

EMPLOYMENT DISCRIMINATION LAW RESEARCH IN CHINA: A REFLECTION ON CURRENT APPROACHES AND A DISCUSSION

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Abstract

This article discusses the research methodologies employed in probing into employment discrimination issues in China. It examines the three current research approaches, namely, the “Chinese Facts” approach, the “Foreign Law” approach and the “Advanced Foreign Law” strategy. Then, the article concludes that each of the current strategies has its own limitations and suggests a new strategy that stresses the importance of using a theoretical study to resolve real issues in real life and incorporating local resources to do so.

I. INTRODUCTION

Discrimination in the Chinese workplace has been well documented.¹ However, China’s anti-discrimination law is still in the embryonic stages of development, both in theory and practice. Studies from legal, social, and philosophical perspectives on topics such as the definition of discrimination, the wrongfulness of illegal discrimination, and anti-discrimination rationales, are much less sophisticated than most studies from other countries.² In practice, very few actions to redress employment discrimination have emerged in Chinese courts,³ and plaintiffs have encountered major obstacles.⁴ The under-development of Chinese anti-discrimination

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¹ See, e.g., Jiefeng Lu, *Employment Discrimination in China: Current Situations and Principle Challenges*, 32 HAMLINE L. REV. 133 (2009) [hereinafter Lu: *Employment Discrimination*]; Zhou Wei (周伟) et al., *Zhongguo de Laodong Jiuye Qishi: Falü Yu Xianshi* (中国的劳动就业歧视: 法律与现实) [EMPLOYMENT DISCRIMINATION IN CHINA: LEGISLATION AND REALITY] (2006); *Zhongguo Jiuye Qishi Xianzhuang Ji Fan Qishi Duice* (中国就业歧视现状及反歧视对策) [THE EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES] (Cai Dingjian (蔡定剑) ed., 2007); Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 991 (2007).

² “Anti-discrimination rationale” refers to a set of theories for fighting against illegal discrimination that typically includes a general moral consensus that discrimination is wrongful, a general legal principle disfavoring discriminatory classifications, and analytical and philosophical reasoning as to why discrimination should be eliminated.

³ See Jiefeng Lu, *Curb Your Enthusiasm: A Note on Employment Discrimination Lawsuits in China*, 10 RICH. J. GLOBAL L. & BUS. 211, (2010).

⁴ See Lu, *supra* note 1, at 184.

legal mechanisms has deep cultural, economic and traditional causes.⁵

This paper, however, is not intended to address anti-discrimination litigation and the Chinese legal system itself.⁶ Rather, it focuses on the development of a scholarly foundation for anti-discrimination law in China. It asks how scholars should research anti-discrimination in China. The paper notes that, initially, scholars were concerned with two main tasks in employment discrimination law research: quantifying empirically the existence of discrimination and trying to understand where China stood in comparison with other countries in regulating discrimination. In the former situation, scholars conducted empirical research, and in the latter, scholars conducted comparative research. This paper argues that both research strategies produce useful but incomplete results. In the case of empirical research, such research demonstrated a huge problem but could offer no solution. The comparative research likewise showed that China had a relatively limited legal infrastructure for regulating discrimination, but the rather general comparisons did not provide the detail to help move forward, nor did it address the peculiarities of the Chinese context. Some scholars tried to fill in the gaps by drawing upon foreign models and adapting them to the Chinese system. This had the advantage of being fairly specific and practical, but it tended to pay insufficient attention to Chinese conditions that might lead to the rejection of the transplanted models.

⁵ See Lu, *supra* note 1, at 172 (argument on the three aspects reflecting the complexity of the anti-employment discrimination in China) (“First, the economic expansion and privatization, along with the transition from plan market to free market, results in more people coming out from rural areas; and considering China’s large population, there is an imbalance between the availability of the supply of human labor resources and the demand from the market, which places employers in a more advantageous position in picking employees. This is exacerbated by the fact that in order to attract foreign and domestic investors, the Chinese government, both central and local, provides many incentives for employers to have businesses in China. One of these incentives is what we call employment autonomy. The autonomy leaves employers much discretion in selecting their employees and places almost no limitations on discriminatory recruitment. Second, existing and potential social unrest and economic harm that may be caused by the lack of anti-employment discrimination principles have not seemed a direct and imminent threat to the Chinese government. These principles are that discrimination based on those immutable characteristics, such as gender, race, height, and age, is fundamentally wrongful; and that discrimination based on other factors, such as appearance, HB virus carrier status, migrant worker status, religious belief, marital status, and ethnic minority status—those not related to the performance of the job—is inherently unfair. There is a lack of internal force in the government and the legislature for their commitment to eliminate discrimination in employment. Third, incomplete anti-discrimination legislation and ineffective enforcement of this legislation, in addition to the bureaucracy in courts, provides little incentives for those claiming discrimination and their attorneys to resolve employment discrimination disputes through legal courses.”).

⁶ See generally Lu, *supra* note 1; Lu, *supra* note 3.

This paper discusses a research approach that emphasizes the combination of both Chinese reality and foreign experience. Part II summarizes recent discussions among Chinese legal scholars reflecting the legal research strategy issue in China. Part III examines and evaluates the strategies Chinese scholars have used in conducting anti-discrimination-in-employment law research. It then discusses a more practical and sensible approach. Part IV concludes that the proposed strategy will be a better vehicle for furthering the anti-discrimination cause in China.

II. AN OVERVIEW OF RECENT SCHOLARLY DISCUSSION ON LEGAL RESEARCH STRATEGY ISSUE IN CHINA

The year 2008 marked the 30th anniversary of China's "opening and reforming" policy. In that year, celebration of the great achievements China has made in many areas during the last three decades came with discussions of past development and future goals.⁷ One important area of discussion focused on China's development of its legal system. Chinese legal scholars particularly reflected on the way legal research should be conducted in China. For instance, Professor Zuo Weimin from Sichuan University School of Law pointed out that the two dominating strategies in Chinese criminal procedure law research, the comparative law strategy and the new ideological law strategy, had proved insufficient to promote the modernization of China's criminal procedure system.⁸ In addition, China's legislature has not been sufficiently responsive to reform proposals regarding the Chinese criminal procedure law put forth by legal scholars.⁹ According to Professor Zuo, the "comparative law strategy" can be described as first comparing the Chinese criminal procedure system to systems in foreign countries (usually Great Britain, United States, France, Germany and Japan) where rule of law is well-developed in criminal procedure law. Second, the strategy seeks to find differences between implementation of the legal system in China and in the

⁷ In 1978, China adopted the reforming and opening policy after the Cultural Revolution. See generally People's Daily Online, <http://30.people.com.cn/GB/index.html> (last visited Nov. 23, 2011) (presenting various articles and discussions on celebrating the 30th Anniversary of China's Reform and Opening-up); *President Hu Calls on Nations to Continue Reforms, Opening up*, People's Daily Online (Dec. 28, 2008, 10:30 AM), <http://english.people.com.cn/90001/90776/90785/6563077.html> (demonstrating the official comments on the anniversary).

⁸ See Zuo Weimin (左卫民), *Fanshi Zhuanxing Yu Zhongguo Xingshi Susong Zhidu Gaig* (范式转型与中国刑事诉讼制度改革) [Paradigm Transition and the Legal Reform of Chinese Criminal Procedure System], *ZHONGGUO FAXUE* (中国法学) [CHINA LEGAL SCI.], Apr. 9 2009, at 118.

⁹ *Id.*

foreign countries. The strategy next pushes scholars to discuss the possibility of applying the foreign system to China.¹⁰

In contrast, the “new ideological law” strategy, according to Professor Zuo, focuses on analyzing and evaluating the Chinese criminal procedure legal system from an abstract value perspective. It emphasizes core values such as human rights, rule of law, and democracy. These core values are usually embodied in the international human rights documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Criminal Justice Standards. They are considered the goal for the Chinese criminal procedure legal reform.¹¹

Professor Zuo argued that “legal transplantation” of foreign law to China without considering Chinese experience is responsible for the impasse in Chinese criminal procedure legal reform.¹² He therefore proposes a new method for Chinese legal research, which he calls the empirical research paradigm.¹³ The empirical paradigm differs from the traditional paradigms in that it starts with Chinese facts, reality and experience, identifies problems in achieving legal reform, and then discusses what should be done to address those problems.¹⁴

Professor Chen Ruihua of Peking University School of Law also reflected on the Chinese legal research strategy issue.¹⁵ Professor Chen shares similar views with Professor Zuo, and argues Chinese legal scholars should start from facts and experiences to identify questions, and then base their research on these questions.¹⁶ He stressed the ultimate goal of the legal research is to predict, analyze and explain legal questions.¹⁷ He is critical of what he calls “pure policy jurisprudence,” “introduction jurisprudence” and “transplantation jurisprudence” in Chinese legal research because such strategies stray from Chinese reality or exaggerate the success of foreign models.¹⁸ He argues that strategies applying “Western theory without considering Chinese reality” or analyzing “Chinese

¹⁰ *Id.* at 118-119.

¹¹ *Id.* at 119.

¹² *Id.* at 120.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See generally Chen Ruihua (陈瑞华), Xingshi Susong Faxue Yanjiu Fanshi de Fansi (刑事诉讼法学研究范式的反思) [Reflection on the Mode of Research on the Science of Criminal Procedure], ZHENGFA LUNTAN (政法论坛) [TRIB. POL. SCI. & L.], May 2005 at 3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 19.

facts without articulating generalized theory” are incomplete.¹⁹ He favors “A Third Road” for Chinese legal research, one that goes from experience to theory, ultimately resulting in a combination of foreign and Chinese concepts.²⁰

The same issue exists in the study of Chinese employment discrimination law. The more commonly used approaches are (1) the “Chinese facts” strategy, in which scholars quantify the existence of discrimination by collecting data from interviews and questionnaires, and (2) the “foreign law” strategy, in which scholars mainly study foreign anti-employment discrimination practices (usually in Western countries like the United States, Canada, France, Germany, Australia, Great Britain, and Japan), including anti-discrimination legislation and enforcement through administrative agencies. By studying the foreign practice, scholars gauge where China stands relative to other countries.

Some scholars later tried to apply the foreign experience to China. Under this advanced “foreign law” strategy, scholars use the foreign anti-discrimination legislation and enforcement as a benchmark to evaluate Chinese anti-discrimination legislation and enforcement, and then suggest improvement in Chinese legislation and enforcement if it differs from the foreign practice. The following section discusses and reviews these approaches more fully.

III. REFLECTION AND DISCUSSION

As mentioned previously, legal research on employment discrimination in China is a very recent phenomenon.²¹ As we have just reviewed, Chinese scholars were initially concerned with quantifying the existence of discrimination and determining where China’s regulation of discrimination stood in comparison to that of other countries. These strategies of empirical and comparative research have been useful in advancing anti-discrimination law in China, but they are not enough.

A. “Chinese Facts” Approach to Employment Discrimination Law Research

In 2002, Professor Zhou Wei of Sichuan University School of Law represented the plaintiff in the nation’s first height-based

¹⁹ See Chen Ruihua (陈瑞华), *Lun Faxue Yanjiu Fangfa* (论法学研究方法) [Methodology of Legal Research] 2-3 (2009).

²⁰ *Id.*

²¹ See Lu, *supra* note 1, at 135.

employment discrimination lawsuit.²² In 2003, Professor Zhou Wei and the author represented the nation's first employment lawsuit against Hepatitis B-based discrimination.²³ Several other high-profile discrimination cases claiming equal employment rights emerged in the ensuing years.²⁴ After these cases, employment discrimination began to draw nationwide attention. A practical question at the time was how to research discrimination in China; to what extent did employment discrimination exist in the Chinese workplace and to what extent discrimination affects Chinese workers. Several studies of the Chinese employment discrimination situation were published.²⁵ In 2006, Professor Zhou Wei coauthored and edited *Employment Discrimination in China: Legislation and Reality*.²⁶ In 2007, Professor Cai Dingjian edited *Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies*.²⁷ Both books provided considerable insights and facts regarding the prevalence of employment discrimination in the Chinese workplace. In the first book, the authors discussed workplace discrimination based on age, physical appearance, height and disability.²⁸ Based primarily on newspaper job advertisements, the book provides employment restrictions in age, physical appearance, and height.²⁹ It further discusses employment discrimination by government employers and state-controlled enterprises.³⁰ Many charts and tables display data demonstrating the prevalence of employment discrimination in the Chinese workplace.³¹

²² *Id.* at 140 n.35.

²³ *Id.* at 140 n.36.

