

CHINA LAW UPDATE

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CHINA LAW UPDATE

I. LAW

*1. Social Insurance Law of the People's Republic of China
(promulgated by the Standing Comm. Nat'l People's Cong., Oct.
28, 2010, effective July 1, 2011.)*

This is the first time for the National People's Congress to legislate a social insurance system. The basic social insurance system, established in the Social Insurance Law of the People's Republic of China (hereinafter referred to as Social Insurance Law), includes basic endowment insurance, basic medical insurance, employment injury insurance, unemployment insurance and maternity insurance attempting to guarantee the rights of citizens to obtain material assistance from the state and society in case of old age, illness, work-related injuries, unemployment and childbirth. Legalization of the field of social insurance in China settles the complex relations between different types of social insurances and protects the rights and interests of citizens participating in social insurance programs.,

Highlights of the social insurance law are as follows:

Firstly, the Social Insurance Law forms the basic framework of the social insurance system in China. Compared with the unilateral regulations of social insurance in the past, the Social Insurance Law makes comprehensive and uniform provisions, which stipulate the benefits of specific social insurance that individuals can enjoy, the administration and supervision of social insurance funds, the social insurance services that should be provided by social insurance agencies and the various channels which social insurance funds should be raised through, which include the insurance premiums paid by individuals and the subsidies from the government.

Secondly, it has established the guidelines of "broad coverage of insurants, basic insurance level, multiple types of insurance," which overcomes the institutional impediments that hindered the flow of personnel and employment of rural laborers. In the past, the endowment insurance system varied among different overall planning areas and the transference of endowment insurance relationship of those migrant workers was really difficult, which discouraged them from participating in the basic endowment insurance. However, this problem has been effectively solved by the Social Insurance Law. According to article 19, when an individual is employed in a different overall planning area, his or her

basic endowment insurance can be transferred with him, and the contribution period shall be calculated on a cumulative basis. For long-term consideration, these guidelines provide protection for the social insurance of all workers and help to form a uniform and normative human resources market.

Thirdly, it has solved many legal problems which were ignored by the previous related laws or administrative regulations. For instance, article 16 provides that individuals who have reached the statutory retirement age shall receive a monthly basic pension from the basic endowment insurance funds, while the employers and individuals need not pay the endowment insurance premiums anymore. This article received public support since it not only protects the legitimate rights and interests of individuals but also lightens the burden of employers. In addition, the Social Insurance Law has broadened the coverage of expenses that shall be paid from employment insurance funds, which now includes food subsidies for hospitalization, travel expenses and a lump-sum disability subsidy. This will further protect injured employees and effectively change the undesirable situation of employees at present. The Social Insurance Law also broadens the sources of social insurance funds and strengthens the collection of social insurance premiums. For instance, article 63 provides that if the employer fails to provide security for its insufficient payment of social insurance premiums, the collection agency of social insurance premiums may apply to the people's court for seizure, sealing up or auction of the employer's property at a value equivalent to the social insurance premiums payable to offset the social insurance premiums with the proceeds from auction. "This new provision helps to enforce the collection of social insurance premiums," commented Hu Xiaoyi, the minister of the Ministry of Human Resources and Social Security of People's Republic of China.¹

Wu Bangguo, chairman of the NPC Standing Committee, said that the Social Insurance Law was a fundamental element in China's socialist legal system, and strengthened the supervision of power of local legislatures on the management of social security funds. "The law's adoption would help improve the social security system in both urban and rural areas, ensure that all citizens enjoy the achievement

¹ Wang Yijun & Cui Li (王亦君 & 崔丽), *Yanglao Baoxian Ke Zhuanyi Jiexu, Yiliao Baoxian Ke Yidi Jiesuan* [*The transference of endowment insurance relationship and basic medical insurance relationship*], *Zhongguo Qingnian Bao* (中国青年报) [China Youth], Oct. 29, 2010.

of the reform and liberalization policy, and build a harmonious society,” Wu concluded.²

2. *Amendment to the State Compensation Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 2010, effective Dec. 1, 2010)*

