> The implementation regulations for the Marriage Law or the Marriage Registration Regulations, enacted in 2003, echo this command, stating that marriage registration agencies will not register the marriage if the authorities believe that one of the parties has a disease not suitable for marriage.<sup>145</sup> These provisions provide the basis on which authorities can deny marriages to those with AIDS.

Although there is no one provision of *central*<sup>146</sup> law or regulation that directly denies people with AIDS the right to marry, the Ministry of Health has issued an Opinion on the Regulation of Persons with HIV and AIDS.<sup>147</sup> This Opinion states that those who have contracted full-blown AIDS should temporarily delay their marriages.<sup>148</sup> Those with HIV should seek medical counseling before marrying.<sup>149</sup> Surveys of AIDS in China done by independent sources have found that those with AIDS are indeed denied marriage licenses by local officials.<sup>150</sup>

Although the modern trend of AIDS regulation in China has been to eliminate various forms of AIDS-based discrimination, including discrimination with regard to marriage rights, the concern still remains about mothers and children. As the section below will illustrate, national and local regulations require that localities take measures to protect mothers from infecting children, while also requiring that there is no discrimination in marriage. These types of conflicting mandates might result in less vigorous enforcement of the anti-discrimination laws, especially when localities are accustomed to denying marriage licenses to those who test positive for HIV/AIDS.

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<sup>143</sup> Zhonghua renmin gonghe guo muning baojian fa [Law for the Protection of Mothers and Infants], art. 8 (1994) (on file with author). The mandatory nature of this premarital medical examination has come under debate recently. Cheng Liping, *Hunqian yixue jiancha ying mianfei qiangzhi* [Should a Premarital Medical Exam be Free and Compulsory], FAZHI RIBAO [LEGAL DAILY], Jul. 27, 2005. The scope and contours of this debate are truly beyond the scope of this article. What is relevant is that where local authorities do enforce the medical examination requirement an AIDS test is an includable infectious disease test.

<sup>144</sup> Zhonghua renmin gonghe guo hunyin fa [PRC Marriage Law], art. 7 (2001), available at <http://www.helpline.com/law/china/marriage/mlaw.php>.

<sup>145</sup> Hunyin dengji tiaoli [Marriage Registration Regulations], art. 6.5 (2003) (on file with author).

<sup>146</sup> Local regulations do explicitly forbid marriage registration of those with AIDS. Shanghai shi aizibing fangzhi banfa [Shanghai City AIDS Prevention and Treatment Regulations], art. 15 (1998) (on file with author) [hereinafter Shanghai AIDS Regulations].

<sup>147</sup> Dui aizibing bingdu ganranzhe he aizibing bingren guanli yijian [Management Opinion for those Infected with HIV and AIDS] (1999) (on file with author) [hereinafter Management Opinion].

<sup>148</sup> *Id.* §III.ii.2.

<sup>149</sup> *Id.*

<sup>150</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 37.

### 3. High-risk Groups

High-risk groups under Chinese law include prostitutes, men who have sex with other men, and intravenous drug users.<sup>151</sup> The laws governing these groups are quite different, but all of them have some present or past tie to the PRC Criminal Law and the Public Order Law in China. This article has already noted that a legislative intersection, such as that between criminal law and public health law, is problematic because it creates conflicting mandates for local officials.<sup>152</sup> The local governments are expected to reach out to intravenous drug users and sex workers and educate them on how to protect themselves against HIV/AIDS.<sup>153</sup> At the same time, the local police are required under various laws to crack down on these groups.<sup>154</sup>

Prostitution in China is punishable in various forms under various laws. Prostitution itself is punishable under the Public Order Law by fines of up to 5000 Yuan and detention of up to ten days in prison depending upon the severity of the circumstances.<sup>155</sup> Organizing, forcing, inducing, housing, or introducing prostitutes is punishable under the 1997 Criminal Law by up to ten years in prison.<sup>156</sup> The Public Order Law also penalizes intravenous drug use with detention of up to ten days combined with a fine of up to 2000 Yuan, or, under less severe circumstances, a detention period of five days and a fine of 500 Yuan.<sup>157</sup> Of course smuggling, trafficking, and manufacturing drugs are punishable under the Criminal Law.<sup>158</sup>

What is on paper, however, is only part of the story. Over-detention of criminals is common and other abuses in the criminal justice system are rampant.<sup>159</sup> On and off for several years during the Reform Era (1980–present), the government led a campaign called the Stern Blows Campaign to reduce the crime rate.<sup>160</sup> This campaign put pressure on local officials to fulfill arrest quotas.<sup>161</sup> It is unclear whether the campaign in its fullest form still continues, but high level leaders still use the words “Strike Hard” or “Stern Blows” (*yanda*) in speeches about crime.<sup>162</sup> These criminal laws and policies may make it hard for local

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<sup>151</sup> See GUAONG, *supra* note 3.