²⁴ *Id.* at 141 nn.37-39.

²⁵ See, e.g., Zhongguo Jiuye Qishi Xianzhuang Ji Fan Qishi Duice (中国就业歧视现状及反歧视对策) [The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies], *supra* note 1; Zhou et al., *supra* note 1; Xiao Zesheng (肖泽晟), Gongwuyuan Tijian zhong de Tige Guilei Yu Pingdeng Danren Gongzhiquan (公务员体检中的体格归类与平等担任公职权) [The Physique Classification in Check-up of Civil Servant and the Equal Right to Hold Public Office], Xingzheng Faxue Yanjiu (行政法学研究) [Admin. L. Rev.], May 15, 2005 at 32; Zhou Wei (周伟), Chengzhen Jiuye zhong de Shenchang Qishi Yanjiu (城镇就业中的身高歧视研究) [Height Discrimination in Urban Employment], Huadong Zhengfa Daxue Xuebao (华东政法大学学报) [J. E. China U. of Pol. Sci. & L.], July 20, 2008 at 13; Zhou Wei (周伟), Zhongguo Chengzhen Jiuye Zhong de Xingbie Qishi Yanjiu (中国城镇就业中的性别歧视研究) [Research on Sex Discrimination in Employment of City and Towns in China], Zhengzhi Yu Falü (政治与法律) [Pol. Sci. & L.], Apr. 5, 2008 at 27.

²⁶ Zhou et al., *supra* note 1.

²⁷ Zhongguo Jiuye Qishi Xianzhuang Ji Fan Qishi Duice (中国就业歧视现状及反歧视对策) [The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies], *supra* note 1.

²⁸ Zhou et al., *supra* note 1 at 81-149.

²⁹ *Id.* at 81-89, 108-13, 122-29.

³⁰ *Id.* at 3-80, 150-83.

³¹ *Id.* at 3-42.

Professor Cai Dingjian's book *Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies* is composed of different research reports on different kinds of discrimination in China.³² These reports cover discrimination based on gender, health, disability, registered residence, migrant worker status, age, education level, and political affiliation.³³ The book also includes a survey research report, directed by Professor Cai Dingjian, and conducted through the Institution of Constitutional Study of China University of Political Science and Law.³⁴ The survey was carried out in May 2006 and October 2006, in Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi'an, Chengdu, Zhengzhou, Yinchuan, Qingdao, and was focused on documenting the employment discrimination situation in China.³⁵ Of the 3500 questionnaires issued, 3454 valid answers were returned.³⁶ According to the report, 85.5% of people surveyed responded that they had experienced discrimination, or observed it happening to others, and 50.5% of them saw discrimination as a serious problem. Only 6.6% reported seeing no discrimination.³⁷ According to the survey, a broad range of factors were considered when employers reviewed job applicants and assessed employees. These factors include gender, age, health condition, physical appearance, height, disabilities, ethnicity, religious belief, political affiliation, registered permanent residency, and sexual orientation.³⁸ Discrimination occurs during all stages of employment, from application, to hiring, to work assignment, to compensation and benefits, to promotion and to termination of employment.³⁹ Of those surveyed, 30.8% reported experiencing discrimination in compensation and employment benefits, 22.7% in job assignment, 21.3% in promotion and 17.6% in the application process.⁴⁰ As a whole, 54.9% of the surveyed people reported having been discriminated against in their employment and 15.6% of surveyed people described the discrimination as severe.⁴¹

³² See Zhongguo Jiuye Qishi Xianzhuang Ji Fan Qishi Duice (中国就业歧视现状及反歧视对策) [The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies], *supra* note 1.

³³ *Id.* at 47-292, 329-411.

³⁴ *Id.* at 1-46.

³⁵ *Id.* at 23, 505-53.

³⁶ *Id.* at 23, 505.

³⁷ *Id.* at 23.

³⁸ *Id.* at 24, 512-518.

³⁹ *Id.* at 519.

⁴⁰ *Id.* at 23, 520.

⁴¹ *Id.*

As illustrated above, using the “Chinese facts” strategy, scholars were able to obtain considerable data regarding Chinese employment discrimination. On the one hand, understanding employment discrimination is a necessary and important part of studying the relationship between anti-discrimination and China’s legal system, since problems can be resolved only after they are properly identified. On the other hand, neither book offered explanations for the phenomenon. They demonstrated there was a huge problem, but they offered no solutions. From this perspective, the “Chinese facts” strategy is incomplete. What is needed is to determine what is behind these data and facts, and to develop a theory that explains them.

B. “Foreign Law” Approach to Employment Discrimination Law Research

The “foreign law” strategy introduces foreign legislation and practice to China.⁴² Scholars tried to understand where China’s regulation of discrimination stood in relation to that of other countries. The foreign countries from which anti-discrimination legislation and practice were introduced to China were usually Western nations where an anti-discrimination regime was believed to be well-developed. Typically, those nations included the United States, the European Unions, Canada, France, Holland, Germany, Australia, Great Britain, and Japan.⁴³ The introduction of anti-discrimination legislation and practice in India, Taiwan and Hong Kong also was also considered.⁴⁴ Many publications used the

⁴² See, e.g., Haiwai Fan Jiuye Qishi Zhidu Yu Shijian (海外反就业歧视制度与实践) [Employment Discrimination Overseas: Law and Practice] (Cai Dingjian (蔡定剑) & Zhang Qianfan (张千帆) eds., 2007); Rao Zhijing (饶志静), Yingguo Fan Jiuye Qishi Zhidu Ji Shijian Yanjiu (英国反就业歧视制度及实践研究) [British Institutions and Practice on Anti-discrimination Law in Employment], Heibe Faxue (河北法学) [Hebei L. Sci.], Nov. 5, 2008 at 61; Li Ao (李傲), Meiguo Youguan Xingbie Qishi de Panli Yanjiu (美国有关性别歧视的判例研究) [Study on Sexual Discrimination Cases in US], Faxue Pinglun (法学评论) [L. Rev.], Nov. 13, 2008 at 125; Xie Zengyi (谢增毅), Mei Ying Liangguo Jiuye Qishi Goucheng Yaojian Bijiao (美英两国就业歧视构成要件比较) [A Comparative Study of Employment Discrimination Between U.S.A. and U.K.], 20 Zhongwai Faxue (中外法学) [PEKING U. L. J.], Aug. 15, 2008 at 613; Wu Jinsong (伍劲松), Meiguo Liangxing Gongzuo Pingdeng Zhidu Yanjiu (美国两性工作平等制度研究) [A Study on America’s Gender Bias in Occupations], Faxuejia (法学家) [Jurist], June 15, 2004 at 81; Maoling (毛玲), Jianada Fan Zhichang Xing Saorao Falü Yanjiu (加拿大反职场性骚扰法律研究) [A Research on Canadian Anti-Workplace-Sexual Harassment Law], Jan. 1, 2007 at 126.

⁴³ Japan is customarily considered as a western country despite its location.

⁴⁴ See Zhou Qingfeng (周青凤), Yindu Fan Jiuye Qishi Yanjiu Baogao (印度反就业歧视研究报告) [Research on Indian Anti-discrimination in Employment Practice], in Haiwai Fan Jiuye Qishi Zhidu Yu Shijian (海外反就业歧视制度与实践) [Employment Discrimination Overseas: Law and Practice] 301, *supra* note 42 (introduction of anti-discrimination legislation and practice in India); Qing Aolei (秦奥蕾), Xianggang Fan Jiuye Qishi Yanjiu Baogao (香港反就业歧视研究报告) [Research on Anti-discrimination in Employment in Hong Kong], in Haiwai Fan Jiuye Qishi Zhidu Yu Shijian (海外反就

“foreign law” strategy. A typical example is *Employment Discrimination Overseas: Law and Practice*, published in 2007.⁴⁵ Fourteen authors discussed antidiscrimination practice in the European Union, the United States, Holland, France, Germany, Great Britain, Canada, India, Japan and Hong Kong.⁴⁶ These discussions are generally compressed, descriptive, and introductory. They list the anti-discrimination legislation, and briefly describe the laws, the regulatory framework, and the law enforcement agency. Some authors also include a brief description of the history of the anti-discrimination development in that particular foreign country.⁴⁷ For example, one chapter discusses Great Britain’s anti-discrimination practice in fourteen pages.⁴⁸ It first describes several major anti-discrimination enactments in Great Britain, including the Sex Discrimination Act of 1975, the Disability Discrimination Act of 1995, the Employment Equality (Religion or Belief) Regulation of 2003, and the Employment Equality (Sexual Orientation) Regulation of 2003.⁴⁹ In most cases, the author uses several sentences to describe each of these anti-discrimination laws. There is no reference to the full text of the legislation, either in Chinese or in its original language. The author then describes several anti-discrimination law enforcement agencies in the Great Britain, including the Equal Employment Commission, the Commission for Racial Equality, the Disability Rights Commission, and the Commission for Equality and Human Rights.⁵⁰ The descriptions of these law enforcement agencies often are compressed into half a page.⁵¹

Even though the introduction to foreign anti-discrimination practice in the book is very general, the book is a useful resource for an introduction to foreign anti-discrimination experiences. People may argue that since works produced under the “foreign law” strategy do not really touch the practical questions concerning the

业歧视制度与实践) [Employment Discrimination Overseas: Law and Practice] 396, *supra* note 42 (introduction of anti-discrimination legislation and practice in Hong Kong).

⁴⁵ Zhongguo Jiuye Qishi Xianzhuang Ji Fan Qishi Duice (中国就业歧视现状及反歧视对策) [The Employment Discrimination in China: Current Conditions and Anti-discrimination Strategies], *supra* note 1; see Haiwai Fan Jiuye Qishi Zhidu yu Shijian (海外反就业歧视制度与实践) [Employment Discrimination Overseas: Law and Practice], *supra* note 42.

⁴⁶ *Id.*

⁴⁷ Haiwai Fan Jiuye Qishi Zhidu yu Shijian (海外反就业歧视制度与实践) [Employment Discrimination Overseas: Law and Practice], *supra* note 42, at 73-124, 125-60, 213-62, 396-427.

⁴⁸ *Id.* at 192-212.

⁴⁹ *Id.* at 195-99.

⁵⁰ *Id.* at 201-06.

⁵¹ *Id.* at 192-212.

Chinese anti-discrimination issue, they do little to advance the Chinese anti-discrimination cause. However, the foreign law strategy does not purport to tackle the Chinese discrimination problem, but only to make comparisons from which other scholars using different approaches can derive ideas for China.⁵²

Some scholars have tried to fill the gap between foreign experience and Chinese reality by drawing upon foreign models and adapting them to the Chinese system. This approach can be viewed as a “foreign law to China” strategy. However, it is a more advanced version or an upgrade to the “foreign law” strategy, because it not only discusses foreign experiences but also tries to apply them to China. Under this strategy, research starts with studying the foreign experience, uses the foreign experience as a benchmark to evaluate Chinese anti-discrimination legislation and enforcement, then suggests improvements for Chinese legislation and enforcement. Works produced under this approach usually include two parts: the foreign experience and its application to China.⁵³ For example, in a typical article using the application of foreign practice to China approach, *On The Anti-Employment Discrimination Act In England and the Legislative Improvement in China*,⁵⁴ the author introduces several important anti-discrimination enactments (such as those against gender and race discrimination), important anti-discrimination concepts (such as the distinction between direct and indirect discrimination), and defenses available to the defendant in a discrimination lawsuit (such as the Bona Fide Occupational Qualification, or BFOQ defense), and procedural and remedial issues (such as the burden of proof in and remedies available to plaintiff).⁵⁵ The author then proposes China should adopt similar

⁵² Unfortunately, many authors do not have legal experience, study, or practical training in the particular country they are writing about. This may raise a concern as to the extent that these authors really understand that foreign country's anti-discrimination regime.