The State Compensation Law of the People's Republic of China (hereinafter referred to as State Compensation Law) was called “the non-compensation Law,” because of its little content, low compensation standards and unreasonable proceedings. This amendment is seen as a signal to “build a new relationship between the state and the people.”³

Highlights of Law of the People's Republic of China on State Compensation are as follows:

First, it establishes compensation for mental damages. Article 35 stipulates that “[i]f serious consequence are caused, the infringing organ shall pay a proper amount of consolation money for the mental distress.” Following the Tort Law, the State Compensation Law also clarifies types of mental damages. This may show that the government's attention has expanded beyond focusing only on people's material life, but now encompasses their mental life too. Nonetheless, when considering China's complex national conditions, the legal system's lack of the practical experience adjudicating mental damages, and that this amendment does not provide a clear compensation standard, it remains unclear how compensation will vary amongst forum courts.

Second, a “violation of the law” is not required in order to give compensation. In the last State Compensation Law, Article 2 reads that “[w]here State organs or State functionaries, in violation of the law, abuse their functions and powers infringing upon the lawful rights and interests of the citizens, legal persons and other organizations, thereby causing damage to them, the victims shall have the right to State compensation in accordance with this Law.” This provision meant the victim could get compensation only if the action done to the victim was taken by state organs or state subsidiaries in violation of the law. After the amendment, even

² *Top legislature adopts Social Insurance Law*, China Daily, Oct. 29, 2010, http://www.chinadaily.com.cn/bizchina/2010-10/29/content_11474982.htm.

³ He Weifang (贺卫方), *Xiugai Guojia Peichang Fa Shi Dui Shengming de Chongxin Renzhi* (修改《国家赔偿法》是对生命的重新认知) [*To amend the State Compensation Law is to reconsider the value of life*], *ZHONGGUO XINWEN ZHOUKAN* (中国新闻周刊) [China Newsweek], July 22, 2009, at 52-53, available at <http://news.sina.com.cn/pl/2009-07-22/154918275366.shtml>.

though state organs or state subsidiaries are acting in accordance with the law, they are still responsible for damages they cause to individuals.

Third, the burden of proof has been shifted in certain circumstances. The victim requesting state compensation is usually the one who is required by the law to bear the burden of proof. However, in the new State Compensation Law, Article 26 stipulates that “[i]f a person in custody dies or loses his civil conduct capacity during the period of custody, the organ obligated to make compensation shall provide evidence on whether there is a causation between its action and the death or loss of civil conduct capacity of the person in custody.” This provision has placed the burden of proof on the government in order to deter the use of torture, protect a suspect’s legal rights, and help applicants get state compensation more easily.

Fourth, there is a “wrong arrest exemption period” in the amendment, which, means that when detention is taken in accordance with the conditions and procedures as prescribed in the Criminal Procedure Law, people with a decision to withdraw the case or not to prosecute or a judgment of acquittal is made later to terminate the criminal procedure, an individual cannot get compensation except if the period of detention has exceeded the time limit as prescribed in the Criminal Procedure Law. The idea behind the exemption is that public security organs will have problems in settling cases if there is no “wrong arrest exemption period.” The police might be too cautious in making arrests for fear of liability under the compensation law. However, the general public disapproves of the “wrong arrest exemption period.”

3. *Law of the Application of Law for Foreign-related Civil Relations of The People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Oct, 28, 2010, effective Apr. 1, 2011)*

As foreign-related civil relations have become increasingly common in China, disputes among local and foreign people, corporations and institutes have increased accordingly. Therefore, an important legal issue is which law judges should apply when in foreign-related civil disputes. Before the Law of the Application of Law for Foreign-related Civil relations (hereinafter referred to as Law of the Application of Law) had been promulgated, this issue haunted Chinese scholars specialized in Private International Law, because the conflict rules stipulated in different laws in China are not only inconsistent with each other, but also incomplete so those rules could not adequately solve all legal disputes. What’s more, some of

the conflict rules are out of date and needed to be adjusted or even abandoned.