<sup>152</sup> See Jianfeng, *supra* note 31.

<sup>153</sup> 2006 State Council Regulations, *supra* note 2, art. 18.

<sup>154</sup> See e.g. Shanghai City AIDS Prevention and Treatment Regulations, *supra* note 146, art. 15.

<sup>155</sup> Zhonghua renmin gonghe guo zhian guanli chufa fa (on file with author) [PRC Public Order Administrative Punishment Law], art. 66 (2005) (on file with author) [hereinafter Public Order Law].

<sup>156</sup> Zhonghua renmin gonghe guo xingfa [PRC Criminal Law], arts. 358-62 (1997), available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> [hereinafter Criminal Law].

<sup>157</sup> Public Order Law, *supra* note 155, art. 72.3.

<sup>158</sup> Criminal Law, *supra* note 156, arts. 347-57.

<sup>159</sup> Congressional Executive Commission on China, Annual Report 2005, 23 (2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>.

<sup>160</sup> Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983-1986 “Stern Blows” Campaign*, THE CHINA JOURNAL NO. 44, 93-125 (2000).

<sup>161</sup> *Id.*

<sup>162</sup> See *Yange guifan mei yi ge huanjie de zhifa xingwei* [Strictly Guiding Enforcement of the Law in Every Area], FAZHI RIBAO [LEGAL DAILY], June 24, 2005 (describing a speech by Luo Gan, head of the

governments to conduct public health outreach to these groups without conflicting with the police.

The situation with homosexuals, as stated above, is somewhat different. There is not, nor has there ever been, a provision of Chinese law that specifically criminalizes anal intercourse between two men. Still, various provisions of law, such as those dealing with “hooliganism,” have been used to prosecute homosexuals, and police harassment of homosexuals still occurs.<sup>163</sup> Today situations still arise in which homosexuals are detained at police stations.<sup>164</sup> The harshest punishment can be the revelation of their identity, because they face tremendous social pressure and discrimination.<sup>165</sup>

Regardless of the type of criminal provisions, the biggest problems facing these high-risk groups is that they are underground, scared of local authorities, and hard for China’s still small, quasi-independent NGO community to reach. The effect is to make outreach and education work on HIV/AIDS very difficult.

#### 4. *A Note on Anti-Discrimination Law*

Anti-discrimination law in the PRC is still in the early stages of development, despite the fact that many complain of discrimination based on gender, age, place of birth, and disabilities such as Hepatitis B.<sup>166</sup> There have been anti-discrimination cases before the courts, and the body of law that includes anti-discrimination provisions is growing. Still, laws and regulations usually only contain anti-discrimination *provisions*.<sup>167</sup> There are no detailed procedures for collecting evidence and bringing suit in order to enforce these provisions. In addition, China lacks a strong court system. Although they are in the drafting stages, China currently has no detailed law or rules of evidence for criminal and civil cases.

AIDS regulation fits this trend. Regulations at both the central and local levels only include *provisions* that forbid discrimination in housing, marriage, and employment (among other areas) based on an individual’s AIDS status.<sup>168</sup> Still, most agree that the only way to combat discrimination is through the use of techniques to raise education and awareness and increase tolerance.<sup>169</sup>

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politics and law area in the Communist Party in which he advocated the “strike hard” policy on a long term basis for some offenses).

<sup>163</sup> John Balzano, *Toward a Gay Friendly China: Legal Implications of a Changing China For Gays and Lesbians*, 16 *TUL. J. L. & SEXUALITY* (forthcoming 2007).

<sup>164</sup> *Id.*

<sup>165</sup> LI YINHE, *TONG XINGLIAN YA WENHUA [CULTURE OF HOMOSEXUALITY]* 380 (1998).

<sup>166</sup> China Law & Development Consultants, *Voices Against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices*, *CHINA LAW & GOVERNANCE REV.*, No. 2 (June, 2004), available at <http://www.chinareview.info/pages/main1.htm>.

