The Rise and Decline of the Reversal of the Burden of Proof in China’s Medical Negligence Law: A Political Economy of Lawmaking Perspective*

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Abstract

An issue of central importance to the medical negligence law reforms in China over the past decade is the allocation of the burden of proof between the plaintiff patient and the defendant medical care provider in medical negligence actions. From a political economy of lawmaking

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*This research was supported by the Fundamental Research Funds for the Central Universities, and the Research Funds of Renmin University of China (Project No. 10XNK103), and by the Research Funds of the PRC Ministry of Education National Centre for Civil and Commercial Law at Renmin University of China (Project No. 12MSFJD820001). The authors thank the anonymous reviewers for very helpful comments and suggestions. The usual disclaimer applies.
perspective, this article examines the evolution of the burden of proof rules, with a focus on the reversal rule developed by the judiciary. Drawing extensively on firsthand legislative materials, this article argues that the successful lobbying of the medical profession in the legislative process leading to the enactment of the 2010 Tort Liability Law explains the nonadoption of a full-blown reversal of the burden of proof rule for medical negligence actions in the law.

Medical negligence laws in China have undergone a series of major reforms in the past decade, culminating in the enactment of the 2010 Tort Liability Law. Throughout the reform process, the allocation of the burden of proof between the plaintiff patient and the defendant medical care provider remained an enduring issue of debate. The pre–Tort Liability Law medical negligence law was characterized with bifurcated burden of proof rules: The State Council’s administrative rules strictly followed the traditional rule that the burden of proof is on the claimant, whereas the judicial rules issued by the Supreme People’s Court (SPC) reversed the burden of proof and shifted much of the burden to the defendant. The 2010 Tort Liability Law represents a “third way.” Under the law, the general rule is that the burden lies with the plaintiff. Under limited circumstances, however, the medical care provider is assumed to have acted negligently, unless it can prove otherwise.

This article attempts to present an understanding of these legal changes from a political economy of lawmaking perspective. Traditionally, lawmaking in China has been seen as a “rubber-stamping” process. However, recent economic reforms have fundamentally transformed both process and substance of lawmaking. The legislative process is now far more open, consultative, reactive and adaptive than it was in early post-Mao years. Many legislative developments in China are now closely influenced by political economy and interest group politics. Although the party and central government agencies remain powerful policy makers, interest groups and individuals have become interested in politics when the issues under discussion relate to their interests. Direct lobbying by interest groups is becoming increasingly common. Drawing extensively on firsthand legislative materials, this article argues that the successful lobbying of the medical profession in the legislative process leading to the enactment of the 2010 Tort Liability Law explains the absence of a full-blown reversal of the burden of proof rule for medical negligence actions in the law.