The Law of the Application of Law can be recognized as a milestone in the development of Private International Law in China. In fact, some scholars consider the promulgation of the Law of the Application of Law an indication of the completion of the modernization of Chinese legislation of Private International Law.⁴

Highlights of the Law of the Application of Law are as follows:

Firstly, the Law of the Application of Law has systematic provisions to stipulate all kinds of civil relations issues, such as civil subject, marriage and family, inheritance, property, contract, obligation, intellectual property and so on. There is a consistent system of conflict rules applicable to almost all foreign-related civil disputes.

Secondly, advanced international rules have been adopted in the Law of the Application of Law, which makes the Private International Law in China correspond to international practices. It can be reflected in the conflict rules provided in this law, which are all open bilateral conflict rules, showing that domestic law and foreign law are treated equivalently and that interests of both parties are balanced with a leaning towards the weaker one.⁵ The most important point that merits attention is that Article 3 provides that “[t]he parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law.” This provision has established the principle of autonomy as an important leading principle in solving foreign-related civil disputes. Another reflection is that Article 20 adopts principle of habitual residence, which is in accordance with the trend of Private International Law development and the practice of Hague Conference on Private International Law since 1956.⁶ Besides, the principle of most significant relationship has been adopted as a supplementary rule in Article 2, subdivision 2.

⁴ Chen Weizuo (陈卫佐), *Shewai Mingshi Falüguanxi Fazhan Shida Liangdian* (涉外民事法律关系发展十大亮点) [*The Law of the Application of Law for Foreign-related Civil Relations of The People's Republic of China Has Shown Ten Highlights*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Nov. 2, 2011, at 10, available at http://www.legaldaily.com.cn/international/content/2010-11/02/content_2335894.htm?node=22628.

⁵ *Id.*

⁶ *Id.*

4. *People's Mediation Law of the People's Republic of China*
(promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28,
2010, effective Jan. 1, 2011)

In China, people value their personal relationships and tend to solve neighborhood problems or family problems in a private manner, with an emphasis on utilizing the people's mediation process. Chinese people's mediation system is similar to ADR. The promulgation of this law represents a new beginning of Chinese mediation, which may turn it into a formal legal system. In other words, people's mediation will now have formal rules to get a fairer result protected by law.

Highlights of People's Mediation Law are as follows:

First, the People's Mediation Law clarifies the entire people's mediation system. It makes rules for the people's committee's organizational form, the mediation procedure, qualifications for a people's mediator and so on.

Second, mediation will be enforced. People's Mediation Law clarifies the legal force of the mediation in Article 31 subdivision 1, which stipulates that a mediation agreement reached upon mediation by a people's mediation commission is binding to all parties concerned, and the parties concerned shall fulfill it as agreed. When the mediation fails, the litigant can turn to arbitration committee, administrative system or judicial system. When the two parties reached a mediation agreement, the parties concerned may jointly apply to the people's court for judicial confirmation. After the people's court confirms the effect of the mediation agreement, if one party concerned refuses to perform or fails to fully perform it, the other party may apply to the people's court for enforcement.

Third, though the law has ruled a priority doctrine of people's mediating, unlike civil actions in some countries such as France which claim that parties must have gone through preceding procedure of mediation before entering judicial proceedings, basic people's courts and public security organs only guide and inform the parties that they can apply for mediation to the people's mediation committee before permitting cases. However, parties have the right to reject mediation. No mediation may be made if one party has expressly refused to settle the dispute by mediation.

Fourth, mediation is totally free. People's mediation commissions may not charge for mediation of disputes among the people. The local governments at or above the county level shall appropriately guarantee the funds needed for the people's mediation work.

II. ACADEMIC DEVELOPMENTS

*1. Council for the draft of Amendment to the Criminal Law of the People's Republic of China (VIII) to Criminal Law of the People's Republic of China*⁷

The 16th meeting of the 11th National People's Congress was held at the Great Hall of People on Aug. 23, 2010 for the preliminary examinations of the draft Amendment to the Criminal Law of The People's Republic of China (VIII) (hereinafter referred to as the 8th amendment draft). After receiving opinions from all over the state, the formal amendment will be discussed in the beginning of the 2011 on whether it should be passed.