<sup>167</sup> Article 12 of the Labor Law is a good example. It states that there will not be discrimination on the basis of race, nationality, sex, and religious belief, but, as stated above, it contains no provisions to enforce this guarantee. *Zhonghua renmin gonghe guo laodong fa [PRC Labor Law]*, art. 12 (1994) (on file with author).

<sup>168</sup> 2006 State Council Regulations, *supra* note 2, art. 3.

<sup>169</sup> GUOMEI, *supra* note 3, at 99.

## 5. *Central AIDS Regulations*

Although the enactment of the 2006 State Council Regulations officially terminated the 1988 Several Regulations on AIDS Monitoring Management, they deserve a brief mention here for purposes of historical background. The 1988 Central Regulations reflected the “foreign disease” mentality about AIDS that was prevalent through the early 1990s. First, the regulations had several provisions regarding testing of foreigners staying longer than one year and returning Chinese nationals.<sup>170</sup> Second, the regulations required that those who has AIDS be isolated or sent to designated hospitals, and also allowed for the restriction of movement of those with HIV or those with close contact to people with AIDS and HIV.<sup>171</sup> Finally, any person suspected of having AIDS by the courts or police was required to undergo an investigation.<sup>172</sup>

Although the 1988 Regulations did contain a broad, anti-discrimination and privacy provision,<sup>173</sup> clearly such anti-discrimination and privacy guarantees would be next to impossible to enforce while still giving force to the other strict reporting and isolation requirements in the Regulations. The 2006 State Council Regulations remove virtually all of the restrictions in the 1988 Regulations and reflect tremendous progress in AIDS policy in China.

## 6. *Local Regulations*

Besides the enormous amount of regulation at the local level, numerous provinces have also enacted various regulations on AIDS. The 2006 State Council Regulations were, no doubt, built upon experience and study of the history of some of these local regulations. Now that the 2006 State Council Regulations have been enacted, the localities should amend their regulations to conform, but because of tensions between the central and local governments, this process may not always be smooth or efficient.

This article has discussed the law and policy of the central government, but now and in the future, local governments at various levels of the system will play a huge role in implementing the central government’s policy on AIDS or creating local policy where no central policy yet exists. The local regulations have, however, displayed some problematic features and policies over the last 20 years. The following section will detail some examples of local regulations and their provisions, before moving to a discussion of the 2006 State Council Regulations.

Starting in the late 1990s, from about 1998 onward, many of the provinces began to enact regulations on the prevention and treatment of AIDS. Not all of the provinces enacted these types of regulations at the same time. Indeed, this work was carried out over the course of many years. For example, while Shang-

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<sup>170</sup> Aizibing jiance guanli de ruogan guiding [Several Regulations on AIDS Monitoring Management], arts. 4-9 (1988) (on file with author) [hereinafter 1988 AIDS Regulations].

<sup>171</sup> *Id.* arts. 23-24.

<sup>172</sup> *Id.* art. 15.

<sup>173</sup> *Id.* art. 21.

hai enacted its prevention and treatment regulations in 1998,<sup>174</sup> Yunnan only enacted its regulations in March of 2004.<sup>175</sup> When reading these regulations, it is important to keep Professor Li Mei's words in mind: while much of the AIDS policy and law on the one hand purports to outlaw discrimination, others can actually perpetuate discrimination.<sup>176</sup>

The Shanghai AIDS Prevention and Treatment Regulations illustrate this phenomenon. The Regulations guarantee that those with HIV/AIDS will have equal rights under the law,<sup>177</sup> and be free from discrimination with regard to medical treatment, employment, and social events.<sup>178</sup> The Shanghai Regulations also contain provisions on information privacy.<sup>179</sup> However, the Shanghai Regulations do require mandatory testing for eight specific groups of people, including those "suspected" of having AIDS or any sexually transmitted disease.<sup>180</sup> The Shanghai Regulations also subject people with HIV and AIDS to such indignities as "disinfection work."<sup>181</sup> Under the 1998 Shanghai Regulations, those infected with HIV/AIDS are required to undergo daily disinfection work, which will be carried out by the person's family or work unit under the supervision of the local health and quarantine department, during which their possessions are disinfected.<sup>182</sup> Finally, the indignities do not end after death for those with AIDS, because the Shanghai Regulations also require that the body be cremated under the supervision of the local health authorities.<sup>183</sup>

Although the Shanghai Regulations are currently under revision in response to the changing policy reflected in the 2006 State Council Regulations, they are indicative of the conflicting policy on HIV/AIDS in China, where the ideas of anti-discrimination and intolerance have created an environment of fear and lack of understanding about the disease. Other regulations, however, can be less apologetic about certain discriminatory practices. For example, the Chongqing AIDS Prevention and Control Regulations explicitly forbid local authorities from issuing marriage licenses to those with AIDS,<sup>184</sup> and make no broader attempt to forbid discriminatory treatment on the basis of the disease.

