

## CHINA LAW UPDATE

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## CHINA LAW UPDATE

### I. LAWS AND REGULATIONS

#### *A. Key Amendments to the Environmental Protection Law of the People's Republic of China<sup>1</sup>*

##### 1. Introduction

On April 24, 2014, the Standing Committee of the 12<sup>th</sup> National People's Congress ("SCNPC") in its eighth meeting passed a decision to amend the nation's 25-year-old Environmental Protection Law<sup>2</sup>. It is the basic law regulating major environmental main issues in China, including the governmental supervision and management of environmental problems and prevention and control of pollution<sup>3</sup>. The amendments came as a response to the changing economic and environmental landscape in China, especially in recent years.

With 70 articles, compared with 47 in the original law, the revised Environmental Protection Law sets environmental protection as a basic national policy and gives harsher punishment to environment-related wrongdoing. The amendments witness a paradigm shift in legislative rationale as economic development had long been placed the first in lawmaking<sup>4</sup>. Specifically, five principles are established: protection first, prevention emphasis, comprehensive treatment, public participation and accountability for damages<sup>5</sup>.

The amended Environmental Protection Law will take effect on January 1, 2015.

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<sup>1</sup> This update is prepared by Jin Ning, LL.B. Candidate, Tsinghua Law School.

<sup>2</sup> Quanguo Renda Changweihui guanyu Xiugai "Zhongguo Renmin Gongheguo Huanjing Baohu Fa" de Jueding (全国人大常委会关于修改《中华人民共和国环境保护法》的决定) [SCNPC's Decision to Amend the Consumers' Right Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr. 24, 2014, effective Jan. 1, 2015).

<sup>3</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) table of contents (Chinalawinfo).

<sup>4</sup> Lian Yingting (廉颖婷), *Luoshi Xin Huanbaofa Jiang Youli Pojie Dangqian Huanjing Wenti* (落实新环保法将有力破解当前环境问题) [Enforcing The New Environmental Protection Law will effectively solve the environment problems] FAZHI RIBAO (法治日报)[LEGAL DAILY] May 1, 2014, at A5.

<sup>5</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr. 24, 2014, effective Jan. 1, 2015) art. 5 (Chinalawinfo).

## 2. Content

### *(a) More Specific Supervision and Administration*

#### i. Environmental Protection Plan and Environmental Quality Standards

Under Article 13, environmental protection is included in the national economic and social development plan. Thus, formulating the environmental protection plan and environmental quality standards becomes a mandatory obligation for government at various levels. Article 16 stipulates that the local government cannot set pollutant emission standards lower than national standards.

As to the supervision of environmental problems, a more comprehensive and detailed monitoring and assessment system is established by Article 17, Article 18 and Article 19, emphasizing that the monitoring institutions and the persons in charge of the institutions shall be responsible for the authenticity and accuracy of the monitoring data.

When environmental protection is in conflict with economic development, which usually happens, local government always tend to sacrifice the environment as the government at higher levels can hardly evaluate environmental conditions. In response to such practice, the amendments implement the target-based responsibility system and assessment and evaluation system for environmental protection. The completion of the environmental protection work is incorporated as an important basis for assessment and evaluation of the government and related departments.

#### ii. Ecology Protection Measures

In order to effectively solve the ecological problems, the amendments establish a coordinating mechanism for joint prevention and control of environmental pollution and ecological damage in areas across administrative regions<sup>6</sup>. In such areas, the planning, standards, and monitoring of protection measures should be unified or should be tackled under the coordination of governments at the higher levels. The coordinating mechanism has proven to be effective especially in handling water pollution, which usually affects several administrative regions.

For key ecological functional zones, strict protection is implemented, including delimiting red lines, according to Article 29 of the Environmental Protection Law.<sup>7</sup> Also, for damages already

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<sup>6</sup> *Id.* art. 20.

<sup>7</sup> *Id.* art. 29.

caused to ecological zones, local governments are able to make use of the compensation funds to remedy the situation.

*(b) Greater Liability for Enterprises*

The revised law expands the scope of projects that shall be subjected to environmental impact assessment, and clarifies the legal consequences of non-compliance. Enterprises are prohibited from commencing projects that have not undergone an environmental impact assessment.

Furthermore, Article 42 compels enterprises to establish environmental protection responsibility systems. Enterprises that discharge pollutants must build up such environmental protection responsibility systems to specify the responsibilities of persons-in-charge. In addition, enterprises that discharge certain key pollutants must install and use monitoring equipment. All original monitoring records should be kept.

A control system for total emissions of key pollutants is established under Article 44. Enterprises must also follow the control indicators of total emissions of key pollutants allocated to the enterprises.

Article 45 provides that all enterprises must apply for a license for discharging pollutants, and must observe the requirements of the license. Currently, the Ministry of Environmental Protection is establishing an integrated pollution discharge license management system, and has recommended that the State Council formulate implementing regulations.

Other obligation of enterprises includes preparing emergency response plans for emergency incident and filing such plans with competent authorities, among many others.

*(c) More Severe Punishment for Illegal Acts*

*i. Liability for Enterprises and Employees*

The old law stipulated that any enterprise that fails to eliminate or control pollution within a specific period of time might be ordered to suspend or shut down its operations<sup>8</sup>, while the revised law provides more specified and stricter regulatory measures, as well as greater powers to the authorities such as restricting, suspending and shutting down production.<sup>9</sup>

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<sup>8</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat' l. People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) art. 29 (Chinalawinfo).

<sup>9</sup> *Id.* art. 60.

The “daily penalty” system introduced by Article 59 is a huge step forward<sup>10</sup>. It provides that, if an enterprise illegally discharges pollutants and is subsequently fined, the enterprise will be ordered to rectify the situation. The fines are implemented according to factors such as the operating costs of pollution prevention and control facilities, and direct losses arising from violations or illegal gains<sup>11</sup>. If the enterprise refuses to do so, the authority that imposed the penalty may impose cumulative daily fines. An official from Ministry of Environmental Protection stated that the limit to the total amount of fines might be set by special regulations in the future, though there is no such limit up to now<sup>12</sup>.

In addition, employees who are directly responsible for environmental law violations may face detention<sup>13</sup>.

#### ii. Liability of Environmental Institutions

Institutions that commit fraud in providing environmental services are liable for any environmental pollution or ecological damage that results under Article 65<sup>14</sup>. In addition to independent liability, these parties can also be held jointly liable for pollution or ecological damage.

### *(d) Information Disclosure and Public Participation*

#### i. Information Disclosure

The new environmental protection law contains a chapter on “Information Disclosure and Public Participation”. This chapter clarifies that enterprises discharging certain key pollutants must truthfully disclose their major pollutants, discharge methods, emission concentration, total emissions, excessive emissions as well as the construction and operation of pollution prevention and control facilities<sup>15</sup>. Further, enterprises are required to provide information to the public where members of the public are affected by the pollutants and solicit public opinions when preparing environmental impact reports.