The 8th amendment draft is the biggest amendment to Criminal Law in the sense of the number of the related articles and the depth of the modification. As never before, this time the amendment no longer focuses only on some modification of specific crimes. It pays more attention to deeper things like legislative purpose and effect, even the legislative principles.

The greatest changes made in the draft that scholars are most interested in are as follows:

First, the draft is planning to rescind the death penalty in 13 economic nonviolent crimes including the crime of smuggling cultural relics, the crime of smuggling precious metals, the crime of smuggling rare species of wildlife, the crime of financial fraudulent activities, the crime of theft, the crime of excavating and robbing a site of ancient culture or ancient tomb and so on.

These 13 crimes are all economic-related and pose less danger to the peace of society so individuals convicted of these crimes shouldn't be sentenced to the death penalty. In fact, the death sentence has hardly been applied to these crimes in practice. In China, the abolishment of the death penalty to these nonviolent crimes will make the law consistent with jurisprudence theories and legal practice.⁸ It reflects that China will be more critical towards application of the death penalty and will try to decrease death sentences gradually.

"The weight of a penalty is related to the ability of society's governance. More sufficient society governance leads to less dependence on heavy penalties, especially the death penalty. On the contrary, society governance to some extent has to rely on heavy

⁷ http://www.npc.gov.cn/huiyi/lfzt/xfxza8/node_14002.htm.

⁸ You Wei (游伟), Jianshao Sixing Hai Keyi Zuo Gengduo de Nuli (减少死刑,还可以做更多的努力) [More Efforts to Be Made to Reduce Death Penalty], FAZHI RIBAO (法制日报) [LEGAL DAILY], Aug.26, 2010, at 3, available at <http://epaper.legaldaily.com.cn/fzrb/PDF/20100826/03.pdf>.

penalty even the death penalty because of insufficiency of society governance. China is trying to build up an adequate legal system and has taken effective methods in the way of society governance reforming period so that dependence on heavy penalties will decline which accordingly and reduce the application of the death penalty. In this sense, fewer crimes that have the death penalty attached is a reflection and result of the improvement of society's governance ability."⁹

Second, the draft is meant to raise the upper limit of fixed-term imprisonment from 20 years to 25 years and will strictly limit the commutation of punishment to the death penalty or death with a suspension penalty.

An opinion that is widely held by scholars is that the death penalty in China is too strict, while other kinds of penalties are too light. That means though there are many death sentences, the suspended death and life imprisonment penalty period of execution are too short. Research done by Chen Xingliang, a well-known law professor at Peking University, shows that a suspended death sentence in China generally equals 14 years to 24 years of fixed-term imprisonment, with an average of 18 years, while life imprisonment equals 12 years to 22 years fixed-term imprisonment, with an average of 15 years.¹⁰ This factor influences the emotion of the public about death sentences and suspended death sentences, and makes them wary of the death sentence. Similar feelings affect judicial personnel about the difference between death and prison penalties. The 8th amendment draft is attempting to assure the execution of the imprisonment and get the death penalty and prison penalties more differentiated. This is an important step for China's revolution of death penalty system, to find a balance between crime and punishment.

Third, of the new crimes created in the draft, the one that leads to the most discussion is the crime of dangerous driving. As many countries not only in Civil Law System but also in Common Law System, for example, Japan, Germany, the United Kingdom and the United States, have stipulated the crime of dangerous driving, the draft seems an action to follow this common universal practice. In addition to this, scholars consider it necessary to make the action of

⁹ Chen Xingliang (陈兴良), Yin hong (殷泓), Wang Yiyin (王逸吟), *Xingfaxuejia Cheng Jianshao Sizui Shi Kuanyan Xiangji de Juti Tixian* (刑罚学家称减少死罪是宽严相济的具体体现), GUANGMING RIBAO (光明日报) [GUANGMING DAILY], Sept. 2, 2010, at 9, available at http://epaper.gmw.cn/gmrb/html/2010-09/02/nw.D110000gmrb_20100902_1-09.htm?div=-1.