There is, however, improvement. The 2004 Yunnan Regulations do not contain many of the discriminatory practices present in the Shanghai Regulations.

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<sup>174</sup> Shanghai AIDS Regulations, *supra* note 146.

<sup>175</sup> Yunnan sheng aizibing fangzhi abnfa [Yunan Province AIDS Prevention and Treatment Regulation] (2004) (on file with author) [hereinafter Yunnan Regulations].

<sup>176</sup> Yongchao, *supra* note 16.

<sup>177</sup> Shanghai AIDS Regulations, *supra* note 146, art. 7.

<sup>178</sup> *Id.* arts. 25, 31.

<sup>179</sup> *Id.* art. 26.

<sup>180</sup> *Id.* art. 15.

<sup>181</sup> *Id.* art. 22.

<sup>182</sup> Shanghai AIDS Regulations, *supra* note 146, art. 21.

<sup>183</sup> *Id.* art. 22.

<sup>184</sup> Chongqing shi yufang kongzhi xingbing aizibing tiaoli [Chongqing City Prevention and Control Regulations for AIDS and Sexually Transmitted Diseases], art. 10 (on file with author) [hereinafter Chongqing Regulations].

The Yunnan Regulations contain a broad protection against discrimination,<sup>185</sup> privacy protection,<sup>186</sup> free medical services for mothers and infants,<sup>187</sup> and sex education requirements for schools.<sup>188</sup> Thus, local regulations, like central policy, have become more liberal with the passage of time.

## V. 2006 State Council Regulations

The newest piece of AIDS legislation in the PRC is the Regulation for the Prevention and Treatment of AIDS, which the State Council issued in February 2006.<sup>189</sup> Although the provisions are a giant step forward in many ways, implementation may become difficult because of various legislative conflicts. These Regulations sit on a body of central and local rules and regulations that provided the inspiration for and lessons against certain types of rules.<sup>190</sup> These rules are not included in, and some are currently contradictory to, the State Council Regulations.<sup>191</sup> Moreover, the new State Council Regulations, which drew a wide range of preliminary comments from the domestic and international communities, are potentially in opposition to older laws, such as the Frontier Health Quarantine Law, that represent less progressive thinking on AIDS issues.<sup>192</sup>

In addition to these and other legislative obstacles, there are a wide range of institutional constraints, discussed above, that may make implementation of the aggressive plans under the 2006 State Council Regulations difficult. For example, weak courts and an underdeveloped body of anti-discrimination law may prove problematic for implementation.

Still, the provisions of the 2006 State Council Regulations represent progress in government policy on the AIDS issue and will, hopefully, pave the way for equally progressive amendments and adjustments at the local level. After the central government has collected another round of experience, in accordance with common legislative techniques in the PRC, the government may choose to enact a more definitive and detailed AIDS law, instead of only regulations.

### A. Content of the 2006 State Council Regulations

The Regulations draw upon a broad range of social and governmental resources in an effort to combat the AIDS virus. The Regulations call upon various central<sup>193</sup> and local government ministries<sup>194</sup> and departments,<sup>195</sup> quasi-govern-

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<sup>185</sup> Yunnan Regulation, *supra* note 175, art. 14.

<sup>186</sup> *Id.* arts. 21, 23.

<sup>187</sup> *Id.* art. 19.

<sup>188</sup> *Id.* art. 5.

<sup>189</sup> See 2006 State Council Regulations, *supra* note 2.

<sup>190</sup> *Id.*

<sup>191</sup> The Shanghai Regulations and the Chongqing Regulations, discussed above constitute regulations that will mostly like have to be revised because they are contrary to some provisions of the State Council Regulations.

<sup>192</sup> See Frontier Health and Quarantine Law, *supra* note 132.