⁵³ See, e.g., Jinzhi Jiuye Qishi: Guoji Biaozhun He Guonei Shijian (禁止就业歧视: 国际标准和国内实践) [Employment Discrimination: International Standards and National Practice] (Li Weiwei (李薇薇) & Lisa Stern eds., 2006); Xie Zengyi (谢增毅), Yingguo Fan Jiuye Qishi Fa Yu Woguo Lifa zhi Wanshan (英国反就业歧视法与我国立法之完善) [On The Anti-Employment Discrimination Act In England And The Legislative Improvement In China], Faxue Zazhi (法学杂志) [Law. Sci. Mag.], Sept. 15, 2008, at 46; Zhang Mingfeng (张明峰), Jianada de Jiuzheng Qishi Xingdong Ji Qi Dui Woguo de Qishi (加拿大的纠正歧视行动及其对我国的启示) [Affirmative Actions in Canada and Their Implications to China], Faxue (法学) [Legal Sci. Monthly], July 10, 2006, at 103; Li Weiwei (李薇薇), Guoji Renquanfa Zhong Buqishi Yuanze de Guonei Shishi Jizhi: Jianada Yu Aodaliya Falü Moshi de Jiejian (国际人权法中不歧视原则的国内实施机制: 加拿大与澳大利亚法律模式的借鉴) [Non-discrimination Principle in International Human Rights Law and Its Application in China - The Canadian and Australian Legislation Mode as A Reference], Faxue Zazhi (法学杂志) [Law. Sci. Mag.], July 15, 2003, at 24.

⁵⁴ Xie, *supra* note 53.

⁵⁵ *Id.* at 46-48.

practices.⁵⁶ Specifically, the author proposes Chinese legislation should distinguish between direct and indirect discrimination, should provide the BFOQ defense, should adopt similar proof burden rules, and should establish similar enforcement agencies.⁵⁷

When scholars talk about application of a foreign experience to China, they rarely talk about the problems within the foreign regime. For instance, in talking about enforcement mechanisms, most scholars have proposed China create a special administrative agency resembling the Equal Employment Opportunity Commission (EEOC) in the United States.⁵⁸ But most of these propositions do not discuss the problems this administrative agency encounters when handling employment discrimination claims. Typically, the EEOC faces issues including inefficient processing, and an overwhelming caseload producing a large case backlog.⁵⁹ Also, the “foreign law to China” or the advanced “foreign law” strategy tends to pay insufficient attention to Chinese conditions that might lead to rejection of the foreign transplant. Not all foreign experiences and practices are good for China.

C. A Proposed Approach

Despite the substantial information and insights from traditional strategies of employment discrimination law, the Chinese legislature has largely if not totally, ignored proposals for reform produced by scholars using these traditional approaches.⁶⁰ This failure to act

⁵⁶ *Id.* at 48-49.

⁵⁷ *Id.* at 49.

⁵⁸ See, e.g., Zhang Weidong (张卫东), *Pingdeng Jiuye Quan Chulun* (平等就业权初论) [On Equal Right of Employment], ZHENGZHI YU FALÜ (政治与法律) [Pol. Sci. & L.], May 9, 2006, at 18-25 (proposing that China should create an equal employment opportunity commission in the labor and social security department); Zeng Xun (曾恂), *Meiguo Fan Jiuye Qishi Lifa de Qishi* (美国反就业歧视立法的启示) [Enlightenment from the United States Anti-discrimination in Employment Legislation], NANFANG JINGJI (南方经济) [S.J. ECON.], May 15, 2003, at 73 (suggesting a creation of a similar administrative agency in China as the equal employment opportunity commission in the United States).

⁵⁹ See KATHRYN MOSS ET AL., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1 (2001); also, in 2008, the backlog of unresolved cases in Equal Employment Opportunity Commission (EEOC) climbed to 73,951, up 35 percent from the previous year's total of 54,970. "Fewer than half of private sector discrimination charges filed in the last year were resolved within 180 days, a goal that is now so difficult to reach that the commission recently changed its target compliance rate from 72 percent to 48 percent due to the agency's higher workload and decreasing resources." Steve Vogel, *EEOC Struggles With Huge Workload, Diminished Staff*, WASH. POST, Feb 2, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020202452.html?wprss=rss_politics%2Ffedpage.

⁶⁰ For instance, the Employment Promotion Law of the People's Republic of China, which was enacted in response to series of high-profile employment discrimination lawsuits, does not address the issue of setting up an administrative agency in enforcing the law, while most of antidiscrimination

demonstrates that from a practical perspective, the current strategies are incomplete. The fact that they are incomplete does not mean they are wrong, but rather, there is a missing approach that would bring together the best aspects of the various traditional approaches. An improved approach to improving employment discrimination law research should start with Chinese facts, then conduct fact-based comparative studies, and finally use local resources to determine a favorable resolution. It has three parts.

The first part is that good discrimination law research in China must be grounded in Chinese facts. The starting point is the questions and problems identified by examining real life and legal practices in China. Any discussions as to how to build up a Chinese anti-employment discrimination regime without first assessing and analyzing current fact-based situations would be an exercise in futility. The Chinese facts that must be considered are the employment discrimination phenomenon and existing Chinese anti-discrimination laws. Both the extent and nature of discrimination and the existing rules are Chinese facts. Typical questions that must be researched include the prevalence of discrimination in the Chinese workplace and the nature and effectiveness of Chinese laws and enforcement mechanisms in deterring and redressing discrimination. These Chinese facts provide a concrete basis for our further research on a coherent Chinese anti-discrimination theory. Also, based on these facts problems can be identified and analyzed. Only after problems are identified is it possible to talk about what kinds of solutions are appropriate. Research under this approach fundamentally differs from the research under the “application of foreign practice to China” approach. This approach starts with the Chinese facts, while the latter starts with the foreign practice.

The second part is a fact-based comparative study. The comparative study of foreign practice must be related to the questions reflecting the Chinese facts. In other words, the foreign theories we are examining or referring to must be based on, and pertinent to, the problems we are trying to resolve in China. Presenting Chinese facts is not enough – a theory must be developed to explain and analyze them. For this component we need first to realize that, as previously emphasized, the current stage of theoretical study on anti-discrimination as a legal, social and philosophical subject remains far less sophisticated in China than in

scholars have been actively advocating the creation of such agency like EEOC in the United States. *Jiuye Cujin Fa* (就业促进法) [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG GAZ. 13 (China). See *supra* note 58.

other countries.⁶¹ There are many important issues regarding employment discrimination that need to be addressed.⁶² China needs to learn from the experiences of foreign countries, and comparative studies with other countries' anti-discrimination practices are necessary and important. The term "employment discrimination" was imported to China⁶³ and the jurisprudence of the foreign anti-discrimination legal theory will continue to play an important part in influencing Chinese anti-discrimination law.⁶⁴

Although comparative studies are imperative, they must be based on the Chinese facts and pertinent to the questions derived from the Chinese facts. To some extent, it is understandable that many people want to start with the foreign practices and then apply them directly to China. Such an approach may be an easy way to set up a Chinese anti-discrimination legal regime, but it cannot ensure that the resulting regime is appropriate and effective. Proper use of foreign legal theory has been a major subject for discussion among many Chinese scholars.⁶⁵ Most scholars tend to believe that the application of foreign theories in China must consider the Chinese context so that the necessary modifications and adjustments can be made.⁶⁶ Legal theory importation or law transplantation without considering the Chinese facts or the "Chinese characteristics"⁶⁷ may not be workable. Mechanical importation or transplantation of

⁶¹ See Lin Jia (林嘉) et al., *Laodong Jiuye Falü Wenti Yanjiu* (劳动就业法律问题研究) [Labor and Employment Legal Issues Research] 230 (2005).

⁶² These important issues, as many Chinese scholars have stated, include: defining the concept of discrimination; understanding the international standard for non-discrimination employment practices; understanding and analyzing current discriminatory employment practices in China from law, policy and sociology perspectives and to seek solutions accordingly; comparing and contrasting experiences of other countries' anti-discrimination legislations and practices and learning from them. See Jinzhi Jiuye Qishi: Guoji Biaozhun He Guonei Shijian (禁止就业歧视: 国际标准和国内实践) [Employment Discrimination: International Standards and National Practice], *supra* note 53, at 9.

⁶³ See Tong Xin (佟新) et al., *Qishi Yanjiu de Fangfalun: Diceng Laogong Qunti Dui Qishi de Renzhi* (歧视研究的方法论: 底层劳工群体对歧视的认知) [The Methodology of Discrimination Research: The Perception of Discrimination from the Grass-Roots Chinese Workers], in Jinzhi Jiuye Qishi: Guoji Biaozhun He Guonei Shijian (禁止就业歧视: 国际标准和国内实践) [Employment Discrimination: International Standards and National Practice], *supra* note 53, at 80.

⁶⁴ *Id.* An important part of constructing a Chinese anti-discrimination regime entails efforts of comparing and contrasting experiences of other countries' anti-discrimination legislations and practices and learning from them.

⁶⁵ See, e.g., Zuo, *supra* note 8 at 118-19; Chen, *supra* note 15 at 8.

⁶⁶ See, e.g., Long Zongzhi (龙宗智), *Xiangdui Heli Zhuyi* (相对合理主义) [The Relative Reasonableness] (1999); Su Li (苏力), *Fazhi Ji Qi Bentu Ziyuan* (法治及其本土资源) [Rule of Law and the Local Resources] (2d ed. 2004).

⁶⁷ The Chinese facts are also referred to by some scholars as the "Chinese characteristic", a very popular term used in describing the special situations in China, which usually means things that are "unique" to China or "distinct" from any other country. See Mo Zhang, *Choice of Law in Contracts: A Chinese Approach*, 26 NW. J. INT'L L. & BUS. 289, 302 (2006).

foreign practices in China is not a wise choice.⁶⁸ In sum, the comparative study should be a facts-based analysis that provides an explanation that accounts for Chinese facts and offers solutions to problems gleaned from analyzing such facts.

The third part of the approach involves utilizing local resources. Taking advantage of Chinese factors to resolve Chinese issues should be preferred for two reasons. First, solutions using local resources are easier for the Chinese government and people to accept. China has a unique social and cultural background. Living in a land with a history of more than five thousand years, Chinese people have cultural characteristics that are different from people in other countries. Some notions are so deeply ingrained in the Chinese consciousness that challenges to them may not be easy.⁶⁹ For instance, one unique characteristic is that in China, people generally do not prefer litigation as means of solving their problems, and traditionally lawsuits are deemed the least preferred means for resolving disputes among people.⁷⁰ The concept of “harmony” and “no suits” are generally considered the basic values of traditional Chinese legal culture.⁷¹ As Confucius said, “To handle lawsuits, I am resolved to eliminate lawsuits.”⁷² As a result of that cultural and traditional value, many people in China consider lawsuits a very unfriendly way to remedy their violated rights, especially when those violations arise in the workplace.⁷³ Second, countries with different cultural, historical and traditional backgrounds may have distinct foci and priorities in regulating employment discrimination issues. In the United States, for instance, the anti-discrimination principle is often referred to as a “general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties

⁶⁸ See, e.g., Zuo, *supra* note 8 at 118, 119-20; Chen, *supra* note 15 at 3, 8, 20.

⁶⁹ The death penalty issue is a case in point. Though China has been long under criticism from the international community for executing the largest number of people each year, it is not likely that China will abolish capital punishment in the foreseeable future. One major reason is that, “he who kills shall pay with his life”, is firmly ingrained in the traditional Chinese mindset.

⁷⁰ The cultural factors embody the cultural rationale of a society. See NIALL CROWLEY, AN AMBITION FOR EQUALITY 1-3 (2006).

⁷¹ See Zhang Wenxiang (张文香) & Saqironggui (萨其荣桂), *Chuantong Susong Guannian zhi Guaiquan*: “Wusong”, “Xisong”, “Yansong” Zhi Neizai Luoji (传统诉讼观念之怪圈——“无讼”、“息讼”、“厌讼”之内在逻辑) [*The Dilemma of Traditional Litigation Conceptions: the Intrinsic Logic among “No Suit”, “Dropping Suit” and “Disgusting Suit”*], HEBEI FAXUE (河北法学) [HEBEI L. SCI.], Mar. 2004, at 79.

⁷² See Confucius (孔子), Lunyu (论语) [The Analects] 81 (Beijing Chubanshe (北京出版社) [Beijing Publishing House] 2008).

⁷³ As noted in the previous paper that it would be not a likely scenario in China even nowadays that someone would be willing to seek an order from the court against an employer to ask to be hired. See Lu, *supra* note 1, at 189.

affected.”⁷⁴ The heart of the anti-discrimination principle is its prohibition of race-dependent decisions that disadvantage the members of minority groups.⁷⁵ While from the Chinese perspective, race and ethnic origin have not seemed to be a predominant source of social inequality and unrest.⁷⁶ Among Western nations where anti-discrimination laws are comparatively well-developed, different countries may have different foci for legislating and enforcing anti-discrimination laws. Using race as an example again, both France and the United States have enacted legislation against race-based employment discrimination. But under French law, one could be criminally liable for racist speech, while U.S. law imposes civil, rather than criminal liability, and is more tolerant of race-conscious affirmative action.⁷⁷ People have forecasted that soon, “race-conscious affirmative action in France is highly unlikely just as it is highly unlikely that Americans will ever throw a person in jail for questioning whether the Holocaust happened.”⁷⁸ The reasons for that forecast are complicated, but are deeply rooted in the two nations’ very different histories of race relations.⁷⁹

In a word, the ultimate goal of the anti-discrimination in employment research in China is to resolve the Chinese employment discrimination issues. Respecting the Chinese cultural and legal tradition and using the local resources is a preferable method for resolving problems, and will surely facilitate the establishment of rule of law in regulating employment discrimination.