¹⁰ Yan Youliang (严友良), *Xingfa Di Ba Xiu*, (刑法第八修), [*The Eighth Amendment to Criminal Law*], SHIDAI ZHOUBAO (时代周报) [TIME WEEKLY], Sept. 2, 2010.

dangerous driving a crime regulated in the Criminal Law of the People's Republic of China (hereinafter referred to as the Criminal Law), There were more than 186 million motor vehicles in China at the end of 2009 and more significantly the deaths caused by traffic accidents in China every year are about one fifth or one sixth of the total amount of those in the whole world and driving while intoxicated is one of the most common reasons for traffic accidents.¹¹

In fact, the current Criminal Law has already stipulated the crime of traffic injury and other laws and administration regulations have already stipulated driving while intoxicated and furious driving, and clearly provide punishments. Though specially stipulating the crime of dangerous driving may strengthen implementation of the penalties attached to the action of dangerous driving, which can possibly help reduce the occurrence of traffic accidents. Scholars still question how the crime of dangerous driving can merge into the system of existent crimes, in particular, how to distinguish it from crime of traffic injury, and what situation these two provisions apply to respectively.¹² It is obvious that the action of dangerous driving is different from the crime of traffic injury and the crime of endangering public security, as dangerous driving's degree of hazard tends to lie between the two crimes currently stipulated in the Criminal Law. Some argue that if dangerous driving is stipulated as a crime, it should be punished because of the conduct rather than the result.¹³ Scholars have also criticized that the draft did not regulate a mens rea of the crime, which may cause great theoretical disputes and cause trouble in legal practice.¹⁴ Besides, the draft has limited the crime of dangerous driving only to driving while intoxicated and furious driving, while it has ignored the crime of driving while under the influence of drugs, which should also be an important category of

¹¹ Zhao Qi (赵琦), *Zuijiu Jiache Xianxiang de Falü Fenxi* (醉酒驾车现象的法律分析) [Jurisprudential Analysis on the Phenomenon of DWI], FAZHI YU SHEHUI (法制与社会) [LEGAL SYS. & SOC'Y], Oct. 2010, at 65; Wu Xuean (吴学安), *Zuijia Ruxing Shi Youxiao Zhili Jiujia de Guanjian Yibu* ("醉驾入刑"是有效治理酒驾的关键一步) [Making DWI a Crime Is a Key Point to the Efficiency of Controlling DWI], RENMIN GONGAN BAO (人民公安报) [PEOPLE'S POLICE POST], Aug. 23, 2010, at 3.

¹² Editors' note: examples are Law of the People's Republic of China on Road Traffic Safety; *Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falü Shiyong Wenti Zhidao Yijian ji Xiangguan Dianxing Anli de Tongzhi* (最高人民法院关于印发醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DWI and the Relevant Typical Cases], translated in Chinalawinfo.

¹³ Wu Xuean (吴学安), *supra* note 10.

¹⁴ Liu Xianquan (刘宪权), *supra* note 12.

it. Also, the penalty for the crime is considered to be too light, which, as set in the draft, includes criminal detention and fines.¹⁵

Dangerous driving is not the only topic in the draft that caused discussion among scholars. Intentional refusal of pay has also raised many debates. However, different from the situation of dangerous driving, scholars tend to question the rationality of this decision. The necessity of stipulating this kind of action in the Criminal Law has been questioned based on the caution of penalty. It is argued that if a employer intentionally refuses to pay his or her employee, the dispute between these two parties should be resolved by the Labor Contract Law of the People's Republic of China (hereinafter referred to as Labor Contract Law). In addition, it is considered that the Criminal Law can make limited efforts in this social problem and that it may cause trouble in legal practice as it may mix up the application of criminal litigation and civil litigation. But there is still approval for this decision in the draft, because some find that it is often insufficient to solve this problem through Labor Contract Law or other administrative regulations and that the harm it causes to the society is so severe that it worth the attention of the Criminal Law.¹⁶