<sup>10</sup> *Id.* art. 55(1).

<sup>11</sup> *Id.* art. 55(2).

<sup>12</sup> Zhao Chunya(赵春艳), *Xin Huanbaofa Liangdian Jiedu* (新环保法亮点解读) [*Highlights of the new Environmental Protection Law*], MINZHU YU FAZHI SHIBAO (民主与法制时报) [DEMOCRACY AND RULE OF LAW TIMES], Apr. 28, 2014, at A9.

<sup>13</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr. 24, 2014, effective Jan. 1, 2015) art. 63 (Chinalawinfo)

<sup>14</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr. 24, 2014, effective Jan. 1, 2015) art. 65 (Chinalawinfo).

<sup>15</sup> *Id.* art. 55.

Local governments should also prepare a “pollution blacklist”. The pollution blacklist will record all environment law violations and will be publicly available.

#### ii. Environmental Public Interest Litigation

Public interest litigation has been used as an effective tool to control acts of environmental degradation. Yet the old environmental protection law did not specifically stipulate environmental public interest litigation. According to Article 55 of the Civil Procedural Law, for serious polluting conduct that damages the public interest, relevant organizations, as prescribed by law, may institute an action in court<sup>16</sup>. But what kind of organization is able to raise such litigation is still not clear under Civil Procedural Law.

As a response to the above problem, the revised Environmental Protection Law clarifies the scope of environmental public-interest litigation. A social organization that meets certain conditions may appeal to the court for acts that pollute the environment, damage ecology, and harm the public interest. Though public interest litigation provides a legal channel for citizens and community groups to participate in environmental protection, there are a number of conditions that the social organization is required to meet<sup>17</sup>. For example, the social organization must be registered in the civil administrative department of the local government, and the organization must have specifically engaged in public environment protection activities over five consecutive years without any violations. According to preliminary estimates, nearly 300 social organizations in China meet these requirements<sup>18</sup>. The legal basis of environmental public-interest litigation under the new law appears to be the traditional tort liability: under Article 64, if environmental pollution causes any ecological or environmental damage, persons responsible should bear tortious liability in accordance with the Tort Law of the People’s Republic of China<sup>19</sup>.

### 3. Conclusion

The Environmental Protection Law is perceived to be transforming from a soft law into a hard law, thus tackling the

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<sup>16</sup> Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012) art. 55 (Chinalawinfo).

<sup>17</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr. 24, 2014, effective Jan. 1, 2015) art. 58 (Chinalawinfo).

<sup>18</sup> Jin Yu (金煜), 300 Yujia Shehui Zuzhi Ke Ti Huanbao Gongyi Susong (300余家社会组织可提环保公益诉讼)[*More than 300 Environmental Organizations Are Qualified to Raise Environmental Public Interest Litigation*], XIN JIN BAO (新京报) [BEIJING NEWS] Apr. 25, 2014.

<sup>19</sup> Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm., Nat’l. People’s Cong., Apr. 24, 2014, effective Jan. 1, 2015) art. 64 (Chinalawinfo).

pollution problems in China. It is true that the new law introduced many new provisions as a response to the worsening environment, but the enforceability of the new law is still to be tested in practice.

It is pointed out that the new amendments introduce several mandatory measures, which may place an unprecedented burden on environmental authorities, judicial bodies and local governmental budget. The new law also challenges current law enforcement capabilities, especially in small towns and villages where the concept of protecting the environment is still in its infancy<sup>20</sup>.

### *B. Key Amendments to the Budget Law of the People's Republic of China*<sup>21</sup>

#### 1. Introduction

The new People's Republic of China Budget Law ("Budget Law") will come into force on January 1, 2015. After a decade of discussion, three sessions of the National People's Congress, and four readings to the draft amendments, the final draft was finally passed on August 31, 2014, to amend the 20-year-old Budget Law<sup>22</sup>. The Budget Law is also known as the "Financial Constitution", which regulates all aspects of the country's budget. This amendment is in response to the great changes in fiscal revenue, economic growth and the insufficiencies of the current law.

The new Budget Law had changed over 82 parts of the original articles of the Budget Law of 1994. These changes emphasize the importance of the integrity of governmental budget, the openness of financial budget, and the respect for the law of economy.

#### 2. The Emphasis on Supervision and Openness

##### *(a) All Government Revenue and Expenditure Subject to Supervision*<sup>23</sup>

One of the biggest highlights in the new Budget Law is the enlargement of the scope of the law to include all sorts of government revenue and expenditure. As the Finance Minister LOU

<sup>20</sup> Yin Hong (殷泓) & Wang Yiyin (王逸吟), *Xin Hunabao Fa, Ni Dudong Le Ma?* (新环保法, 你读懂了吗?) [*Do You Understand The New Environmental Protection Law?*], GUANGMING RIBAO (光明日报) [GUANGMING DAILY], Apr. 30, 2014, at A5.

<sup>21</sup> This update is prepared by Qu Heyi, LL.B. Candidate, Tsinghua Law School.

<sup>22</sup> Quanguo Renda Changweihui guanyu Xiugai "Zhonghua Renmin Gongheguo Yusuan Fa" de Jueding (全国人大常委会关于修改《中华人民共和国预算法》的决定) [SCNPC's Decision to Amend the Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Jan. 1, 2015) (Chinalawinfo).

<sup>23</sup> Liu Yonggang (刘永刚), *Xin Yusuan Fa: Yibu Guanli Zhengfu de Fa* (新预算法: 一部管理政府的法) [*New Budget Law: the Law for Government Regulation*], ZHONGGUO JINGJI ZHOUKAN (中国经济周刊) [CHINA ECONOMIC WEEKLY], Sept. 8, 2014, at 58.

Jiwei commented, this change is extremely important as a premise for the establishment of a modern fiscal system<sup>24</sup>.

To expand its scope, the new law deleted Article 76 of the old Budget Law for extra-budgetary funds<sup>25</sup>. In addition, Article 4 in the new Budget Law clearly states, for the first time, that all governmental revenue and expenditure should be included in the budget<sup>26</sup>. Article 5 explains that the budget should include general public revenue, government fund budget, state capital budget, social insurance fund budget<sup>27</sup>. With these new provisions, the scope of the Budget Law is expanded to include an increased number of revenues and expenditures. For revenues, it not only includes tax and toll, but also the income from state-owned capital management and governmental funds. For expenditures, it includes all kinds of governmental activities, including local governmental debt<sup>28</sup>.

*(b) Emphasis on Openness of Budget to Prevent Corruption*

Compared to the former Budget Law, the new law comprehensively provides for budget disclosure for the first time. Article 14 of the new Budget Law gives clear requirements for the scope of disclosure, subject and time limit. It also requires the government to give explanations for payment transfers, government debts and government agency's operating expenses<sup>29</sup>. If the requirements are violated, Article 92 states that the government shall be legally liable<sup>30</sup>.