IV. CONCLUSION

The different strategies reviewed in this paper have been useful in terms of advancing Chinese anti-discrimination research, but they are incomplete. The approach proposed here has three components, which can be viewed as a practical and sensible synthesis of the current approaches. This new approach also has unique

⁷⁴ See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976).

⁷⁵ *Id.* at 2.

⁷⁶ People may argue that the recent riots taking place in the Xinjiang Autonomous Region could be interpreted as a social unrest derived from ethnic minority issues in China and the inequality between the minority Uygur Chinese and the majority Han Chinese, but the Chinese government has defended its ethnic minority policies by arguing that the riots were plotted and masterminded by separatists, see *Separatist Forces Behind Xinjiang Riot*, CCTV.COM (Jul. 9, 2009), <http://www.cctv.com/program/chinatoday/20090709/109780.shtml>.

⁷⁷ See Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumption of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007).

⁷⁸ *Id.* at 296.

⁷⁹ Suk, *supra* note 77.

characteristics. It differs from the “foreign law” approach in that it starts with the Chinese facts, experience, and reality. It differs from the “Chinese facts” approach in that it not only collects facts and data, it also aims to examine this data, discover patterns, and develop theories to explain the facts using comparative analysis. This new strategy also stresses the importance of using theoretical study to resolve real issues in real life and incorporating local resources to do so. The new approach aims at abstracting facts and experiences in real life to discover patterns, developing generalized theories based on such patterns, reviewing and improving theories under critical and comparative study, and using improved theory to resolve questions by taking advantage of local resources.

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CHINA LAW UPDATE

I. LAWS AND REGULATIONS

A. Amendment to the Criminal Law (VIII) (promulgated by the Standing Comm., Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011)

The Eighth Amendment to the Criminal Law of the People's Republic of China (hereinafter referred to as the Eighth Amendment) has caused significant changes to both the general provisions and particular criminal provisions of the statute.

1. General Provisions

First, special punitive consideration is given to individuals who attain the age of 75. In accordance with the newly-added Article 17A, where an offender of an intentional crime attains the age of 75, he may be given a lighter or mitigated penalty; also, where an offender of crime of negligence attains the age of 75, he should be given a lighter or mitigated penalty.¹ The same mitigation principle is also found in the newly-added Paragraph 2 of Article 49 of the Criminal Law, which rules out the application of death penalty to persons attaining the age of 75 at the time of trial, unless such person has caused the death of another person by extremely cruel means. Furthermore, wrongdoers who attain the age of 75 — as well as those under 18 years old and pregnant individuals — should be put on probation, instead of being jailed. In fact, special consideration for elderly wrongdoers is not new to the Chinese legal system, as it coincides with the traditional Chinese virtue of respect for the elders. Examples of such provisions can be traced back to “*Zhouli*” (周礼), “*Lijing*” (礼经), “*Fajing*” (法经) and other Confucian classics.² Apart from the historical and cultural backgrounds, these modifications are also supported by the relatively weak psychological status of the elderly — aging might affect their ability of recognition and self-control.³

¹ Xing Fa Xiuzhengan (Ba) (刑法修正案(八)) [Amendment to the Criminal Law (VIII)] (promulgated by the Standing Comm., Nat'l People's Cong. Feb. 25, 2011, effective May 1, 2011) 2011 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 128 (China) [hereinafter Amendment to the Criminal Law (VIII)].

² Li Fangxiao (李芳晓), Laonianren Fanzui Congkuan Chufa de Helixing Tanxi (老年人犯罪从宽处罚的合理性探析) [Discussion on the Rationality of Soft Terms in Criminal Law for the Elderly], Zhengfa Luntan (政法论坛) [Tribune of Political Science & Law], Sept., 2011, at 143-44 (China).

³ *Id.*

Second, it amends the method of calculation of the combined punishment for more than one crime in Article 69.⁴ In the original version of Article 69 of the Criminal Law, the utmost fixed-term imprisonment was 20 years.⁵ It is more reasonable to have two ranges in deciding the final term of imprisonment of a criminal as in the amended Article 69 – if respective terms of imprisonment add up to less than 35 years, the final term of imprisonment cannot exceed 20 years; if the total amount exceeds 35 years, the final term will be no more than 25 years. This modification has been seen as a reflection of the complying with the long-standing principle of matching the severity of the criminal penalty with the crime.

Third, the amendment has actually restrained the application of probation, reduction of sentence and parole.⁶ However, it gives a wider definition and heavier punishment to recidivists.

Finally, a new sentence, “*Community Correction*” (社会矫正), is introduced into Article 85 of the Criminal Law, which is applicable to those convicts released on parole. It was first brought into the public insight via a judicial interpretation of 2003⁷ and was further developed through a judicial interpretation of 2009.⁸ Under the new regime, special organs of the state, by placing wrongdoers in the community, strive not only to correct the wrongdoers’ behaviours, but also to help them resettle into the society.⁹ As regards the implementation of the new sentence, pursuant to the revised provision, the police force is no longer in charge of the community correction. Meanwhile, no other public organ has obtained the discretion under the new provision to administer the community correction. Therefore, certain problems in the implementation of

⁴ Xing Fa (刑法) [Criminal Law] (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) 1997 STANDING COMM., NAT’L PEOPLE’S CONG. GAZ. 138 (the 1997 version) (China).

⁵ *Id.* art. 69.

⁶ See Amendment to the Criminal Law (VIII), *supra* note 1, arts. 72, 74, 78, 81.

⁷ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong’an Bu, Sifa Bu Guanyu Kaizhan Shequ Jiaozheng Shidian Gongzuo de Tongzhi (最高人民法院、最高人民检察院、公安部、司法部关于开展社区矫正试点工作的通知) [Notice of the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security and the Ministry of Justice on the Trial Implementation of Community Corrections] (promulgated by the Sup. People’s Ct., Sup. People’s Procuratorate, Ministry of Pub. Sec’y & Ministry of Justice, July 10, 2003, effective July 10, 2003) SUP. PEOPLE’S PROC. COMMUNIQUE, June, 2003, at 18-20 (China).

⁸ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong’an Bu, Sifa Bu Guanyu Zai Quanguo Shixing Shequ Jiaozheng Gongzuo de Yijian (最高人民法院、最高人民检察院、公安部、司法部关于在全国试行社区矫正工作的意见) [Opinions of the Sup. People’s Ct., the Sup. People’s Procuratorate, the Ministry of Public Sec’y and the Ministry of Justice on the Trial Implementation of Community Corrections in the Whole Country] (promulgated by Sup. People’s Ct, Sup. People’s Procuratorate, Ministry of Pub. Sec’y & Ministry of Justice, Sept. 4, 2009, effective Sept. 4, 2009) (Chinalawinfo).

⁹ *Id.*

these revisions are expected, unless such gaps are filled by future legislation. Paragraph 2 of Article 38 also restrains the activities of the offenders.¹⁰ Article 81 requires that the judge shall consider the impact of a convict's release on the community where he lives when the parole decision is made.¹¹ However, even though the code has taken steps forward, it will still be difficult for the community correction measure to become popular in China because of the long-standing belief of heavily penalizing criminals. As mentioned before, even if it were to take effect, there is no specialized organ to take charge of the community correction, which poses problems.¹²

2. Particular Criminal Provisions

To begin with, the death penalty is removed from “*offences against the order of the socialist market economy*” (破坏社会主义市场经济罪) – for instance, offences stipulated in Article 141, Article 151, Article 153, amongst other crimes stipulated in Chapter III of the Criminal Law.¹³

Next, an additional article was incorporated after Article 133 as Article 133A.¹⁴ This newly-added article was highly controversial during the drafting process. For the first time, dangerous driving is made a criminal offence. This article is aimed at curbing the ever-increasing number of traffic accidents, which endangers people's lives and thus threatens the stability of the society.

Unlike the offense of dangerous driving, the offense of intentional arrears of salaries or wages did not receive much attention. There is view that crime of intentional arrears of salaries or wages is stipulated to be in conformity with the calls from the society. However, the severity of the phenomenon that the employer often refuses to pay the wages to the workers, as pointed out by many scholars, may not be able to form solid grounds to make arrears of wages a criminal offence.¹⁵ Article 133A stipulated that the employer can be acquitted if he pays the wages in response to

¹⁰ Amendment to the Criminal Law (VIII), *supra* note 1, art. 38, § 2.

¹¹ Amendment to the Criminal Law (VIII), *supra* note 1, art. 81.

¹² Du Haomiao (杜浩渺), Cong Xingfa Xiuzhengan (Ba) Kan Woguo Shequ Jiaozheng de Fazhan (从刑法修正案(八)看我国社区矫正的发展) [Views on the Development of Community Correction in China from Amendment to the Criminal Law of the People's Republic of China (VIII)], Fazhi Yu Shehui (法制与社会) [Legal Sys. & Soc'y], Apr. 2011, at 264.

¹³ Amendment to the Criminal Law (VIII), *supra* note 1, arts. 141, 151, 153.

¹⁴ Amendment to the Criminal Law (VIII), *supra* note 1, art. 133A.

¹⁵ Zhang Yanjun (张彦君), Eyiqianxin Zui de Ruogan Falü Sikao (恶意欠薪罪的若干法律思考) [Jurisprudential Discussion on the Intentional Refusal of Payoff], Zhishi Jingji (知识经济) [Knowledge Economy], Sept. 2011, at 26.

orders of an administrative organ.¹⁶ Such timely administrative procedures make it possible for employers to transfer their money in time and thus escape from liability.¹⁷ The provision was criticized not only for its limited effectiveness in controlling the abovementioned social problem, but for its ambiguity — there are no other provisions clarifying the word “intentional”, nor is there any regulation outlinging the burden of proof.¹⁸ That aside, the reasonableness of creating the offence of arrears of wages is questionable under the modest and restraining principle of the criminal law. Whilst the social problem can well be solved by civil law and administrative orders, criminalization of the employer’s wrongdoing is unnecessary.¹⁹

B. Interpretation of the Standing Committee of the National People’s Congress on Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China

(Promulgated by the Standing Committee, National People’s Congress August 26, 2011, effective August 26, 2011)

The proposal of the Chairman’s Meeting on deliberating the Interpretation (Draft) of the Standing Committee of the National People’s Congress on Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (hereinafter referred to as “the Basic Law”) was made in response to a report submitted by the Court of Final Appeal of the Hong Kong Special Administrative Region.²⁰

In *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, the Court of Final Appeal of the Hong Kong Special Administrative Region encountered the problem of whether the state immunity rules adopted by the Central People’s Government are

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Li Ruilong (李瑞龙), Lun Eyi Qianxin Zui Cunzai de Wenti (论恶意欠薪罪存在的问题) [Discussion on the Problems of Crime of Intentional Refusal of Payoff], *Fazhi Yu Shehui* (法制与社会) [Legal Sys. & Soc’y], Aug. 2011, at 112.

²⁰ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu “Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa” Di Shisan Tiao Di Yi Kuan He Di Shijiu Tiao de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第十三条第一款和第十九条的解释) [Interpretation of the Standing Committee of the National People’s Congress on Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China] (promulgated by Standing Comm., Nat’l People’s Cong., Aug. 26, 2011, effective Aug. 26, 2011) 2011 NAT’L PEOPLE’S CONG. GAZ. 583 (China) [hereinafter Interpretation on the Basic Law].

applicable in Hong Kong.²¹ Therefore, under Paragraph 3, Article 158 of the, the Court of Final Appeal of the Hong Kong Special Administrative Region submitted a request to the Standing Committee of the National People's Congress (hereinafter referred to as "SCNPC") for interpretation of the following specific provisions of the Basic Law.²²

In accordance with Item 4, Article 67 of the Constitution of the People's Republic of China²³ and Article 158 of the Basic Law²⁴, after consulting the Hong Kong SAR Basic Law Committee of the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress thereby gave the following interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law:

1. Issue I

The first issue raised by the Court of Final Appeal of the Hong Kong SAR is that whether, under the true interpretation of paragraph 1, Article 13 of the Basic Law, the Central People's Government is entitled to decide the state immunity rules or policies of the People's Republic of China.²⁵

The SCNPC's answer to the first issue was affirmative.²⁶ Pursuant to Item 9, Article 89 of the Constitution, the State Council, as the Central People's Government, exercises the power of administering the foreign affairs of the state.²⁷ Insofar as the state immunity rules or policies fall within the scope of foreign affairs, the Central People's Government has the power to decide the state immunity rules or policies of the People's Republic of China and uniformly execute them within the territory of the People's Republic of China. Therefore, under paragraph 1, Article 13 of the Basic Law, which provides that "The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region,"²⁸ the Central People's Government has the power to administer foreign affairs relating to the Hong Kong

²¹ See generally *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, FACV Nos 5, 6 & 7 of 2010, [2011] Legal Reference System (C.F.A.) (H.K.).