Fourth, the death penalty has been adjusted so it does not apply to people over 75 years old. Also, the draft decided that any person who is under 18 years old and is sentenced to less than five years imprisonment can have his or her juvenile delinquency eliminated, which is a significant progress for the protection of adolescents. And as a matter of fact, many local governments have already adopted the practice of eliminating juvenile delinquency, but this practice is inconsistent and varies from one place to another.¹⁷ The draft meant to develop a unified system for the elimination of juvenile delinquency, but the stipulation is too rough and should be more detailed for practice requirements.¹⁸ These two adjustments were meant to give more protection to the elderly and the youth because of their mental situations and social status, which actually requires more attention to be paid on them. More importantly, the elderly and the

¹⁵ Zhao Qi (赵琦), *supra* note 10; Liu Xianquan (刘宪权), *supra* note 12.

¹⁶ He Mu (何牧), *Dui Eyi Qianxin de Falü Sikao* (对“恶意欠薪”的法律思考) [Jurisprudential Discussion on the Intentional Refusal of Payoff], FAZHI YU SHEHUI (法制与社会) [LEGAL SYS. & SOC'Y], Nov. 2010, at 61.

¹⁷ Yao Caiyun (姚彩云), *Qianlun Weichengnianren Weifa Fanzui Jilu Xiaochu* (浅论未成年人违法记录消除) [Discussion on the Elimination of Juvenile Delinquency], HEILONGJIANG SHENG ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (黑龙江省政法管理干部学院学报) [J. HEILONGJIANG ADMIN. CADRE INST. POL. & L.], Dec. 2010, at 47.

¹⁸ *Id.*

youth will cause less harm to the society and there is less necessity to give these two groups a death sentence.

2. Interpretation of the Supreme People's Court about Several Problems Concerning the Application of the Marriage Law of the People's Republic of China (III)

The Supreme People's Court of People's Republic of China has recently released the draft of its the latest judicial interpretation of the application on the Marriage Law of the People's Republic of China (hereinafter referred to as Marriage Law). The interpretation mainly focuses on issues such as real estate division, confirmation of parent-child relationship, reproductive rights, some of which are the most controversial topics concerning the practical application of Marriage Law and have attracted the most attention.

The provisions about housing division are formulated in order to solve problems in different situations. In practice, trial courts find that, when it comes to divorce, the most difficult issue is how to divide the property. Nowadays, it is a common phenomenon that the spouses jointly financed the house or apartment. But when the couples get divorced, how they deal with the house often leads to disputes. The Draft of the judicial interpretation formulated the following regulations depending on different situations.

If the real estate is financed by the parents of one party after marriage, and property right of the real estate was registered in the name of their child, this piece of property shall be deemed as personal property for one party. If the house or apartment was financed by parents of both parties, and the property right was registered in one name, the property can be identified as co-ownership by shares based on the proportions of money paid in the purchase of the house, as provided in Article 8.

If one of the spouse bought the real estate through down payment and took loans from the bank before marriage, and if the property right was registered in the name of the person who paid for loans after marriage, the real estate can be regarded as a personal property when the spouses get divorced. The loans which are not paid off are personal debts belonging to the person who made the purchase. In the duration of marriage, if the loans were paid off by the couple's collective property, the property right holder who has his or her name registered for the property should make reasonable compensation, which is calculated based on factors such as the market price of the real estate and the percentage of the loan payment to the other side when the couple got divorced, as provided in Article 11.

Li Mingshun, the vice president of Academy of Marriage and Family Law of China Law Society, believes that some articles in the

new interpretation, such as Article 11, shows the emphasis on the protection of personal property, which would really enable the problem of dividing property to be solved in a clear and quick way. But the protection of the rights of the other party seemed to be missing. Li Mingshun considers that from the objectives of the Marriage Law, the relevant articles of the property relations of husband and wife must help to promote the maintenance of the marital relationship. However, Article 11 of the draft, when dealing with property issues in marriage, seems to apply too much to the principles of Property Law rather than fully reflect the special nature of marriage and family.¹⁹