The new Budget Law also contains provisions to ensure the clarity of the budgets, such as Article 32, 37 and 46. These articles emphasize that all levels of expenditures should be drawn up according to both its function and economic nature, so that it is easier to reflect where the government used the money and how government budgets would be achieved.

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<sup>24</sup> Lou Jiwei (楼继伟), *Renchen Guanche Xinyusuanfa Yifa Jiaqiang yusuanquanli* (认真贯彻新预算法依法加强预算管理) [*Seriously Implement the New Budget Law and Strengthen Lawful Budget Management*], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Sept.1, 2014, at A10.

<sup>25</sup> Yusuan Fa (预算法) [Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Mar. 22, 1994, effective Jan. 1, 1995) art. 76 (Chinalawinfo).

<sup>26</sup> Quanguo Renda Changweihui guanyu Xiugai "Zhonghua Renmin Gongheguo Yusuan Fa" de Jueding (全国人大常委会关于修改《中华人民共和国预算法》的决定) [SCNPC's Decision to Amend the Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Jan. 1, 2015) art. 2 (Chinalawinfo).

<sup>27</sup> *Id.* art. 3.

<sup>28</sup> *Id.* art. 29-30.

<sup>29</sup> Yusuan Fa (预算法) [Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Jan. 1, 2015) art. 14 (Chinalawinfo).

<sup>30</sup> *Id.* art. 92.

### 3. Strengthened Management and Regulation on Local Government Debt

Before the new Budget Law, most of the local government debts were not included in the budget management, and were therefore a potential risk<sup>31</sup>. Compared to the old law, the new provisions contain clearer regulations to address this problem. It prohibits the old undisciplined approach and sets a clear way forward. In Article 35 and 94, the new Budget Law sets out clear regulations by regulating the borrowing parties, purpose, size of debt, supervision mechanism, legal liability and more<sup>32</sup>. It therefore gives a legal solution to how local government debts should be created, managed and repaid.

### 4. Regulations on Payment Transfer<sup>33</sup>

In the new Budget Law, Article 16, 38 and 52 give very clear regulations on payment transfer, including rules for establishment, purposes, budgeting and time limits, among others<sup>34</sup>. These rules are meant to solve problems for the local government, because usually the general transfer payments at the local governments' free disposal are small in scale, and those payments with limited usages are complicated and overlap with one and another, leading to a lot of complications and inconveniences.

This new arrangement for transfer payments emphasizes the establishment and strengthening of assessment and resign mechanism. It also prohibits such special transfer payments when the market can already function by itself in relation to the issue. The higher-level government should not ask the lower levels to provide supporting funds, except for projects, which should be undertaken by both of them together, as prescribed by the State Council. This would have positive effect on the reduction of a phenomena called "Pao Bu Qian Jin (跑部钱进)"<sup>35</sup>, which breeds corruption. It is considered a method of improper control exercised by the central government on the local government.

<sup>31</sup> Lou Jiwei (楼继伟), *Renzhen Guanche Xinyusuanfa Yifa Jiaqiang Yusuan Guanli* (认真贯彻新预算法依法加强预算管理) [Seriously Implement the New Budget Law and Strengthen Lawful Budget Management], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Sept. 1, 2014, at A10.

<sup>32</sup> *Supra* note 7, art. 35, 94.

<sup>33</sup> Liu Yonggang (刘永刚), *Xin Yusuan Fa: Yibu Guanli Zhengfu de Fa* (新预算法：一部管理政府的法) [New Budget Law: the Law Regulating the Government], ZHONGGUO JINGJI ZHOUKAN (中国经济周刊) [CHINA ECONOMIC WEEKLY], Sept. 8, 2014, at 60.

<sup>34</sup> Yusuan Fa (预算法) [Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Jan. 1, 2015) art. 16, 38, 52 (Chinalawinfo).

<sup>35</sup> Lou Jiwei (楼继伟), *Xin Yusuan Fa "Liu Da Liangdian" Zheshe Xiayibu Gaige Fangxiang* (新预算法“六大亮点”折射下一步改革方向) [Six Highlights in the New Budget Law, Reflecting the Next Step in Reform], REUTERS (Sept. 11, 2014), <http://cn.reuters.com/article/CNAnalysesNews/idCNKBS0H604Q20140911>.

### 5. Legislation on Budget Efficiency: Strengthening and Clarifying Related Liability

In order to solve the problem of unwarranted extravagance, the new Budget Law places rigorous constraints on expenditure. In Article 12, several principles and methods are set out for the government when setting revenue and expenditure. The rules are: a balanced and comprehensive review must be carried out; budget must be set and spent with care, bearing in mind governmental capacities; result and the efficiency of expenditure should be emphasized during the whole process. Article 37 provides for restrictions embodying such principles by regulating expenditures of the government in terms of operating expenses and construction fees.

The old Budget Law imposed legal liability in only three situations, namely unauthorized budget changes, unauthorized disposal of repository funds, and concealing budget revenues. The new Budget Law gives a new and clearer definition of such circumstances and other unlawful acts. In Article 92, 93, 94, and 95, the new Budget Law sets out detailed provisions for related legal liability, which are conducive for effective law implementation<sup>36</sup>. For instance, when the government makes unlawful borrowings, misappropriates important funds of special use, or conducts construction of governmental buildings outside the budget or exceeds the budget, the person in charge and other directly responsible personnel would be removed from office or expelled. In addition, if a crime is committed, they will also be held criminally responsible.

## II. CASES

### A. Notice of the Supreme People's Court on Issuing the Seventh Group of Guiding Cases<sup>37</sup>

This notice is the seventh group of such guiding cases issued by the Supreme People's Court ("SPC") since it first issued a procedure to designate guiding cases which will "serve as guidelines for courts nationwide in their trial and execution work"<sup>38</sup> in November, 2010. These cases are not precedential, but do have a similar effect. The SPC has previously selected and published 26 guiding cases. The

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<sup>36</sup> Yusuan Fa (预算法) [Budget Law] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Jan. 1, 2015) art. 92-95 (Chinalawinfo).

<sup>37</sup> This update is prepared by Zhang Xiaoyue, LL.B. Candidate, Tsinghua Law School. Zuigao Renmin Fayuan Guanyu Fabu Diqipi Zhidaoxing Anli de Tongzhi (最高人民法院关于发布第七批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the Seventh Set of Guiding Cases] (promulgated by Sup. People's Ct., Jun. 26, 2014, effective Jun. 26, 2014), (Chinalawinfo).