²² *Id.* ¶ 407.

²³ XIANFA art. 67, § 4 (2004) (China).

²⁴ XIANGGANG JIBEN FA art. 158 (H.K.).

²⁵ *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, FACV Nos 5, 6 & 7 of 2010, [2011] Legal Reference System, ¶ 407 (C.F.A.) (H.K.).

²⁶ Interpretation on the Basic Law, *supra* note 20, at 183-84.

²⁷ XIANFA art. 89, § 9 (2004) (China).

²⁸ XIANGGANG JIBEN FA art. 13 (H.K.).

SAR, and therefore has the power to decide the state immunity rules or policies applicable in the Hong Kong SAR.

2. Issue II

The second issue was that if it is admitted that the Central People's Government has the power to decide the state immunity rules applicable for Hong Kong SAR, whether the Hong Kong SAR (including the courts thereof) — in accordance with the true interpretation of paragraph 1, Article 13 and Article 19 of the Basic Law — (i) is obliged to invoke or execute the state immunity rules or policies decided by the Central People's Government under paragraph 1, Article 13; or (ii) on the contrary, may stray from those rules or policies at its own discretion and adopt different rules instead.²⁹

In response, The SCNPC decided that the Hong Kong SAR, including the courts thereof, is obliged to apply or execute the state immunity rules or policies that the Central People's Government has decided to adopt, and may not stray from them or adopt rules different from them.³⁰ As decided in Interpretation on issue I, the Central People's Government was entitled under paragraph 1, Article 13 of the Basic Law to decide the state immunity rules or policies applicable in the Hong Kong SAR. Meanwhile, the courts of the Hong Kong SAR — according to Article 19 of the Basic Law and Interpretation on Issue III — have no jurisdiction over acts enjoying the state immunity rules or policies decided by the Central People's Government.³¹ That being said, in the trial of cases involving the jurisdictional immunity or immunity from execution of foreign countries or the property thereof, the courts of the Hong Kong SAR must apply and execute the state immunity rules or policies applicable in the Hong Kong SAR as decided by the Central People's Government.

3. Issue III

The third issue was whether deciding state immunity rules or policies by the Central People's Government is one of "acts of state such as defense or foreign affairs" as prescribed in the first sentence of Paragraph 3, Article 19 of the Basic Law.³²

²⁹ *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, FACV Nos 5, 6 & 7 of 2010, [2011] Legal Reference System, ¶ 407 (C.F.A.) (H.K.).

³⁰ Interpretation on the Basic Law, *supra* note 20, at 184.

³¹ See XIANGGANG JIBEN FA art. 19 (H.K.).

³² *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, FACV Nos 5, 6 & 7 of 2010, [2011] Legal Reference System, ¶ 407 (C.F.A.) (H.K.).

The SCNPC noted that state immunity involves the jurisdiction of the courts of a country over a foreign country and its property.³³ In the meantime, whether a foreign country and its property enjoy jurisdictional immunity in the courts of a country is directly related to the foreign relations and international rights and obligations of the country.³⁴ Therefore, deciding state immunity rules or policies is an act of state in foreign affairs.³⁵ That being said, the “acts of state such as defense and foreign affairs” as mentioned in paragraph 3, Article 19 of the Basic Law include deciding state immunity rules or policies by the Central People’s Government.³⁶

4. Issue IV

The last issue was that after the Hong Kong SAR was founded, as that impacted by Paragraph 1, Article 13, Article 19 and Hong Kong’s status as a special administrative region of the People’s Republic of China, that whether Hong Kong’s original common law concerning state immunity (before July 1, 1997) (if contravening the state immunity rules or policies decided by the Central People’s Government under paragraph 1, Article 13) must be subject to necessary modifications, adaptations, restrictions or exceptions in the course of application according to Articles 8 and 160 of the Basic Law and the Decision of the Standing Committee of the National People’s Congress made under Article 160 on February 23, 1997, to be consistent with the state immunity rules or policies decided by the Central People’s Government.³⁷

The SCNPC’s answer to the last issue was, again, affirmative.³⁸ As Articles 8 and 160 of the Basic Law set out, the original laws of Hong Kong may be maintained only if they do not contravene the Basic Law, whilst the original Hong Kong laws adopted as laws of the Hong Kong SAR shall — pursuant to Article 4 of the Decision of the Standing Committee of the National People’s Congress on Handling the Original Laws of Hong Kong under Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, from July 1, 1997 — be subject to necessary modifications, adaptations, restrictions or exceptions in the course of application to be consistent

³³ Interpretation on the Basic Law, *supra* note 20, at 184.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, FACV Nos 5, 6 & 7 of 2010, [2011] Legal Reference System, ¶ 407 (C.F.A.) (H.K.).

³⁸ Interpretation on the Basic Law, *supra* note 20, at 184.

with Hong Kong's status after the People's Republic of China resumes its sovereignty over Hong Kong and the relevant provisions of the Basic Law.³⁹ In the meantime, as an administrative region with a high degree of autonomy, the Hong Kong SAR falls within the jurisdiction of the Central People's Government and is thereby bound to execute the state immunity rules or policies decided by the Central People's Government.⁴⁰ That being said, state immunity rules in the original Hong Kong laws can continue to be applicable after July 1, 1997 only if they are consistent with the above provisions.⁴¹ Therefore, the state immunity rules in the original Hong Kong laws adopted as laws of the Hong Kong SAR under the Decision of the Standing Committee of the National People's Congress on Handling the Original Laws of Hong Kong under Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China shall, from July 1, 1997, be subject to necessary modifications, adaptations, restrictions or exceptions in the course of application to be consistent with the state immunity rules or policies that the Central People's Government has decided to adopt.⁴²

C.Amendment to the Law on Individual Income Tax (promulgated by the Standing Committee, National People's Congress, June 30, 2011. effective September 1, 2011)

The Law of the People's Republic of China on Individual Income Tax is amended for the sixth time in accordance with the Decision of the 21st Session of the Standing Committee of the Eleventh National People's Congress on Amending the Law of the People's Republic of China on Individual Income Tax on June 30, 2011 (hereinafter referred as "the 2011 Amendment").

1. Background and Importance of the 2011 Amendment

The Individual Income Tax Law has played an active and important role in adjusting income distribution and generating revenue ever since its adoption in 1980. In recent years, as the society and economy develops, the current system of individual income tax has been exposed to some shortcomings. For instance, adopting a scheduler system of taxation with complex rate structures and excessive tax levels has been criticized for going against the principle of fair burdens. Another problem of the current system is the rate structure of the income and wages. This amendment targets

³⁹ See XIANGGANG JIBEN FA arts. 8, 16 (H.K.).

⁴⁰ Interpretation on the Basic Law, *supra* note 20, at 184.

⁴¹ *Id.*

⁴² *Id.*

at strengthening the function of individual income tax on income distribution, and lowering the middle and low income people's tax burdens. It also aims to narrow the gap of income distribution by properly strengthening the tax adjustment to the high income people.

2. Major modifications of the 2011 Amendment

There are three main components to the Amendment.

First, the 2011 Amendment raises the Initial Deduction from 2000 to 3500 yuan. The tax law established that for income from wages and salaries, the amount of taxable income shall be the monthly income minus the Initial Deduction, assuring that the basic living expenses are not subject to taxation. In accordance with this principle, when there are big fluctuations in a resident's living expenses necessary for basic maintenance, the amount of money to be subtracted from income when calculating the taxable income should be modified accordingly. In order to decrease the tax burden for the middle and low income, as well as to cushion the impact of rising inflation, the 2011 Amendment raised the Initial Deduction from 2000 yuan to 3500 yuan per month. Paragraph 1 of Article 6 of the Amendment provides that "[f]or income from wages and salaries, the amount of taxable income shall be the monthly income minus 3,500 yuan."⁴³ As for how the authorities decided on the 3500 yuan figure, the number is based on Per Capita Consumptive Expenditure of Urban Residents issued by the National Bureau of Statistics. It is estimated that the per capita consumption expenditure burdened by urban employment grows approximately 10 percent each year. In 2011, the per capita consumption expenditure burdened by urban employment turns out to be 2384 yuan per month. By raising the threshold amount of money deducted from one's income, the 2011 Amendment is supposed to decrease the tax burden borne by taxpayers, decreasing the number of taxpayers from 84 million to 24 million⁴⁴.

⁴³ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai "Zhonghua Renmin Gongheguo Geren Suode Shui Fa" de Jueding (全国人民代表大会常务委员会关于修改《中华人民共和国个人所得税法》的决定) [Decision of the Standing Comm. Nat'l People's Cong. on Amendment to Individual Income Tax Law of the People's Republic of China] (promulgated by Standing Comm., Nat'l People's Cong., June 30, 2011, effective Sept. 1, 2011) 2011 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 460 (China) [hereinafter 2011 Amendment].

⁴⁴ Geshui Qizheng Dian Ti Zhi Sanqianwu, Zhong Di Shouru Zhe Shui Fu Jianqing (个税起征点提至三千五, 中低收入者税负减轻) [The Initial Deduction Raised to 3,500 RMB, the Tax Burden of the Low and Middle-Income People was lessened], <http://www.chinatax.gov.cn/n8136506/n8136593/n8137537/n8138532/11592712.html> (last visited on Oct. 25, 2011).

Second, it applies a unified standard for the Initial Deduction applicable to the income from wages and salaries. The reasons for the application of the unified standard are three-fold. To begin with, China is a country with a uniform legal system, and the system of taxation constitutes an important part of the legal system. Therefore, we should adopt and implement a unified tax policy nationwide. In addition, the population mobility is relatively high under the condition of market economy in China nowadays. That is, for many people, their domicile and their place of work may not be in the same place. The different taxation standards are very likely to result in the irregular transfer of tax sources, which definitely would create difficulties for the administration of tax collection as well as set obstacles to the flow of personnel. Finally, in a global perspective, the international practice is to have a unified standard for the Initial Deduction applicable to the income from wages and salaries nationwide.

Third, it modifies the structure of the individual income tax rate. This amendment modified and optimized the current structure of the individual income tax rate from nine grades to seven grades (See the schedule of tax rates attached hereto). It is well established that tax on an individual's income is progressive. Before the 2011 Amendment, for incomes from wages and salaries, the progressive tax rate in excess of a specific amount was applicable and the rate ranges from five to forty-five per cent. However, the 2011 Amendment changed the progressive tax rates ranging from three to forty-five per cent, lowering the lowest grade (See the schedule of tax rates attached hereto). Moreover, the new Schedule removed two grades, namely fifteen and forty per cents. Another change is that the application of the first tax rate grade for monthly taxable income was broadened to 1500 yuan. Similarly, the application of the second tax rate grade was broadened to 4500 yuan, thus better serving the purpose of easing the taxation burden of the middle of low income taxpayers. Meanwhile, the 2011 Amendment also expanded the coverage of a forty-five per cent tax rate, the highest tax rates grade, including the monthly taxable income ranging from 80,000 yuan to 100,000 yuan originally subject to a forty per cent rate.

In sum, the pivotal point of the 2011 Amendment is that the Initial Deduction and the rate structure are modified, in accordance with the new situation of the taxpayers' income affected by the recent economic development and the rising prices. In light of these modifications, the low-income are expected to enjoy more benefits brought by tax breaks whilst the high-income taxpayers may bear greater yet reasonable burden, which enable the Individual Income Tax Law fully play its role in adjusting income distribution.