<sup>193</sup> 2006 State Council Regulations, *supra* note 2, art. 3.

mental institutions,<sup>196</sup> enterprises,<sup>197</sup> and individuals<sup>198</sup> to help combat the disease. Equally broad is the provision that forbids the much criticized discrimination against those with AIDS or their families in marriage,<sup>199</sup> employment, treatment, and all other legal rights.<sup>200</sup> It is questionable to what extent provisions like this will be enforceable, however, because the Regulations do not grant a civil right of action nor do they impose administrative punishments for violation of this specific provision.<sup>201</sup> And, as discussed in this article, Chinese courts do not have a particularly encouraging history of enforcing the anti-discrimination provisions in other laws, such as the Labor Law.

Next, the Regulations embark on a much needed campaign to raise education and awareness surrounding AIDS, including the release of posters and other advertisements and information in public places and the mass media.<sup>202</sup> The Regulations also call for education programs to raise awareness amongst medical personnel and to teach young people about safe sex in schools.<sup>203</sup> In instituting this program, the Regulations call for the daunting, but encouraging measure of distributing condoms in public places.<sup>204</sup> The failure to do so can result in fines and a proprietor's loss of license.<sup>205</sup> These measures are interesting and aggressive steps that may encounter tremendous resistance at the local levels because many still believe that sex education and condoms will only encourage promiscuity and declining morals among Chinese youth.<sup>206</sup>

Perhaps one of the more uplifting aspects of the Regulations is that they have seemingly strict provisions requiring the screening of blood by blood donation centers, medical treatment facilities, and border import facilities.<sup>207</sup> Violation of these provisions, can result in loss of license for these types of facilities.<sup>208</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Prior to these Regulations officials in some localities refused to marry those who were infected with HIV and AIDS. HUMAN RIGHTS WATCH, *supra* note 3, at 37.

<sup>200</sup> 2006 State Council Regulations, *supra* note 2, art. 3.

<sup>201</sup> *See id.* arts. 10-21.

<sup>202</sup> *Id.* art. 10-11.

<sup>203</sup> *Id.*, arts. 11-13.

<sup>204</sup> *Id.* arts. 28-29.

<sup>205</sup> *Id.* art. 61.

<sup>206</sup> Fang Yimin, *Daxuesheng feifa tongju jian shou chufen yi zhenyi zhuanjia: gaodeng xuefu xuyao "daode yueshu"* [Disciple Over Students' Common Living Attracts Debate, Specialist Says Higher Education Needs "Moral Boundaries"], NANFANG DUSHI BAO [SOUTHERN METROPOLITAN], Oct. 11, 2005. One of China's most famous AIDS researchers, however, has noted that condom distribution does *not* encourage people to have more sex. In fact, according to surveys conducted by Shanghai Academy of Social Sciences professor Xia Guomei, condom distribution may have the opposite result. GUOMEI, *supra* note 3, at 16-17.

<sup>207</sup> 2006 State Council Regulations, *supra* note 2, arts. 35-37.

<sup>208</sup> *Id.* art. 61.



Building on several civil cases in the last few years,<sup>209</sup> the Regulations allow those who contract HIV through faulty blood transfusions to seek civil compensation.<sup>210</sup> Also, in order to ensure effective treatment for those infected with HIV/AIDS, the Regulations prohibit medical personnel from refusing AIDS patients<sup>211</sup> and require local governments to assure free, first-time testing, free and subsidized drugs,<sup>212</sup> and adequate assistance to mothers and their infants.<sup>213</sup> Archaic practices, such as only telling the family of the patient and not the patient herself about being HIV positive, are strictly prohibited by the Regulations.<sup>214</sup> Medical personnel and local authorities must keep the identity or information that could reveal the identity of those testing positive for HIV/AIDS strictly confidential.<sup>215</sup>

Finally, one other notable feature of the Regulations is the disclosure duty that they place on those who test positive for HIV or AIDS. Those who test positive are required to disclose their status to persons with whom they have a sexual relationship and to those medical personnel from whom they seek treatment.<sup>216</sup> Intentional transmission of the disease can result in civil, administrative, and criminal penalties.<sup>217</sup>

## B. Challenges to the 2006 AIDS Regulations

While the AIDS Regulations are an improvement over previous central polices, several obstacles still exist to the effective implementation of these provisions. First, the localities will have to amend their existing legislation to conform to the Regulations. As past experience has shown, this process can take time and does not always result in local legislation that appropriately conforms to the central government's policy. Second, the Regulations may come into conflict with a large body of public health, healthcare, and drug law and regulations that the government enacted under a different philosophy. In addition, other government policies may conflict with various provisions in the Regulations. For example, provisions in the Regulations calling for treatment of intravenous drug users may end up conflicting with the commands in other central laws and policies to local law enforcement officials to crack down on such drug use. These attitudes are at odds, and must be balanced in order to implement the Regulations.