<sup>38</sup> Zuiguao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作规定) [Provisions of the Supreme People's Court on Case Guiding Work] (promulgated by Sup. People's Ct., Nov. 26, 2010, effective Nov. 26, 2010), (Chinalawinfo).

newly released group includes three criminal cases and two civil cases.

### 1. Zang Jinquan *et al.* Theft and Fraud Dispute

#### (a) *Facts*

On June 1, 2010, after defrauding 197 yuan from victim Jin, defendant Zheng Biling informed defendant Zang Jinquan of the remaining sum of Jin's account and planned to form a partnership to commit crime. Defendant Zang sent Jin a false link indicating a 1 yuan transfer, but upon clicking will actually transfer all of the remaining sum in the victim's account, 305,000 yuan, through a preinstalled computer program.

During May and June 2010, defendants Zang Jinquan, Zheng Biling and Liu Tao used fake identities to open stores on Taobao with no goods to sell. Defendants sent counterfeit Taobao links to customers through Aliwangwang, while the payment would go to their private Alipay account and then the recharging account of web games instead of the public Alipay account. Defendants then cashed out by buying game cards and Q currency and selling them through defendant Zang's Taobao store and the profits. Defendant Zang distributed 22000 yuan in total.

#### (b) *Ruling*

The Intermediate People's Court of Hangzhou, Zhejiang held that defendant Zang was guilty of theft and fraud, and sentenced him to 14 years and 6 months of imprisonment. Defendant Zheng was convicted of theft and fraud and sentenced to 10 years and 3 months of imprisonment. Defendant Liu was convicted of fraud and sentenced to a year and 6 months of imprisonment. Defendant Zang appealed and the Higher People's Court of Zhejiang affirmed the judgment.

#### (c) *Essentials*

After reviewing the Criminal Law<sup>39</sup>, the Court held that, theft indicates a behavior aimed at illegal encroachment and theft of property. Fraud indicates a behavior aimed at illegal encroachment while defrauding persons by making up or concealing facts. In criminalizing a behavior involving both stealing and defrauding, a distinction should be made between the person's main method and whether or not the victim was conscious of dealings with the properties. If the decisive method is stealing and the victim does not

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<sup>39</sup> Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 264, 266 (Chinalawinfo).

pay voluntarily, the behavior should be recognized as theft. If the decisive method is cheating and the victim pays voluntarily due to false knowledge, the behavior should be recognized as fraud.

Acting on the Internet, if the crime is committed by preinstalling a computer program and inducing others to click on the disguised links, it should be criminalized as theft. If the crime is committed by providing tradable goods or service and conning others into click on the link and pay, it should be categorised as fraud.

## 2. Hu Kejin's Refusal to Pay Remuneration

### *(a) Facts*

On December 2010, defendant Hu Kejin sub-contracted part of the landscape construction of Sanshengfeili Mountain in Huangshui, Shuangliu, Sichuan, and hired several laborers for the task. During the construction, defendant Hu received over 510,000 yuan from the contract-letting party, which was more than the actual confirmed sum. After the construction was completed on June 5, 2011, defendant Hu owed over 120,000 yuan to the said laborers. On June 9, the Human Resources and Social Security Bureau instructed defendant Hu to pay the arrears, but Hu booked a flight ticket that night and fled the next morning. On June 30, Sichuan Jintianxia Garden Construction Ltd., paid the remuneration provisionally as the overall contractor.

### *(b) Ruling*

The People's Court of Shuangliu, Sichuan held that defendant Hu Kejin committed the crime of refusing to pay remuneration and was sentenced to a one-year imprisonment and fined 20,000 yuan.

### *(c) Essentials*

After reviewing the Criminal Law<sup>40</sup>, the Court held that, without the status of a subject, the company or person should be investigated for criminal liabilities for refusal to pay remuneration if laborers are hired illegally and there is a large amount of remuneration due, and he is still refusing to pay after an instruction has been given by the related department.

The company or person, without the status of a subject, refusing to pay remuneration, should be investigated for criminal liabilities for refusal to pay remuneration even if other companies or persons pay before the prosecution is registered.

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<sup>40</sup> Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 276 (Chinalawinfo).

### 3. Tianjin China Youth Travel Service v. Tianjin National Youth International Travel Agency for Unauthorized Use of the Name of Another's Enterprise

#### *(a) Facts*

Plaintiff Tianjin China Youth Travel Service (Tianjin Youth Travel) was founded as a SOE on November 1, 1986, directly subordinate to the Communist Youth League Committee of Tianjin. Although "Tianjin Youth Travel" is not registered, the Communist Youth League Committee of Tianjin testifies that "Tianjin Youth Travel" is the abbreviation of the plaintiff, and from 2007, the press has been using "Tianjin Youth Travel" to refer to the plaintiff. The plaintiff also uses "Tianjin Youth Travel" as their abbreviation in quotations, tourist contracts, documents, receipt, etc.

Defendant Tianjin National Youth International Travel Agency (Tianjin National Youth Travel) was founded on July 6, 2010. At the end of 2010, the plaintiff found the defendant using "Tianjin Youth Travel" on all their web pages, website source codes and search engines.

#### *(b) Ruling*

The Higher People's Court of Tianjin held that: (1) the defendant must immediately stop using "Tianjin China Youth Travel Service" and "Tianjin Youth Travel" as their keywords for search links; (2) the defendant must release an announcement of apology on their website and maintain it for 15 days within 30 days after this decision enters into force; (3) the defendant must pay 30,000 yuan as compensation for the plaintiff's damages; (4) the court rejects other requests of the plaintiff; (5) the court rejects other requests of the defendant.

#### *(c) Essentials*

After reviewing the General Principles of the Civil Law<sup>41</sup> and the Law against Unfair Competition<sup>42</sup>, the Court held that, those abbreviations which are widely used in public for a long period of time, acquire a brand visibility and familiarity with the public, and have, in fact, the function of a corporation's name, should be protected as the name of the corporation.

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<sup>41</sup> Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009) art. 120, (Chinalawinfo).

<sup>42</sup> Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Law against Unfair Competition] (promulgated by Standing Comm. Nat'l People's Cong., Sep. 2, 1993, effective Dec. 1, 1993) art. 5 (Chinalawinfo).

Using another's abbreviation, which has already taken on the function of the name of the corporation, as keywords in the bidding rankings on the Internet and in commercial activities in causing confusion among the public, constitutes unfair competition.

4. Lan Jianjun and Hangzhou Xiaomuzhi Automobile Repair Polytron Technologies Co. Ltd. v. Tianjin Xiaomuzhi Automobile Repair Service Co. Ltd., etc. for Infringement of Trademark and Unfair Competition

*(a) Facts*

Hangzhou Xiaomuzhi was founded on October 22, 2004, Lan Jianjun being its legal representative. The subordinate branch of Hangzhou Xiaomuzhi, Xiaoshan Branch Office of Hangzhou Xiaomuzhi Co. Ltd., was founded on November 8, 2005, and its scope of business is: (1) car painting; (2) glazing; (3) repair of small vehicles (license obtained on August 1, 2008).