Schedule: Individual Income Tax Rates (Applicable to income from wages and salaries) shall be amended as follows:⁴⁵

Grade	Monthly Taxable Income	Tax Rate (%)
1	1,500 yuan or less	3%
2	Over 1,500 yuan to 4,500 yuan	10%
3	Over 4,500 yuan to 9,000 yuan	20%
4	Over 9,000 yuan to 35,000 yuan	25%
5	Over 35,000 yuan to 55,000 yuan	30%
6	Over 55,000 yuan to 80,000 yuan	35%
7	Over 80,000 yuan	45%

Before the 2011 Amendment:⁴⁶

Grade	Monthly Taxable Income	Tax Rate (%)
1	500 yuan or less	5%
2	500 to 2,000 yuan	10%
3	2,000 to 5,000 yuan	15%
4	5,000 to 20,000 yuan	20%
5	20,000 to 40,000 yuan	25%
6	40,000 to 60,000 yuan	30%
7	60,000 to 80,000 yuan	35%
8	80,000 to 100,000 yuan	40%
9	All income above 100,000 yuan	45%

*D.Amendment to the Emergency Plan for Food Safety Accidents
(promulgated by the State Council, October 5, 2011, effective
October 5, 2011)*

After the outbreak of the China's melamine-tainted dairy products scandal, which caused tens of thousands of babies to be sick and in danger of death, the Central Government of the People's Republic of China brought into effect the revised Emergency Plan for Food

⁴⁵ 2011 Amendment, *supra* note 43.

⁴⁶ Geren Suode Shui Fa (个人所得税法) [Law on Individual Income Tax] (promulgated by Standing Comm., Nat'l People's Cong., Dec. 29, 2007, effective Dec. 29, 2007) 2008 Standing Comm., Nat'l People's Cong. Gaz. 86 (China).

Safety Accidents (hereinafter referred to as “the Emergency Plan”)⁴⁷ on October 5, 2011, so as to fill the legislative gap. The original version of the Emergency Plan, which was promulgated in February, 2006, had been in effect for 5 years.

Comparing the two versions of the plan, the newly-published Emergency Plan for Food Safety Accidents has made progress by applying *mutatis mutandis* in several detailed aspects as follows.

The amendment classified the sources of accident information into six categories and made specific regulations for each category.⁴⁸ For instance, for those food producers and sellers that are likely to cause or result in acute health damage, once discovering or getting to know about certain food safety accidents, they must inform the local public health administrative department and relevant regulatory departments within 2 hours.⁴⁹ Another example is the reporting mechanism. Any technical institute, social organization or individual concerned with food safety should report the any accidents to the public health authorities and regulatory authorities at the county-level.⁵⁰

As to the classification of food safety accidents, according to Paragraph 1 of Article 5.1, there are four categories.⁵¹ Accidents of an extremely serious nature are described as the first class; correspondingly, response has to be made by the local government of the place where the accident occurred.⁵² Article 5.2 of the Emergency Plan also includes provisions about accident report, evaluation, measures for accident prevention, first aid and handling and so on. Article 5.3 is mainly about the post-accident measures to take, investigation, analysis and evaluation of the accidents after its occurrence. And in Article 5.4, some adjustments in the classification of the accident’s seriousness are allowed in accordance with the means mentioned in the preceding sections.

Accidents taking place in schools are underlined in the new regulation so that the emergency level of this kind of accidents will be elevated according to Paragraph 2 of Article 5.4.1. Enforcement is also to be strengthened so as to ensure effective and efficient control over contingency accidents.⁵³

⁴⁷ Guojia Shipin Anquan Shigu Yingji Yu'an (国家食品安全事故应急预案) [Contingency Plan for Food Safety Accidents] (promulgated by the St. Council, Oct. 5, 2011, effective Oct. 5, 2011) ST. COUNCIL GAZ., Oct. 30, 2011, at 36.

⁴⁸ *Id.* art. 4.2.1.

⁴⁹ *Id.* art. 4.2.2, para. 1.

⁵⁰ *Id.* art. 4.2.2 (5).

⁵¹ *Id.* art. 5.1, para. 1.

⁵² *Id.* art. 5.1.

⁵³ *Id.* art. 5.4.1, para. 1.

These supervisory and precautionary measures included in the Contingency Plan for Food Safety Accidents are as follows: insurance of information security, health-care insurance, human resources and technical support, material and financial support and social mobilization system. The Health Department, together with the regulatory or administrative departments of the State Council of the People's Republic of China, has established a nation-wide uniform information security network system on food safety affairs. The network system covers the monitoring of food safety, accident notification, alertness to hidden accidents, etc.

E. Administrative Coercion Law (promulgated by the Standing Committee, National People's Congress, June 30, 2011, effective January 1, 2012)

The establishment of the Administrative Coercion Law of the People's Republic of China⁵⁴ (hereinafter referred to as "the Administrative Coercion Law") has been put on schedule since 1999, and was finally completed after five amendments on June 30, 2011. The Administrative Coercion Law aims to restrain the administrative power and provide principles of implementation, especially the implementation of proportion principle and conformity of legitimate procedure.

1. Preservation of Legislative Power

The Administrative Coercion Law limits the legislative power to the extent allowed by constitutional law,⁵⁵ where there are clear-cut provisions on the exclusive legislative power on certain restrictive items like people's basic rights,⁵⁶ including one providing that an administrative organ is not allowed to exercise this privilege.

Also, for the first time, this law has a direct provision which requires that any mandatory measures cannot be executed unless certain grounds are satisfied, those of which, within the scope of the duties and powers of the State Council of the People's Republic of China, can selectively be made into administrative regulations. In addition, for those matters that are not included in any laws or administrative regulations mentioned above, and are local affairs, they can be set by local regulation. Any other matters beyond the

⁵⁴ Xingzheng Qiangzhi Fa (行政强制法) [Administrative Coercion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 2011, effective Jan. 1, 2012) 2011 STANDING COMM., NAT'L PEOPLE'S CONG. Gaz. 469 (China).

⁵⁵ *Id.* art. 10.

⁵⁶ XIANFA arts. 37-40 (2004) (China).

rules or regulations hereinafter can not set administrative coercive measures.

2. Implementation of Proportion Principle

The implementation of the Proportion Principle to the Administrative Coercion Law is a method of protecting human rights and requiring the administrative organs to minimize the harm inflicted on the individual when there is a conflict between public and individual interest. Fortunately, the implementation of the proportion principle works well in maintaining equilibrium between the two sides and in fighting administrative organs and their abuse of power. The importance of this principle lies in the clarification of the duties in administrative organs' carrying out their tasks. For instance, it is stipulated in Article 5 that if the purposes of the administration may be achieved by non-coercive means, no administrative coercion shall be set or implemented.⁵⁷ This provision shows that legislators are trying to lower the level of restriction set on a person, property and other lawful rights and interests. Moreover, it is stipulated that administrative organs shall not conduct administrative enforcement at night or on a statutory public holiday, except for emergency. Administrative organs shall not force the parties concerned to perform the relevant administrative decisions by such means as cutting off the supply of water, electricity, heating or gas of the residents,⁵⁸ so no cost should be paid by the administrative relative to achieve the objectives of administration and management.

3. Conformity of Legitimate Procedure

Conformity of legitimate procedure has become the common and sharing values that any country ruling by law cherishes and pursues. In the traditional judicial culture of the People's Republic of China, it has long been the fact that the substantive law has been attached more importance to than legal procedure, while the design and observance of the legal procedure has been received little attention. Nevertheless, such drawbacks in the administrative legal system have already been discovered. Among all the measures or tools designed to achieve the objective of perfection of the current legal system, due process has certain unique values in itself. Judicial fair is of the same significance as the facts, which means we should put equal emphasis on it. This conception has been built into the newly-established Administrative Coercion

⁵⁷ *Id.* art. 5.

⁵⁸ *Id.* art. 43.

Law. For instance, in implementing a specific administrative coercive measure, an administrative organ shall comply with the Article 18 that the party concerned shall be notified on the spot of the reasons and basis for taking the administrative coercive measure and the rights of and remedies available to the party concerned according to law, that the statements and arguments of the party concerned shall be heard during the implementation as well. Article 36 which entitles the party concerned the right to make statements and arguments after receiving a letter of prompting while the administrative organ shall fully hear the opinions of the party, and record and review the facts, reasons and evidence provided.

It is fair to say that the Administrative Coercion Law has made magnificent contributions to administrative legal system, but some problems such as the systematic disorders still remain in some areas in practice. According to Yuan Shuhong, some provisions in the Administrative Coercion Law are not yet clearly stipulated.⁵⁹ In reality, the missing message of such provisions is often specified or supplemented by administrative regulations, local administrative ordinances or government documents, etc., resulting in buck passing or competing for powers. Therefore, the effect of power restriction to the government that the Administrative Coercion Law of the People's Republic of China supposed to achieve will in this way be greatly reduced.

II. JUDICIAL INTERPRETATION

A. *Provisions (I) of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law (promulgated by the Supreme People's Court, August 29, 2011, effective September 26, 2011)*

The Law on Enterprise Bankruptcy has been effective since August 27, 2006.⁶⁰ However, it did not fully play its role in the

⁵⁹ Yuan Shuhong (袁曙宏), *Woguo Xingzheng Qiangzhi Fa de Falü Diwei, Jiazhi Quxiang He Zhidu Luoji* (我国《行政强制法》的法律地位、价值取向和制度逻辑) [Legal Status, Values and Institutional Logic of Administrative Coercion Law], Guowuyuan Fazhi Bangongshi (国务院法制办公室) [Legislative Affairs Office of the St. Council], <http://www.chinalaw.gov.cn/article/jgzn/bld/ysh/xgwz/201108/20110800347736.shtml> (last visited Jan. 31, 2012).

⁶⁰ *Zuigao Renmin Fayue Guanyu Shiyong "Zhonghua Renmin Gongheguo Qiye Pochan Fa" Ruogan Wenti De Guiding (Yi)* (最高人民法院关于适用《中华人民共和国企业破产法》若干问题的规定(一)) [Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China] (promulgated by the Supreme People's Court on Aug. 29, 2011, effective on Sept. 26, 2011) (Chinalawinfo) [hereinafter Provision (I)].

market economy because some judges did not realize its importance in practice.⁶¹ Therefore, it was necessary to promulgate a legal document to instruct judges how to deal with bankruptcy lawsuits. The first judicial interpretation to the Enterprise Bankruptcy Law of People's Republic of China⁶², the Provisions (I) of the Supreme People's Court on several Issues Concerning the Application of the Enterprise (hereinafter referred to as "Provisions (I)") was promulgated under this backdrop.

Article 4 of the Provisions (I) set out three conditions where a debtor is determined to be "apparently insolvent" even when the ledger assets of the debtor are sufficient for its debts – namely, (1) severe lack of funds or bad liquidity of the debtor's assets, (2) the debtor's inability to make full payment to an overdue balance, as well as a lack of legal representation and no other person in charge of the asset, and (3) the debtor's inability to repay his debt due to its assets having been compulsorily enforced by the court.⁶³ The evaluations of the above conditions should, in accordance with Article 3, be based on the financial report of the debtor such as the balance sheet, auditing report or assessment of assets, unless there is any sufficient evidence to negate the financial report.⁶⁴

Benefits of the new regime are three-fold. First, the Supreme People's Court's effort to clarify the term "apparently insolvent" is likely to mitigate the difficulties in proving a cause for bankruptcy, deterring the court from using "standards of bankruptcy filing not satisfied" as an excuse to reject bankruptcy filing cases when the applicant can prove one the conditions stipulated in Article 4 of the Provision (I). In addition, insofar as the courts' discretion in determining insolvency and presence of cause of bankruptcy is now subject to limits, the courts are restrained from rejecting bankruptcy filings at its own will. That said, the number of accepted bankruptcy filing is going to rise from 2,000 to 100,000 per year.⁶⁵ Lastly, the added condition for determining insolvency — wherein the legal

⁶¹ Zuigao Renmin Fayuan Min Er Ting Fuzeren Jiu "Pochan Fa Sifa Jieshi (Yi)" Da Jizhe Wen (最高人民法院民二庭负责人就《破产法司法解释（一）》答记者问) [Answers to Reporters' Questions on "Provisions (I) of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the PRC" Given by Spokesman from Supreme People's Court], Zuigao Renmin Fayuan Wangzhan (最高人民法院) [Supreme People's Court], http://www.court.gov.cn/xwzx/yw/201109/t20110926_165682.htm (last visited on Jan. 29, 2012) (China).

⁶² *Id.*

⁶³ Provisoin (I), *supra* note 60, art. 4.

⁶⁴ *Id.* art. 3.