Other scholars speak highly of the draft. Professor Ma Yinan from Peking University Law School argues that family relations have changed greatly in recent decades and that it is quite urgent and important to see how the judicial practice responded to these changes. Therefore, launching the new judicial interpretation of Marriage Law is necessary. "The draft reflects the unity between the maintenance of stability of marriage and family and the individual rights and freedoms, balancing the interests among family members as well as family-social relationships." In her view, the draft is a tribute to solving controversial problems in practice.²⁰

The new draft of the interpretation is supposed to stipulate the "reproductive rights" which is an issue that has aroused great concern. The previous interpretations of Marriage Law did not expressly stipulate the right. The latest draft of judicial interpretation stipulates that if the husband intends to seek recovery from his wife on the grounds that his wife terminated the pregnancy without his knowledge, thereby claiming that his reproduction right is violated, the People's Court shall not support such claims. If the couple has disputes over the reproduction issue, resulting in alienation of mutual affection, and a party requests a divorce after the failure of mediation, the people's court should permit their divorce, which is stipulated in Article 10.

This new proposed provision is regarded as a breakthrough. Because in recent years, there has been observed an increase in reproductive rights dispute cases. In modern society, women may have an abortion without their husbands' knowledge for a variety of reasons, such as career choice, domestic violence, fetus deformities et cetera. Some experts consider that this proposed provision aims to protect the reproductive autonomy of women. They think that the provision relaxes the threshold of the permission of divorce for judges. Meanwhile, the relaxation of the threshold is also

¹⁹ http://www.lawyee.net/News/Legal_Hot_Display.

²⁰ http://www.lawyee.net/News/Legal_Hot_Display.

conducive to the protection of women because infertility in the real world may make women suffer from domestic violence or cold violence.²¹

III. CASES

1. COFCO Wines & Spirits Co. Ltd v. the Trademark Appeal Board of State Administration for Industry and Commerce of the People's Republic of China Invalid Trademark Registration Case

The appellant, COFCO Wines & Spirits Co. Ltd, is a subsidiary of China Oil and Food Import and Export Corporation (hereinafter referred to as COFCO). It produces and sells Great Wall wine, which is quite famous and popular in China. The respondent, the Trademark Appeal Board of State Administration for Industry and Commerce of the People's Republic of China (hereinafter referred to as the Trademark Appeal Board), is a government department in charge of the adjudication of trademark disputes between companies. In 2008, the Trademark Appeal Board judged that the trademark of "Cabernet" belonged to Changyu Pioneer Wine Co., Ltd. (hereinafter referred to as Changyu Pioneer). COFCO, who was unsatisfied with the judgment, filed an action against the Trademark Appeal Board to repeal the registration of the trademark.

The appellant believed that "Cabernet" was not suitable enough to be registered as a trademark, since it was the name of a kind of wine and the trademark registration of Changyu Pioneer would mislead the consumers and cause monopoly in the wine market. As the third party of this case, Changyu Pioneer provided evidence showing that it had registered "Cabernet" as its trademark in 1937 and it continually uses "Cabernet" as its trademark after the founding of the People's Republic of China. To refute the plaintiff's accusation of monopoly, Changyu Pioneer provided its market research data which showed that the market share of wines it produced labeled "Cabernet" was no more than four percent, so it was far from creating monopoly in the wine market.

The main issue in this case is whether "Cabernet" is a trademark or a kind of wine. In the 1930s, Xu Wangzhi, who was then the manager of Changyu Pioneer, named a new kind of wine the company made "Cabernet", which was the first time the name "Cabernet" was used. And in 1937, Changyu Pioneer registered "Cabernet" as its trademark with the National Government of that time. After the foundation of the People's Republic of China, Changyu Pioneer continued to use this trademark and reregistered it

²¹ *Id.*

in 2002. However, during this long period of time, COFCO also developed the skills of making “Cabernet” and began to produce “Cabernet” series of wine. So it regarded “Cabernet” as the name of that kind of wine and claimed that the trademark registration of Changyu Pioneer had a strong impact on the sale of the “Cabernet” series of wine it produced.