On January 14, 2011, Hangzhou Xiaomuzhi obtained No.6573882 "Xiaomuzhi" as its registered word mark. On April 14, 2011, Lan Jianjun permitted Hangzhou Xiaomuzhi to use his No. 6573881 registered word mark, "Xiaomuzhi", exclusively.

Hangzhou Xiaomuzhi has received the certificate of "China's Top 120 Franchise" several times, and was recognized as a "Famous Brand of Zhejiang Service" by Zhejiang Quality and Technical Supervision.

The defendant Tianjin Xiaomuzhi was founded on October 16, 2008, Tian Junshan being its legal representative. Its scope of business is: repair of small bus, assembly repair, vehicle repair, parts repair, rescue and repair and special repair. The corporation obtained its license, which lasted till July 27, 2012, on July 28, 2010.

Tianjin Huashang Corporation was founded on November 23, 1992, Tian Junshan being its legal representative as well. The scope of its license is also repair of small bus, assembly repair, vehicle repair, parts repair, rescue and repair and special repair. During the course of business and merchandise advertising, Tianjin Xiaomuzhi and Tianjin Huashang used the picture of "Xiaomuzhi" on several occasions.

On June 30, 2008, Tianjin Huashang and Hangzhou Xiaomuzhi signed a contract permitting Tianjin Huashang to run the car repair center named "Xiaomuzhi". The contract was valid from June 30, 2008 to June 29, 2011. The contract provided that, without Hangzhou Xiaomuzhi's written approval, Tianjin Huashang cannot register "Xiaomuzhi" or "Xiaomuzhi Repair" as the name of the corporation in any circumstances, nor add any prefix or suffix to "Xiaomuzhi" or "Xiaomuzhi Repair", nor register any name relative

to or familiar with “Xiaomuzhi” or “Xiaomuzhi Repair”. This prohibition extended to the branch offices of Tianjin Huashang. On December 16, 2010, the parties dissolved the contract through the Hangzhou Arbitration Commission due to their dispute about the obligations within.

*(b) Ruling*

The Higher People’s Court of Tianjin held that: (1) the defendants must stop the infringement of “Xiaomuzhi”, No.6573881 and No.6573882 registered word mark; (2) compensate for the plaintiff’s loss.

*(c) Essentials*

After reviewing the Law against Unfair Competition<sup>43</sup>, the Court held that, whether or not the operator takes actions which go beyond the scope of statute or against the laws and regulations of administrative licensing, it does not prevent him from exercising his rights against trade mark infringement and unfair competition.

The Law against Unfair Competition does not require direct competition between the operators, nor in the same industry. If the person violates the regulations of the Law against Unfair Competition and damages the legitimate rights and interests of other operators, even if there is only an indirect competitive relationship, the behavior should be recognized as unfair competition.

5. Jiangsu Weilun Shipping Co. Ltd. v. Miranda Rose Company for Damages Arising from Collision of Ships

*(a) Facts*

On June 3, 2008, the Weilun 06, owned by the plaintiff Jiangsu Weilun Shipping Co. Ltd., and the Miranda Rose (the Rose), owned by the defendant Miranda Rose Company, met in the Yuanyuansha Precautionary Area of Shanghai Port. At 23:27, another foreign ship, Rio de Janeiro Express, contacted the Rose and started overtaking it. At 23:32, the pilot of the Rio de Janeiro Express called the Weilun 06 and the Zhengan 08, 0.2 mile ahead on the Weilun 06’s left, and asked for green light intersection. The Zhengan 08 rejected and adjusted its course to the right and went through to the north of the precautionary area. Under the insistence of the pilot, the Weilun 06 agreed on the green light intersection. The Rose then contacted the Weilun 06 for green light intersection and the Weilun 06 agreed. At

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<sup>43</sup> Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Law against Unfair Competition] (promulgated by Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, eddfective Dec. 1, 1993) art. 2, (Chinalawinfo).

23:38, when the Weilun 06 navigated to the left, ahead of the Rose, the former found the latter lit the red light and contacted the latter immediately, asking it to turn its course to the left as soon as possible. The Weilun 06 started to slow down, yet the Rose could not turn left, because the Rio de Janeiro Express had not finished its overtaking and the two ships were too close to each other. At 23:41, the Weilun 06 and the Rio de Janeiro Express had a short-range intersection, which occurred only 0.2-mile ahead on the Rose's left. At this moment, the Weilun 06 and the Rose both noticed the danger and turn sharply to the left. At 23:42, the right stern of the Weilun 06 and the right bow of the Rose collided.

*(b) Ruling*

The Shanghai Maritime Court held that the defendant should compensate the plaintiff for 50% of the loss and the corresponding loss of interests, according to the demand deposit interest rate of the People's Bank of China over the same period.

*(c) Essentials*

After reviewing the Maritime Code<sup>44</sup>, the Court held that, during the voyage, when the parties agreed not to intersect according to the Convention on the International Regulations for Preventing Collisions at Sea, 1972<sup>45</sup>, the agreement of the parties and the violation of the agreement should not be regarded as the major basis when judging the allocation of responsibility after the collision. The calculation should be made under the said regulation, together with the causation of emergency, the degree of fault and the appropriateness of measures.

In this case, both parties violated the regulation of lookout, safe speed and action to avoid collision of the International Regulations for Preventions for Collisions at Sea, 1972<sup>46</sup>, and had the same degree of responsibility, and therefore should each take half of it. The defendant is the owner of the Rose. According to the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases Involving Disputes over Vessel Collisions<sup>47</sup>, the

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<sup>44</sup> Haishang Fa (海商法) [Maritime Code] (promulgated by Standing Comm. Nat'l People's Cong., Nov. 7, 1992, effective July 1, 1993) art 169, (Chinalawinfo).

<sup>45</sup> The Convention on the International Regulations for Preventing Collisions at Sea rule. 5, 6, 8, Oct. 20, 1972, 1050 U.N.T.S. 15824.

<sup>46</sup> *Id.*

<sup>47</sup> Zuigao Renmin Fayuan Guanyu Shenli Chuanbo Pengzhuang Jiufen Anjian Ruogan Wenti de Guiding (最高人民法院关于审理船舶碰撞纠纷案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases Involving Disputes over Vessel Collisions] (promulgated by Sup. People's Ct., May. 19, 2008, effective May. 23, 2008) art. 4, (Chinalawinfo)

defendant should compensate part of the plaintiff's damage in the collision.

### III. DECISIONS

#### *A. Decision of the Standing Committee of the National People's Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou*<sup>48</sup>

The decision on establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou was adopted by the Standing Committee of the Twelfth National People's Congress on August 31, 2014, followed by a provision on jurisdiction and a notice of guiding opinions on the selection and appointment of judges issued by the Supreme People's Court.