⁶⁵ Xu Hao (许浩), Qiye Pochan Fa Shouge Sifa Jieshi Chutai (企业破产法首个司法解释出台) [The First Judicial Interpretation to the Enterprise Bankruptcy Law of People's Republic of China is Promulgated], China Management Newspaper, Oct. 15, 2011, <http://finance.sina.com.cn/roll/20111015/005810626387.shtml>.

representative of a debtor is not known — not only provides better protection for the creditor but also responds to the current social backdrop of many owners of middle-sized and small-sized businesses running away with money, leaving their balances undue.

The Provisions (I) also includes three other measures which remarkably facilitate the creditors' bankruptcy filing processes. First, Article 6 requires the debtor — but not the creditor — to provide documents concerning its financial conditions in courts. Second, under the regime of the Provision (I), litigation expenses are allotted from the debtor's property. That said, a creditor who is unable to pay the litigation expenses is no longer denied justice.⁶⁶ Third, in the event that a court refuses to accept a bankruptcy filing, the creditor can, in accordance with Article 9,⁶⁷ seek remedy through bringing an action in a court at higher levels.

It is anticipated that these measures in the Provisions (I) will pave way for an improved implementation of the Bankruptcy Law.

III. CASES

A. *Kingsoft Corporation Limited v. Zhou Hongyi (Beijing First Intermediate People's Court)*⁶⁸

On three consecutive days after May 25, 2010, Zhou Hongyi, the appellant (defendant of the first instance court), posted on his microblog the inside stories of Kingsoft Corporation Limited (hereinafter referred to as Kingsoft), the respondent (plaintiff of the first instance court). These stories included Kingsoft's subtle efforts to squeeze out its competitors. Insofar as Zhou Hongyi was the Chairman of the board of directors of the Qihoo 360 Technology Corporation Limited, another leading internet company in China, his posts attracted public attention and caused Kingsoft's share price to plunge a near twelve percent. Kingsoft thereby filed an action against Zhou Hongyi, seeking removal of the posts and a public apology. Kingsoft also claimed for damages of RMB 12,000,000 for the injuries caused by Zhou's speeches.

The main issue of the case, as the Court found, was that whether Zhou Hongyi's speeches on his microblog had constituted any

⁶⁶ Provision (I), *supra* note 60, art. 6.

⁶⁷ *Id.* art. 9.

⁶⁸ Beijing Jinshan Anquan Ruanjian Youxian Gongsi Yu Zhou Hongyi (北京金山安全软件有限公司与周鸿祎) [Kingsoft Corporation Limited v. Zhou Hongyi] (Beijing 1st Interm. People's Ct. Aug. 25, 2011) (Lawyee) (China).

infringement of Kingsoft's right of reputation. Kingsoft claimed that Zhou's speeches were mainly based on his subjective assumptions and impressions, void of any factual proofs. Zhou's microblog posts contained many insulting words which had damaging impacts on Kingsoft's reputation. However, Zhou Hongyi defended that he had no intention to insult or defame Kingsoft by posting messages on his microblog which revealed no truths. Besides, Zhou argued that such microblog posts were lawful means of exercising his freedom of speech and his rights to supervise.

Beijing First Intermediate People's Court held for Kingsoft. The Court noted that notwithstanding the law's protection of freedom of speech, that exercise of freedom should also be subject to reasonable limits, or else others' rights and interests will be jeopardized. Therefore, insofar as microblogs' audience was indefinitely wide, the microblog users' freedom of speech and the others' rights of reputation should be balanced. The specific content of the microblog and their potential consequences, as well as the identity of the microblog user, were important factors that should be taken into consideration.

The Court held that the limits imposed on one's freedom of speech vary according to the identity of the speech maker. In the instant case, insofar as Zhou Hongyi was the president of Kingsoft's major competitor, he was bound to avoid expressing personal dislikes towards his rivals in public. Zhou's abuse of freedom of speech was very likely to undermine Kingsoft's reputation.

On the other hand, since posts on microblogs are, in comparison to speeches in other occasions, more casual and subjective, the law allows a higher degree of freedom on this platform. Therefore, only two of Zhou's microblog posts – those containing direct and apparent insults against Kingsoft – were held to infringe Kingsoft's right of reputation.

Zhou Hongyi was ordered to delete these two pieces of microblog posts and to make a public apology. Zhou was also ordered to pay Kingsoft RMB 50,000 for its economic losses including notary expenses.

"This judgment has drawn the boundary of freedom of speeches enjoyed by microblog user. Nevertheless, we should impose much heavier penalties on those who infringe others' rights of reputation by posting false or fabricated messages on their microblogs, or else new media such as blogs and microblogs may become the rival companies' subtle tool for creating unfair competition. Moreover, apart from the microblog users, those network service providers should also be jointly and separately liable for their failure to take necessary measures in reasonable time to stop the infringement of

rights in accordance with Article 36 of the Tort Law,”⁶⁹ Zhu Yongping, a famous lawyer from DaTong Law Firm commented.⁷⁰

*B. Guizhou Sheng Anshun Shi Wenhua He Tiyuju Yu Zhang Yimou, Zhnag Weiping, Beijing Xin Humian YingyeYouxian Gongsi (Beijing First Intermediate Court)*⁷¹

One week after the Law on Intangible Cultural Heritage⁷² became effective, it was first applied in the Xicheng District People's Court of Beijing. As the People's Court of Xicheng District, Beijing ruled in the trial against the plaintiff, Ministry of Culture of Anshun, the plaintiff appealed to the Beijing First Intermediate People's Court. Involved in this case was Zhang Yimou's film, *Riding Alone for thousands of Miles* (千里走单骑), which was shot in Lijiang, Yunnan Province, and was characterized by its extensive use of the so-called *Yunnan Mask Drama* (云南面具戏) elements.

The plaintiff, Ministry of Culture of Anshun, claimed that the so-called Yunnan Mask Drama elements in Zhang's film were in fact the *Anshun Play* (安顺地戏), which was enlisted as a National Intangible Cultural Heritage. That being said, the defendant's erroneously indicating the *Anshun Play* as the *Yunnan Mask Drama* infringed the right of authorship of the *Anshun Play*. Therefore, the plaintiff, in accordance with Article 7 of the Law on Intangible Cultural Heritage, launched a lawsuit against Zhang Yimou, Zhang Weiping, and the Beijing Xin Huamian Pictures Ltd.

The defendants denied all the plaintiff's allegations. First, the defendants maintained that insofar as their movie was a fictional story – not a documentary either about the *Anshun Play* or the *Yunnan Mask Drama* – the defendants had no legal obligation to reflect the true identity of the *Anshun Play*. In addition, the defendants also argued that the plaintiff had no copyrights regarding

⁶⁹ Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010), 2010 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 4, art. 36 (China).

⁷⁰ Zhao Yang (赵杨), Weibo Diyi An Zhou Hongyi Panpei Bawan Yuan (微博第一案周泓祎判赔八万元) [Judgment on the first Microblog Infringement Case: Zhou Hongyi needs to pay a compensation of RMB 80,000], Nanfang Ribao (南方日报) [South Daily], Mar 28, 2011, at A08, available at http://epaper.nfdaily.cn/html/2011-03/28/content_6941834.htm. (China).

⁷¹ Guizhou Sheng Anshun Shi Wenhua He Tiyuju Yu Zhang Yimou, Zhnag Weiping, Beijing Xin Humian YingyeYouxian Gongsi (贵州省安顺市文化和体育局与张艺谋、张伟平、北京新画面影业有限公司) [Culture and Sports Bureau of Anshun, Guizhou Province v. Zhang Yimou, Zhang Weiping & Beijing Xin Huamian Pictures Ltd.] (Beijing 1st Interm. People's Ct. Sept. 14, 2011) (Lawyer) (China).

⁷² Fei Wuzhi Wenhua Yichan Fa (非物质文化遗产法) [Intangible Cultural Heritage Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective Jun. 1, 2011) 2011 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 145 (China).

the *Anshun Play* when Zhang's film was shot and released because the *Anshun Play* was not listed as an "intangible cultural heritage" until May of 2006, preceding the release of Zhang's film.

According to the history recorded, the *Anshun Play* is a work of folk literature and art inherited from and modified by local people in Anshun, Guizhou Province. As a national non-material cultural heritage, it should be protected and preserved by law, and any kind of infringement, destruction, distortion or derogation should be prohibited.⁷³ Zhang Yimou's film, *Riding Alone for thousands of Miles* (千里走单骑), only uses the *Anshun Play* in the introduction, which means it does not constitute the essence of the whole film. On the other hand, in Zhang's film, some adjustments were made to the instruments and stage arrangements of the performance, rendering it different in both style and pattern from the *Anshun Play*. That is to say, the shooting method met the requirements for film creation.

The Court held that the film in dispute did not infringe the the *Anshun Play* copyright, either intentionally or negligently. That is, Zhang's film did not cause unlawful distortion or defamation to the *Anshun Play*, nor did it mislead its audience. Therefore, the Court dismissed the appeal of the Ministry of Culture of Anshun.

The main issue of this case was whether the Copyright Law can even be applied. Pursuant to Article 44 of the Law on Intangible Cultural Heritage, where intellectual property rights are involved in the intangible Cultural Heritage usage, the provisions of the relevant laws and administrative regulations shall apply. Therefore, the Court held that the Law on Intangible Cultural Heritage is independent from the Copyright Law — the former targets providing administrative protection for copyright holders, whilst the latter belongs to the civil law category. That said, the right of authorship on an intangible cultural heritage is not to be protected by the Copyright Law unless it satisfies the criteria set forth in Article 10 of the Copyright Law. However, the *Anshun Play*, as a performance genre, did not constitute a "work" under the Copyright Law. Therefore, the *Anshun Play* was not a subject of right of authorship, rendering the Copyright Law inapplicable.

In addition, the Court also held that even if the *Anshun Play* was a subject of copyright, copyright users were only bound to indicate the name of the author, but not the name of the work. Therefore, the defendants' erroneously indicating the *Anshun Play* as the *Yunnan Mask Drama* did not constitute any infringement of the the *Anshun Play* copyright.

⁷³ *Id.* art. 5.

IV. ACADEMIC DEVELOPMENTS

A. *Five scholars suggested the abolishment of Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers*⁷⁴

Five scholars⁷⁵ of China Insurance Law Institution appealed directly to the Legislative Affairs Office of the State Council, suggesting the abolishment of Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers (hereinafter “Ordinance”).

1. Inconsistence with the Insurance Law⁷⁶

The main argument for the abolishment is that the Ordinance, which was adopted in 1951 and still effective, is inconsistent with Insurance Law of the People’s Republic of China (hereinafter “Insurance Law”)⁷⁷. The Ordinance fails to provide protection of the legitimate right and interests of passengers injured in railroad accidents. Article 1 of the Ordinance sets out that “all railway passengers should buy the accidental injury insurance.”⁷⁸ However, paragraph 2 of Article 11 of the Insurance Law stipulates that “[a]n insurance contract shall be concluded out of free will, unless the insurance is mandated by a law or administrative regulation.”⁷⁹ No provisions in the Insurance Law or in other laws or administrative regulations mandate the accidental injury insurance as a compulsory insurance. Since the Ordinance is neither a law nor an administrative regulation, the article mandatorily requiring railway passengers to buy the accidental injury insurance is obviously in

⁷⁴ Tielu Lüke Yiwai Shanghai Qiangzhi Baoxian Tiaoli (铁路旅客意外伤害强制保险条例) [Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers] (promulgated by the Fin. & Econ. Comm’n of the Gov’t Admin. Council, Apr. 24, 1951, effective June 24, 1951) (Chinalawinfo) [hereinafter Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers].

⁷⁵ The five scholars are Shi Tiantao (施天涛) of Tsinghua University, Yin Tian (尹田) of Peking University, Jia linqing (贾林清) of Renmin University, Ren Zili (任自力) of Beijing University of Aeronautics and Astronautics, Chen Xin (陈欣) of University of International Business and Economics.

⁷⁶ Wu Xuezhe Lianming Shangshu Jianyi Feizhi Tielu Lüke Qiangzhi Baoxian Tiaoli (五学者联名上书, 建议废止《铁路旅客强制保险条例》) [Five Scholars Suggested the Abolishment of Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers], Zhengyi Wang (正义网) [JCRB], http://news.jcrb.com/jxsw/201107/t20110729_582681.html (last visited Jan. 25, 2012).

⁷⁷ Baoxian Fa (保险法) [Insurance Law] (promulgated by the Standing Comm., Nat’l People’s Cong., June 30, 1995, effective Oct. 1, 1995) 2009 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 197 (promulgated by the Standing Comm., Nat’l People’s Cong., Feb. 28, 2009, effective Oct. 1, 2009) (China) [hereinafter Insurance Law].

