East Asia Science, Technology and Society: an International Journal (2008) 2:453–455
DOI 10.1007/s12280-008-9059-0

Wen-Tsong Chiou ed., Legal Construction of Public Health Risks

Institutum Iurisprudentiae (Preparatory Office), Taipei, 2007, 251 pp

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Received: 4 August 2008 / Accepted: 4 August 2008 /
Published online: 6 February 2009

Four years has passed since the pandemics of severe acute respiratory syndrome (SARS) manifested how vulnerable societies can be toward public health risks, and how societies' safety is intertwined in this global society. Since then, under the auspice of the World Health Organization, governments worldwide have been reviewing their policies and infrastructures, hoping to be better prepared for any future pandemics. Some of these efforts involve statutory revisions, some of them not. Yet, if the legal system in each country represents the infrastructure of how governments can impose coercive powers upon its citizens facing public health risks, how has the law responded to these public health risks? How well have they done?

Bringing together six scholars of law, science, and technology, the anthology of "Legal construction of Public Heath Risks" presents a colorful sampler of the diverse possibilities how legal discourse can contribute to the issue. Boldly entitled "Legal construction of Public Health Risks," the anthology actually talks more about the government more than law, and endeavors to present and critique on how governments perceive public health risk in different issues, how they have responded to it, and how should they respond.

As the organizer of the symposium that led toward this anthology, Wen-Tsong Chiou gives a very good introduction in the beginning of this book. Chiou notices that traditionally, at least in Taiwan, the legal academia seems to perceive the law being able only to respond to scientific development passively; paradoxically, the science circle also regard themselves as having no choice but to accept legal regulation passively. Under this vision of law, science, and technology, the law deals with value issues while science pursues objective facts which are value neutral. In response, Chiou raised a Study of Science Technology and Society (STS) question that is only beginning to be inquired in Taiwan's legal academia: how has science

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constructed specific concepts in law? How has the law fostered certain "scientific facts"?

Perhaps as a result of the subject of their topic, Huei-Chih Niu and Yao-Ming Hsu's analysis on risk assessment and risk communication seems to imply that science can be objective. Though they both place an emphasis on public participation in risk communication, for Niu, the purpose of it is to foster the public's trust for biobank (pp. 183–184); while for Hsu, the purpose is a requirement of good policy-making or deliberative democracy, but did not elaborate on why these two concepts require it (pp. 212–213).

In contrast, Michael Lynch, Wen-Tsong Chiou, and particularly Kevin Chien-Chang Wu is more suspicious of expertise' neutrality and the fact that science can be objective. Michael Lynch uses the development of DNA evidence to demonstrate how its "objective" appearance and durability over time has shaken the court's application of "finality," which sets a time limit one can reopen a convicted case. Wen-Tsong Chiou looks into how people's idea of occupational risk and governance can reshape the interpretation of causation in worker's compensation and how Taiwan law fails to embrace such change and leaves workers to shoulder a lot of work-related risks themselves. Likewise, by reviewing the development of worldwide pandemic such as SARS and the International Health Regulation it led to, Kevin Chien-Chang Wu argues that the complexity, diversity, uncertainty of an assessment of pandemic risks, and the public's viewpoint toward these uncertainties make risk analysis extremely difficult. Nevertheless, Wu stops short of denouncing the utility of these "scientific' analysis, and argues that, though risk analysis has its shortcomings, just as using Prozac against depression, it is useful and can be useful when used with care.

These two different perceptions of the objectivity of risk assessment also influence the authors' attitude on the government's role and ability to govern risk. Interestingly, three authors out of six rely heavily on Michel Foucault's analysis of biopower, and are ambivalent about the government intervening into personal or population health in the name of risk governance. But even though Wu and Chiou may be skeptical of the objectivity of risk assessment, their article ultimately does not challenge the necessity of these interventions altogether. Seeing the limits of Foucault's analysis, Yu-Lin Chiang, on the other hand, introduced Winfried Brugger's Ideal of Common Good which weights the legitimacy of governmental power among legal certainty, legitimacy, and practicality to provide an analytical framework for governing public health risk such as SARS. This provides a useful balance against Foucault's big theory: while his insight and critiques are enlightening and powerful, over the years, the modern legal system embedded in constitutional democracy provides a safeguard against the intricate disciplinary or governing power that Foucault portrayed with bold strokes. While this does not guarantee that his worries will never realize, over the years, legal analysis has developed more precise and delicate principles to prevent them from coming back too easily.

With no or little reference to Foucault, Niu and Hsu's article thus seemed more optimistic and directly dealt with how the government should respond to risk in the development of biobank and genetically modified organisms. In addition to more public participation in risk communication, to foster public trust in the development

of biobank, Niu proposed a partnership between scientists and subjects modeled after stockholder's meeting in Corporate governance (pp. 185–189). Hsu examines risk analysis and made policy suggestions for the principles to follow and the calculation of cost benefit analysis (pp. 218–220).

But aside from these government efforts to govern risks in different areas, how does "law" as a mechanism to govern risk make a difference, compared to other forms of governance? For instance, while Michael Lynch looks into the intricate interaction between DNA and evidence rules and statute of finality, the driving force seems to be the court that applies these laws or interprets the evidence, rather than the law. Likewise, when Chiou pointed out where the law on worker's compensation should head toward, the problem seems to be the lawmaker or policy maker rather than the law itself. Is law then just neutral rules where previous preferences of the policy makers are entrenched? Or is there something special about law governing public health risks as well as constructing how we perceive risks?

Shedding some light on this issue, Hsu questions the ability of court as the final arbitrator of risk governance (pp. 220–222). He argues that, to the extent that whether agencies based their decision upon certain scientific facts, the court can exclude "error policy." But beyond that, it cannot screen out the "best policy" since there is no standard to arbitrate policy making about risk. Hence, such policy making must be determined by democratic procedure rather than courts that have no majoritarian support (p. 221). Yet, does this mean that courts can only govern risk from a procedural legitimacy point of view rather than substantive legitimacy point of view? What kind of court does this vision presupposes? Does it take into consideration the science court or other innovations seeking to respond to disputes that are highly technical?

Likewise, although Wu, Niu, and Hsu all advocate for more public participation in risk analysis, how should we understand the advocated public participation's role with other existing mechanisms and institutions that allegedly reflect public opinion in the constitutional democratic societies? Alternately, how can these public participations avoid repeating the faults of current representative democracy?

Finally, although the risks in GMO and SARS issues are highly global, if law is to construct how we perceive risk or govern the resulting risk, how does law cope with the increasing globalization of risk? How does domestic law respond to increasing soft law in the international society?

Rather than a shortcoming of this book, the lack of answer to these issues demonstrates how the scholarship of law, science, and technology is at its youth in Taiwan and how much more it can contribute to the field. As the first series academic anthology on this issue, this anthology has done a tremendous job in putting together six active and important legal scholars to imagine the issue of law and public health risk together, and represents a good place for readers to begin if one wants to understand the current legal analysis in risk governance in Taiwan.