##### 1. Introduction

An intellectual property right court shall exercise jurisdiction over first-instance civil or administrative intellectual property cases involving patents, new varieties of plant, layout designs of integrated circuit, technical know-how, etc.<sup>49</sup> However, criminal intellectual property cases are excluded.

Jurisdiction over such cases in Guangzhou Province shall be cross regional.<sup>50</sup>

Administrative cases filed against the ruling or decision of the State Council shall be under the jurisdiction of the Intellectual Property Right Court of Beijing as the court of first instance.<sup>51</sup>

The judicial work of said courts shall be under supervision of the Supreme People's Court, the people's procuratorate pursuant and the high people's court at its domicile.<sup>52</sup>

The Higher People's Court of Shanghai and Beijing Municipality and the Intermediate People's Court of Guangdong Province will no longer exercise jurisdiction over such cases.<sup>53</sup>

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<sup>48</sup> This update is prepared by Fan Danting, LL.B. Candidate, Tsinghua Law School.

<sup>49</sup> Quanguo Renda Changweihui Guanyu zai Beijing, Shanghai, Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人大常委会关于在北京、上海、广州设立知识产权法院的决定) [SCNPC's Decision on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 31, 2014, effective Aug. 31, 2014) art. 2 (Chinalawinfo).

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* art. 5.

<sup>53</sup> Zuigao Renmin Fayuan Guanyu Beijing, Shanghai, Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定) [Provisions of the Supreme People's Court on the jurisdiction of Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by Sup. People's Ct., Oct. 31, 2014, effective Nov. 3, 2014).

The judicial members of the judicial committee of the intellectual property court are appointed and removed by the standing committee of the people's congress, following the principle of administration of cadres by the Party, openness and practical performance, judges among whom must possess the following qualifications<sup>54</sup>:

- (1) Having served as a senior judge for four years or above;
- (2) Having relevant trial experience for six years or above;
- (3) Holding degree of law specialties in an institution of regular higher education or above;
- (4) Having relatively strong ability to preside over a court trial and writing judgments.

## 2. Background

### *(a) Rapid growth in the number of intellectual property cases*

Taking 2013 as an example, the number of first and second instance intellectual property cases accepted by courts around the country has exceeded 110,000<sup>55</sup>. Compared to 2012, the number of first instance civil intellectual property cases accepted and disposed of by local courts grew by 1.33% and 5.29% to 88,583 and 88,286 cases respectively.<sup>56</sup> The Supreme People's Court's intellectual property division accepted 457 civil cases involving intellectual property disputes and concluded 417 cases, which were 92.82% and 69.51% higher than last year.<sup>57</sup> The establishment of intellectual property courts also corresponds with the continuously expanding demand to raise overall efficiency and quality of jurisdiction.

### *(b) Establishment of intellectual property divisions and deficiencies*

The judicial practice of intellectual property protection in China can date back to 1993, when the first intellectual property division was set up in the Higher People's Court of Beijing.<sup>58</sup> In 1996,

<sup>54</sup> Zuigao Renmin Fayuan Guanyu Yinfa "Zhishi Chanquan Fayuan Faguan Renxuan Gongzuo Zhidao Yijian (Shixing)" de Tongzhi (最高人民法院关于印发《知识产权法院法官选任工作指导意见（试行）》的通知) [Notice of the Supreme People's Court on Issuing the Opinions on the Selection and Appointment of the Judges of Intellectual Property Courts (for Trial Implementation)] (promulgated by Sup. People's Ct., Oct. 28, 2014, effective Oct. 28, 2014).

<sup>55</sup> Chen Jing (陈静) & Gao Yuan (高远), *Zhongguo Zhishi Chanquan Sifa Baohu Guoji Jiaoliu Jidi Shanghai Jiepai* (中国知识产权保护国际交流基地上海揭牌) [Inauguration Ceremony for Chinese Courts International Exchanges Base (Shanghai) for Judicial Protection of Intellectual Property Rights], CHINANEWS (Sept. 25, 2014), <http://www.chinanews.com/fz/2014/09-25/6631383.shtml>.

<sup>56</sup> *Intellectual Property Protection by Chinese Courts in 2013*, SUPREME PEOPLE'S COURT (Apr. 25, 2014), [http://www.court.gov.cn/zscq/bhcg/201404/t20140425\\_195314.html](http://www.court.gov.cn/zscq/bhcg/201404/t20140425_195314.html).

<sup>57</sup> *Id.*

<sup>58</sup> Tao Xinliang (陶鑫良), *Zhishi Chanquan Fayuan Jianshe de Diyibu yu Xiayibu* (知识产权法院建设的第一步与下一步) [The first and the next step towards the development of Intellectual Property

Shanghai Pudong New Area Court pioneered by launching the “three-in-one” pilot project (administrative, civil and criminal cases in one) concerning intellectual property cases, which effectively promoted efficiency in trials.<sup>59</sup> By the end of Sept. 2014, a total number of 161 courts had followed.<sup>60</sup>

However, despite the improvement in efficiency, to some extent, there are still deficiencies in current adjudication management over intellectual property cases. The subject of jurisdiction is still the intellectual property division inside the original court system. The special demand of such trials in selection of judges and differences in case management could not be fully met, which called for a separation of such courts.

On a practical basis, the considerable number of intellectual property cases tried, the comparatively high efficiency and quality adjudication, and the aggregation of legal professionals in the three areas ensure them fulfilling the task.

### 3. Significance

#### (a) Increasing adjudication efficiency and quality

Due to the complexity of the patent examination system in China, a decision, which invalidates a patent often, turns into a patent litigation cycle. To be specific, the Patent Reexamination Board of SIPO is a section under the administrative organ, which is different from the courts. The right to invalidate a patent is held in the Board, while the courts exercise jurisdiction.<sup>61</sup> Parties may have to undergo several cycles between the Board and the court until they finally reach the Supreme People’s Court or until the patent is validated, which is likely to take years. For instance, the New Leader Battery Industry (Deqing) Company had spent more than eight years to try to have its mercury-free product validated when patent protection was almost due.<sup>62</sup> Such a phenomena can be largely reduced with the

Courts], SIPO OF THE P.R.C., (Sept. 25, 2014), [http://www.sipo.gov.cn/mtjj/2014/201409/t20140924\\_1013928.html](http://www.sipo.gov.cn/mtjj/2014/201409/t20140924_1013928.html).

<sup>59</sup> Shen Mengzhe (申孟哲), *Zhishi Chanquan Fayuan: Sifa Gaige de Xianfeng Budui* (知识产权法院：司法改革的先锋部队) [*Intellectual Property Courts: Vanguard of Judicial Reform*], ZHONGGUO RENMIN RIBAO (中国日报) [PEOPLE’S DAILY] (July 8, 2014), available at [http://paper.people.com.cn/rmrhwb/html/2014-07/08/content\\_1450064.htm](http://paper.people.com.cn/rmrhwb/html/2014-07/08/content_1450064.htm).