Third, there are gaps in the Regulations which might result in abuses in implementation. The Regulations, for example, do not lay out concrete procedures for the anti-discrimination provisions or for the privacy protections provided. There

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<sup>209</sup> See e.g. *Guonei zuida de aizibing supei an kaiting* [China's Largest AIDS Compensation Trial Opens], FAZHI RIBAO [LEGAL DAILY], Jan. 18, 2006.

<sup>210</sup> 2006 State Council Regulations, *supra* note 2, art. 60.

<sup>211</sup> *Id.* art. 41.

<sup>212</sup> *Id.* art. 44.

<sup>213</sup> *Id.* art. 43.

<sup>214</sup> *Id.* art. 42.

<sup>215</sup> *Id.* art. 39.

<sup>216</sup> *Id.* art. 38.

<sup>217</sup> *Id.* art. 62.

are no real concrete mechanisms for supervising whether or not hospitals are accepting or refusing patients with HIV/AIDS. Similar supervisory mechanisms are also lacking concerning the free drug programs and subsidies to children with HIV/AIDS and orphans. In addition, although there is a methadone substitute program,<sup>218</sup> there is not yet a needle exchange program.

Fourth, although the Regulations do encourage public participation and quasi-NGO involvement in outreach programs,<sup>219</sup> the Regulations do not remove the more pressing burdens on NGOs in China. For example, many NGOs in China have difficulty obtaining registration or are forced to register as commercial enterprises.<sup>220</sup> For those forced to register as a commercial venture, the tax burdens can be difficult. For those NGOs that have difficulty registering, they may either cease to exist or exist with no registration at all. Yet, NGOs may be the most viable channel through which the government can control HIV/AIDS. These organizations and hotlines can reach into high-risk communities that still remain underground and out of the government's reach.

Fifth, polls and surveys still indicate that there is considerable societal fear and loathing of people infected with HIV and AIDS. It will take a significant amount of time, education, and awareness work before other provisions in the Regulations will truly take effect. Finally, infrastructural problems, such as corruption, lack of funding, a weak court system, and local protectionism, may also prevent effective implementation.

With all of these impediments and a government that has been sluggish to move forward with HIV and AIDS work, the future implementation of these Regulations remains uncertain.

## VI. Conclusion

AIDS law and policy in China has made considerable progress over the last eighteen years. This change comes in response not only to the realization on the part of the government about the severity of the HIV/AIDS problem in China, but also in response to the tremendous social and economic changes that have swept through the country since 1979. In the course of extraordinary development China has faced many challenges. The once guaranteed jobs from the state-owned enterprises are now gone,<sup>221</sup> and much of the population is left without healthcare or pensions. The 2003 SARS crisis and various food safety accidents have, in their own ways, revealed the shambles of the public health system in China.

Thus, following SARS, and in response to public and international pressure, there has been an increased focus on strengthening the government's ability to control and monitor public health issues. The monitoring and prevention of

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<sup>218</sup> *Id.* art. 27.

<sup>219</sup> *Id.* arts. 6-7.

<sup>220</sup> *Restriction on AIDS Activists in China*, 17 HUMAN RIGHTS WATCH NO. 5C 43-47 (2005), available at <http://hrw.org/reports/2005/china0605/china0605.pdf>.

<sup>221</sup> John Balzano, *Criminal Liability for Labor Safety Violations in the People's Republic of China*, 3 WASH. U. GLOBAL STUD. L. REV. 503, 503-04 (2004).

AIDS has, therefore, become all the more important amidst the healthcare and public health problems of today's China.

AIDS law and policy must be successful in China's highly transitional legal system. Although there has been progress, there are still many deep infrastructural issues that threaten to derail the government's new AIDS Regulations. Allowing NGOs and other organizations to help the government reach out to those suffering with AIDS or to promote education, awareness, and tolerance about the disease may help to greatly ease the burden on the government and the legal system. The coming years will tell the extent to which the government and society can work to curb the AIDS epidemic in China. These efforts can save millions.