⁷⁸ See Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers, *supra* note 74, art. 1.

⁷⁹ See Insurance Law, *supra* note 77, art. 11.

conflict with the Insurance Law, therefore the Ordinance should be considered null and void.

In addition, the five professors hold that Article 136 of the Insurance Law stipulates that “the insurance clauses and premium rates for insurance products which concern public interests, compulsory insurance products and newly developed life insurance products shall be subject to the approval of the insurance regulatory body under the State Council.”⁸⁰ In the context of the Ordinance, the accidental injury insurance is a compulsory insurance. Therefore, pursuant to Article 136 of the Insurance Law, the insurance clauses and premium rates for the accidental injury insurance shall be subject to the approval of the insurance regulatory body under the State Council, namely China Insurance Regulatory Commission. However, the problem is that the railway authorities have not get the approval yet.

2. The compensation standard of the railway compulsory insurance remained unchanged for 19 years

Article 5 of the Ordinance of Compulsory Insurance for Railway passengers stipulates that all railway passengers, no matter which kind of seats, full tickets, half tickets, or free tickets, shall buy an insurance with insured amount of 20,000 yuan. The insurance premium, in an amount of 2% of the tickets, is included in the train tickets.⁸¹ Article 9 of the Ordinance provides that the compensation of the loss of life or personal injury shall be limited within the insured amount, namely 20,000 yuan⁸². This compensation standard still remains effective.

In the wake of Train Crash Accident on July 23, some people began to realize that the price of the tickets of train or high-speed train is more that hundreds of yuan, even up to thousands of yuan, however, with the 2% of the insurance premium unchanged, the maximum amount of compensation a passenger can get after accidental injury is only 20,000 yuan pursuant to Article 9 of the Ordinance. Article 5 of the Contract Law of People's Republic of China reads that “[t]he parties shall adhere to the principle of fairness in deciding their respective rights and obligations.”⁸³ The five scholars deem such insurance as a breach of the Contract Law on the

⁸⁰ *Id.* art. 139.

⁸¹ See Ordinance of Compulsory Accidental Injury Insurance for Railway Passengers, *supra* note 74, art. 5.

⁸² *Id.* art. 9

⁸³ Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) 2 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 104, att. 5, (China).

ground that on one aspect, a passenger has to pay a higher insurance premium as the price of ticket rises, on the other aspect, the maximum compensation he/she can get is still 20,000 yuan, rendering the respective rights and obligations between passengers and carriers obviously unfair.

3. Infringement of the passengers' right to know

According to the Law on Protection of Consumer Rights and Interests, "[c]onsumers shall enjoy the right to obtain true information of the commodities they purchase and use or the services they receive."⁸⁴ However, for years, the railway authorities, as the legal subject providing insurance products, have never informed the public that the price of ticket included the insurance premium, nor have they offer any insurance-related documents or bills. Their negative act has already constituted an infringement of passenger's right to know. In fact, in 2011, the media made a survey around Beijing West Station, a main train station in Beijing, to see if passengers knew they bought the insurance automatically once they bought train tickets. The result turned out to be that only 7 out of 100 had knowledge of such practice.⁸⁵

When the railway authorities provide passengers with the accidental injury insurance, it means that both contract and insurance relationships were established between the railway authorities and the passengers. As the subject of the insurance services, the railway authorities should have explained such practice to the public. Nevertheless in reality, the railway authorities have impliedly mandated the passengers to buy insurance through selling tickets without informing the passengers of such insurance, which obviously broke its duty of informing.

4. The compulsory insurance is unreasonable

Both the Ordinances on compulsory accidental injury insurances for maritime and for air were abolished in 1987 and 1989, respectively. As such, whether to purchase the insurance or not is completely up to the free will of the passengers. However, the compulsory insurance measure for trains still remains. Thus, five scholars think that the existence of the Ordinance, on which the

⁸⁴ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on Protection of Consumer Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) 36 SUP. PEOPLE'S CT. GAZ. 130, art. 8, para. 1 (China).

⁸⁵ Wensuoweiren de Tielu Qiangzhi Xian (闻所未闻的铁路强制险) [Never-known Railway Compulsory Insurance], Wangyi Xinwen (网易新闻) [NetEase], <http://news.163.com/special/reviews/ticket%20insurance.html> (last visited Jan. 25, 2012).

compulsory accidental injury insurance for train is based, may be inconsistent with the legislative intention of the Insurance Law, and therefore conflict with the legal significance and purpose of accidental injury insurance.

International practices inform us that compulsory insurance is mainly for liability insurance based on public policy or public interest considerations, such as medical liability insurance, work injury insurance, environmental liability insurance, carrier's liability insurance, etc, which all fall within the category of property insurance. However, accidental injury insurance belongs to life insurance which is achieved through voluntary insurance. "Therefore, the railway authorities should assume an undertaking of carrier's liability insurance instead of accidental injury insurance", the five professors suggested.

B. The Eighth Annual Brigham-Kanner Property Rights Conference

On October 14 and October 15, 2011, the Eighth Annual Brigham-Kanner Property Rights Conference was held at the School of Law, Tsinghua University. Over one hundred guests from China and the United States, including leading experts and prominent scholars in the field of property rights, attended the conference.

The Brigham-Kanner Property Rights Conference has obtained great international influence since it was first held in 2004. This year was the first time for the conference to be held outside the United States. The pivotal goal of the conference is to enhance the constitutional protection of private property and to guarantee the realization of individual rights. Several profound and comprehensive topics were specially designed for different panels at the conference, including the legal protection of property rights under different legal systems, the cultural impact on property and the relationship between property rights and the environment, among which discussion about the utilization and management of land became the highlight of the event this year.

Each year, the Brigham-Kanner Property Rights Conference awards the Brigham-Kanner Property Rights Prize to individuals whose efforts and works have advanced the cause of property rights and have contributed to the overall awareness of the importance of property rights in the advancement of individual liberty. This year, the prize was awarded to Justice Sandra Day O'Connor for her commitments to uphold the constitutional protections afforded to the property rights in *Kelo v City of New London*.⁸⁶

⁸⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005).

During this year's conference, the former Brigham-Kanner Property Rights Prize winners addressed keynote speeches concerning important property rights decisions as well as their influences on property scholarship. Famous Chinese scholars such as Professor Jiang Ping, now Chairman of the Beijing Arbitration Commission, and Professor Cui Jianyuan of the School of Law, Tsinghua University also shared their achievements and their studies' focal points on property rights during the panel sessions and roundtable discussions of the conference.

Article 11 of the 1982 Constitution of the People's Republic of China provides that the state protects the legitimate rights and interests of the non-public sectors of the economy, including individual and private sectors of the economy.⁸⁷ For the first time, this provision offered constitutional protection to individuals' property rights. In 2007, the promulgation of the Property Law marked the final establishment of the legal institution aimed to protect property rights in China. Nowadays, the issue of property rights has become the focus of public attention and individual interests. Held under such a backdrop, the eighth Annual Brigham-Kanner Property Rights Conference cast great influence on both the academic field and the society.

C. Viewpoints on the Draft of Amendment to Criminal Procedure Law

On August 30, 2011, the Standing Committee of the National People's Congress promulgated the draft of Amendments to the Criminal Procedure Law of the People's Republic of China on its website and began to draw public opinions.⁸⁸ This was the second time for the standing committee to revise the Criminal Procedure Law since it was first adopted in 1979. The draft contains new provisions about the protection of juvenile delinquents, suspects' and defendants' rights against self-incrimination and the exemption for individuals from testifying against their close relatives. The drafted revision further aims to limit public power and strengthen the protection of individual rights. However, some scholars hold low opinions about this draft.

⁸⁷ XIANFA art. 11, § 1 (1982) (China).

⁸⁸ Xingshi Susong Fa Xiuzhengan (Caoan) Tiaowen Ji Caoan Shuoming (刑事诉讼法修正案(草案)条文及草案说明) Drafted Amendment to Criminal Procedures Law and Explanation for the Draft], Zhongguo Renda Wang (中国人大网), Aug. 30, 2011, http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm [hereinafter Drafted Amendment to the Criminal Procedures Law].

Namely, according to Professor Yi Yanyou from Law School of Tsinghua University,⁸⁹ it is unnecessary to amend the current Criminal Procedure Law for the following reasons:

First, only when the conditions and circumstances of a society have changed significantly shall laws be revised. It was because of the considerable change in society we had gone through since 1979, the year when Criminal Procedure Law was first promulgated, that we felt the necessity of amending the law in 1996. At that time, with a more democratic political atmosphere and a market-oriented economic system, there were calls for a revised Criminal Procedure Law which would remedy the old version's shortcomings in connection with the lack of protection of criminal suspects and the rapid development of the society. However, compared with the social conditions in 1996, our economic and political systems have not changed greatly. Thus, revising the Criminal Procedure Law now will not bring much progress to the justice system in China, and thus, it should be of low priority for the government to amend the Criminal Procedure Law under current circumstances. Besides, frequent amendments may even erode the stability of law.

Another reason is that many problems emerging from criminal procedure are not caused by the flaws in the Criminal Procedural Law itself. Instead, it is due to the failure of the law enforcement and other government authorities to strictly observe the provisions that these problems arise. For instance, Article 96 of the current Criminal Procedure Law provides that in the stage of investigation, lawyers entrusted by the suspects may meet and correspond with the criminal suspects in custody.⁹⁰ However, in practice, Beijing Municipal Public Security Bureau only allows the lawyers to meet the criminal suspects only once during investigation, which clearly infringes on the rights of the suspects. The current problems in the criminal justice system lie in the social system and other complex social factors, not because there are any defects in the law itself.

Instead of revising the Criminal Procedure Law, we could achieve the same set of goals simply by means of prudent judicial interpretations. Many procedural rights that the aforementioned draft is supposed to provide are actually covered and protected by the current Criminal Procedure Law already. Such rights will be realized if the courts find appropriate ways to interpret relevant provisions set forth in the current Criminal Procedural Law. We

⁸⁹Interview with Yi Yanyou, Associate Professor, the School of Law, Tsinghua University, in Beijing, P.R.C. (Oct. 27, 2011).

⁹⁰Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997) 1996 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 48, art. 96 (China).

should not hastily revise a law without paying sufficient attention or making any efforts to its interpretation.

Professor Yi also commented that the draft of the amendments to Criminal Procedure Law has a number of improper provisions, mainly in connection with compulsory measures and certain evidence rules.

The draft amendments endow residential surveillance with the characteristics of custody, which virtually deprives the criminal suspects of their personal liberty. Pursuant to Article 30 of the Amendments to Criminal Procedure Law, residential surveillance shall be executed in designated places when the criminal suspect or defendant does not have a fixed domicile. For crimes endangering state security, terrorist activities or large bribes, if the execution of residential surveillance in the criminal suspect or defendant's residence deters the investigation, residential surveillance can be executed in designated places with the approval of the People's Procuratorate or the public security organ at the next higher level.⁹¹ If the second paragraph of the article is interpreted improperly, it could be applied to all circumstances. Since the execution of residential surveillance does not require the approval of judicial organs whilst the lasting up to six months, such a provision unduly elongates the duration of the public security department to restrict an individual's freedom. If the draft were to come into effect, China may fall into the danger of becoming a police state.

In terms of evidence rules, although the draft adds new provisions regarding certain rights against self-incrimination, it still fails to eliminate the criminal suspects' obligation under the current Criminal Procedure Law to answer the investigators' questions truthfully, which renders the law contradictory and inconsistent. What's more, under the draft amendments, the criminal suspects or defendants do not have the right of silence protected by laws in most western countries, which means the newly provided right against self-incrimination is only superficial and unrealizable.

Professor Yi believes that even if the current Criminal Procedure Law must be revised, the amendments should only focus on those substantial issues, including the specification of principles such as the presumption of innocence, the clarification of suspects and defendants' rights to remain silent and to have an attorney present when interrogated, and the perfection of exclusionary rule by introducing judicial interventions into the investigation

⁹¹Drafted Amendment to the Criminal Procedures Law, *supra* note 88.

procedure. Only by solving and perfecting these substantial issues through the process of revision can we truly achieve the purpose of protecting individual's fundamental constitutional rights throughout the criminal justice procedure.

Except for the new provisions on special procedures designed for juvenile delinquents, reconciliation of public prosecutions, and psychotics who conduct violent behaviors and require compulsory medical treatment, the draft amendments to Criminal Procedure Law may be unnecessary. "Those scholars who claim that the amendments have made notable progress are actually contributing to the retroversion of the Criminal Procedure Law of China", Professor Yi pointed out.