<sup>60</sup> See Tao, *supra* note 10.

<sup>61</sup> Xu Hao (许浩), *Pojie “Zhuanli Xunhuan Susong” Guaiquan* (破解“专利循环诉讼”怪圈) [*To Break “the Patent Litigation Cycle”*], ZHONGGUO JINGJI ZHOUKAN (中国经济周刊) [ECONOMIC WEEKLY CHINA] (2008), available at [http://paper.people.com.cn/zgjjzk/html/2008-11/24/content\\_145607.htm](http://paper.people.com.cn/zgjjzk/html/2008-11/24/content_145607.htm).

<sup>62</sup> Fu Guangyun (傅光云), *Liqi Zhuanli Susong: Banian Sanci “Bei Wuxiao”* (离奇专利诉讼：8年3次“被无效”) [*An Unusual Patent Litigation: Invalidated 3 times in 8 years*], GUOJI JINRONG BAO

relatively professional and authoritative guiding judgments provided by intellectual property courts. Proper rights will be more effectively protected while malicious lawsuits can be identified.

*(b) Standardizing the application of law*

With the judicial power over intellectual cases held in various courts at all levels, the judgment made by different courts on similar cases may differ, thus the overall uniformity of law can scarcely be achieved in practice. The establishment of intellectual property courts can to some extent standardize the application of law by centralizing preliminary examination over patent cases in certain courts. Such cross-regional jurisdiction prevents divergences within a single province, which also saves the parties' trouble in choosing a favorable local court.

*(c) Driving indigenous innovation and promoting international competitiveness*

While the number of patent application is increasing rapidly these years, there is no denying that China's quality innovation is still lacking. Applications for a utility model patent or a design patent make up the majority, exceeding invention patent applications greatly. By improving adjudication efficiency and standardization, litigation period can be shortened, thus stimulating the cycle of innovation. The reduction of malicious lawsuits over patent right will also be an incentive towards applicants.

#### 4. Conclusion

The past decade has seen the steady steps toward deepening the judicial reform in China. As was raised in the Third Plenary Session of the 18th Central Committee of the Communist Party of China, the protection of intellectual property rights is on the way.<sup>63</sup> Intellectual property courts should play an active role against patent infringement and malicious law suits to protect intellectual property rights, thus further motivating original innovation. Seeing a start-up, we still expect a more thorough organization of the inner system of said courts, with a comprehensive top-layer design to ensure actual practicality, so that such experience can be extended.

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( 国 际 金 融 报 ) [INTERNATIONAL FINANCE NEWS] (2010), available at [http://paper.people.com.cn/gjjrb/html/2010-01/13/content\\_425872.htm](http://paper.people.com.cn/gjjrb/html/2010-01/13/content_425872.htm).

<sup>63</sup> Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding (Quanwen) (中共中央关于全面深化改革若干重大问题的决定(全文)) [Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform], THE STATE COUNCIL INFORMATION OFFICE OF THE P.R.C. (Nov. 15, 2013), [http://www.scio.gov.cn/zxbd/wz/Document/1351283/1351283\\_2.htm](http://www.scio.gov.cn/zxbd/wz/Document/1351283/1351283_2.htm).

*B. Decisions of Standing Committee of the National People's Congress on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method<sup>64</sup>*

1. Introduction

On August 31, 2014, the 10<sup>th</sup> Session of the Standing Committee of the 12<sup>th</sup> National People's Congress (SCNPC) issued the decisions concerning Hong Kong's (HK) 2017 administrator election and 2016 Legislative Council formation.<sup>65</sup> According to the decisions, the 2017 HK administrator will be selected by universal suffrage and the 2016 Legislative Council formation method will remain unchanged.

The universal suffrage of the Administrator is a promise and a goal set in Article 45, Section 2 of "the Basic Law of the Hong Kong Special Administrative Region" (the Basic Law).<sup>66</sup> For stability concerns, the predecessors are not elected by universal suffrage but by some special committee. They are the 1<sup>st</sup> Administrator Tung Chee-hwa by the HK Organizing Committee; 2<sup>nd</sup> Tsang Yam-kuen and 3<sup>rd</sup> Leung Chun-ying by HK Election Committee. In 2017, if everything goes along smoothly, HK citizens will have their first election of Administrator in history.

To make sure that the universal suffrage is held properly and orderly, the Appendix I of the Basic Law and its explanation<sup>67</sup> has designed a five step process:

- (1) Administrator submits a report to SCNPC on whether the selection method needs amending.
- (2) SCNPC decides whether to amend the selection method.
- (3) If SCNPC approves amending the method, the Administrator needs to bring in an amending bill to the Legislative Council and gets 2/3 majority's approval.
- (4) Administrator approves the bill.
- (5) Administrator submits the bill to SCNPC to get approved or filed.

<sup>64</sup> This update is prepared by Li Qiaofeng, LL.B. Candidate, Tsinghua Law School.

<sup>65</sup> Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhangguan Puxuan Wentihé 2016 Lifāhui Chansheng Banfa de Jueding (全国人大常委会关于香港特别行政区长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 13, 2014 effective Aug. 31, 2014) (Chinalawinfo).

<sup>66</sup> See generally Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa (中华人民共和国香港特别行政区基本法) [The Basic Law of Hong Kong Special Administrative Region] (promulgated by Nat'l. People's Cong., Apr. 4, 1990 effective July. 1, 1997) art.45 (2) (Chinalawinfo).

<sup>67</sup> Quanguo Renda Changweihui guanyu "Xianggang Tebie Xingzhengqu Jiben Fa" Fujian Yi Diqitiao he Fujian Er Disantiao de Jieshi (全国人大常委会关于《香港特别行政区基本法》附件一第七条和附件二第三条的解释) [The SCNPC's explanation of Article 7, Appendix I and Article 3, Appendix II of the Basic Law] (promulgated by Standing Comm., Nat'l. People's Cong., Apr. 6, 2004 effective Apr. 4, 2004) (Chinalawinfo).