Beijing Higher People’s Court held that the Trademark Appeal Board’s adjudication was legitimate and Changyu Pioneer should still hold the private right of using “Cabernet” as its trademark. However, since both sides had provided new evidence, the Court required the Trademark Appeal Board to remake its adjudication based on that evidence.

2. *The People’s Procuratorate of Langfang, Hebei Province v. Huang Songyou*

The defendant, Huang Songyou, former vice-president of the Supreme People’s Court of the People’s Republic of China, was accused of bribery and embezzlement and was prosecuted by the People’s Procuratorate of Langfang, Hebei Province on January 19, 2010. The Langfang Intermediate People’s Court affirmed that the defendant had illegally accepted money and property bribes from lawyers and CEOs from investment and real estate companies and committed embezzlement. The total of the bribes amounted to 3.6 million RMB and 300 thousands HKD. The defendant received a life sentence from Langfang Intermediate People’s Court of Hebei Province, and deprivation of political rights for life. Additionally, the defendant was sentenced to confiscation of property. After the trial, the defendant pleaded guilty in taking bribes but not guilty for committing embezzlement. The prosecutors and the defendant held a heated debate over whether the defendant committed only bribery or committed both bribery and embezzlement. The defendant did not agree with the judgment and filed an appeal to the Higher People’s Court of Hebei Province.

The Higher People’s Court of Hebei Province held that when the defendant was the vice-president of the Supreme People’s Court, he had taken advantage of the facilities created by his authority of office and position and illegally accepted others’ money. According to the verdict, from 1997 to 1998, Zhanjiang Intermediate People’s Court of Guangdong Province was in charge of a case about the bankruptcy of Zhongmei Co., Ltd.. The company was judged to hold an asset auction after the trial. The defendant with two other civil servants took advantage of his position as the President of Zhanjiang Intermediate People’s Court of Guangdong Province to

conceal the truth and illegally transferred the money from the auction to his bank account. He got a share of 1.2 million RMB.

The defendant's acts have violated article 385 of the Criminal Law of the People's Republic of China. Although the defendant had voluntarily confessed to his crimes and most of the bribes had been recovered, "but as a top judge, Huang intentionally violated the law by trading power for money and taking a hefty sum of bribes, which has had a bad impact on society, and should be punished severely," as the verdict read. Thus, the Court rejected the appeal and upheld the original judgment.

Upon the announcement of the final judgment of Huang's case, there was a heated discussion. Huang is said to be the highest-ranking official toppled in the judicial system since the founding of the People's Republic of China in 1949.

Wang Shengjun, the current President of Supreme People's Court of PRC, said that the courts of all levels should hold discussions about judicial integrity in depth, drawing lessons from Huang's case and directing judges to enhance self-discipline. Wang also added that the whole court system should have a profound reflection on the management of judges and supervision of the operation of judicial powers.²²

Some scholars made comments about the value of this case. Professor Jiang Ming'an from Peking University Law School remarked that judicial corruption has more serious impacts on disrupting the process of rule of law of a nation than administrative corruption does. It is well known that the judiciary is the last defense for social justice. Lin Wei, a professor from China Youth University for political Sciences, suggested that more efforts should be put on the regulation of the relations between judges and lawyers. Judicial integrity not only requires judges to enhance self-discipline, but they also need supervision from society. The transparency of the judiciary itself is the prerequisite of an effective social supervision. From Huang's case, it showed that the illegal collaboration of judges and lawyers is quite a common phenomenon of the judicial corruption. Lin Wei also emphasized that increasing the transparency of the process of trying cases will help curb the illegal relationships between judges and parties or lawyers.²³

Both Lin and Jiang also called for that higher social dignity, treatment and salary to be given to judges as well as prosecutors.²⁴

²² Editorial, Big News: Final Judgment to Huang Songyou (大新闻：黄松有案终判审), <Daxinwen: Huangsong Youan Zhongshenpan>, DONGFANG RIBAO (东方日报) [DONGFANG DAILY], Mar. 18, 2010, at A4.

²³ *Id.*

²⁴ *Id.*