To carry out these 5 steps, a rough schedule is made by the HK government<sup>68</sup>:

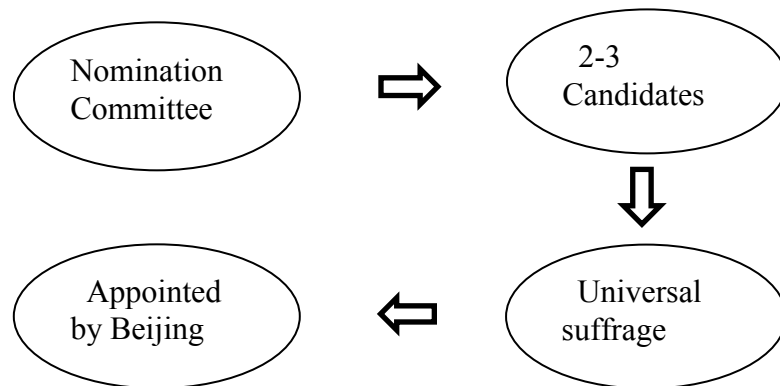
Time	Assignment
2013.14-2014.5	The first public consultation
Mid of 2014	Submission of the report
Third quarter of 2014	The second public consultation
First quarter of 2015	Submission of the amending bill
2015	Approval of the Legislative Council

Administrator Leung Chun-ying had submitted the decisions being discussed now is of the 2nd step, as a report<sup>69</sup> earlier in July.

## 2. Election of the Administrator

The universal suffrage of the Administrator is the core of the decisions. Different from other forms of democratic elections, it empowers a Nomination Committee as the only nomination institution.

The basic procedure is as follows:



### (a) Nomination Committee

Article 45, Section 2 of the Basic Law has set a principle of the revolutionary reform for the selection of Administrator stating that: “the method of selecting the Administrator must be in accordance

<sup>68</sup> Edit. Deng Qingsong, *Hong Kong Political Reform Timetable*, IFENG NEWS (Dec. 6, 2013), <http://news.ifeng.com/hongkong/special/xianggangzhenggaizixun/>.

<sup>69</sup> Leung Chun-ying (梁振英), *Guanyu Xianggang Tebie Xingzhengqu 2017 Nian Xingzheng Zhangguan ji 2016 Nian Lifahui Chansheng Banfa Shifou Xuyao Xiugai de Baogao* (关于香港特别行政区2017年行政长官及2016年立法会产生办法是否需要修改的报告) [The Report on Whether the Methods for the Selection of the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for the Formation of the Legislative Council of the Hong Kong Special Administrative Region in 2016 Need to be Amended] (July 15, 2014).

with the actual situation of HK and with the principle of evolutionary reform. The ultimate purpose is a selection of the Administrator by universal suffrage on the nomination of a broadly representative committee with democratic procedures.”<sup>70</sup> This principle has taken into consideration both the sovereignty of the Chinese central government and the anticipation of democracy of HK residents and promotes the interests of national safety and HK economical development. It also shows the spirit of the “one country, two systems” policy.<sup>71</sup> Based on the principle, a Nomination Committee is needed to ensure the universal suffrage is held orderly.

The constitution of the Nomination Committee inherits that of the current Election Committee.<sup>72</sup> It consists of 1200 members from basically 4 circles: industry, commerce and finance; specialists; labor, social service and religion; member of Legislative council, delegates of district parliament, delegates of village council, deputy to the National People’s congress and members of the Political Consultative Conference.<sup>73</sup> The specific way of forming the committee is up to the HK Special Administrative Region.<sup>74</sup>

Such arrangement of the committee basically has the following considerations<sup>75</sup>:

<sup>70</sup> *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa* (中华人民共和国香港特别行政区基本法) [The Basic Law of Hong Kong Special Administrative Region] (promulgated by Nat’l. People’s Cong., Apr. 4, 1990, effective July. 1, 1997) art. 45 (2) (Chinalawinfo).

<sup>71</sup> Li Fei (李飞), Guanyu “Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti he 2016 Nian Lifahui Chansheng Banfa de jue ding (Caoan)” de Shuoming (关于《全国人民代表大会常务委员会关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定(草案)》的说明) [Explanation on “Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method (draft)”] Aug. 27, 2014.

<sup>72</sup> *Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhangguan Puxuan Wenti he 2016 Lifahui Chansheng Banfa de Jue ding* (全国人大常委会关于香港特别行政区行政长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat’l. People’s Cong., Aug. 13, 2014, effective Aug. 31, 2014) (Chinalawinfo).

<sup>73</sup> *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Fujian Yi Xianggang Tebie Xingzhengqu Xingzheng Zhangguan de Chansheng Banfa Xiuzhengan* (中华人民共和国香港特别行政区基本法附件一香港特别行政区行政长官的产生办法修正案) [Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region] (promulgated by Standing Comm., Nat’l. People’s Cong., Aug. 8, 2010 effective Aug. 8, 2010) (Chinalawinfo).

<sup>74</sup> *Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhangguan Puxuan Wenti he 2016 Lifahui Chansheng Banfa de Jue ding* (全国人大常委会关于香港特别行政区行政长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat’l. People’s Cong., Aug. 13, 2014, effective Aug. 31, 2014) (Chinalawinfo).

<sup>75</sup> Li Fei (李飞), Guanyu “Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti he 2016 Nian Lifahui Chansheng Banfa de Jue ding (Caoan)” de Shuoming (关于《全国人民代表大会常务委员会关于香港特别行政区

(1) In terms of the legislative intent, the “broad representation” of the Nomination Committee regulated in the Basic Law has the same connotation with the “broad representation” of the current Election Committee regulated in Appendix I of the Basic Law. The 2007 decision of the SCNPC has regulated that “the formation of the Nomination Committee remains the same with that of the Election Committee.”<sup>76</sup>

(2) The constitution of the Election Committee has a consensus through broadly consultation and adequate discussion when it was made during the drafting of the Basic Law. The practice of Administrator elections after the return has also proven that the Election Committee can guarantee the wide and balanced participation of every social stratum and covers the representative figures of every field. Therefore, to inherit the constitution of the Election Committee it is needed to be risk proofing and have a balanced-participation.

(3) The majority of HK society hopes that the Nomination Committee inherits the Election Committee in terms of constitution method.

*(b) The candidates*

The Nomination Committee shall nominate two to three candidates with democratic procedures. Every candidate shall be supported by more than half of the members.<sup>77</sup>

The reasons for the limitation of candidates is explained in by SCNPC<sup>78</sup>:

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行政长官普选问题和2016年立法会产生办法的决定(草案)》的说明 [Explanation on “Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method (draft)”] Aug 27, 2014.

<sup>76</sup> Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu 2012 Xingzheng Zhangguan he Lifahui Chansheng Banfa ji Youguan Puxuan Wenti de Jueding (全国人大常委会关于香港特别行政区2012年行政长官和立法会产生办法及有关普选问题的决定) [Decision of the Standing Committee of the National People's Congress on the Methods for Selecting the Chief Executive and Forming the Legislative Council of the Hong Kong Special Administrative Region in 2012 and Issues on Universal Suffrage] (promulgated by Standing Comm., Nat'l. People's Cong., Dec. 9, 2007 effective Dec. 9, 2007) (Chinalawinfo).

<sup>77</sup> Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhangguan Puxuan Wenti he 2016 Lifahui Chansheng Banfa de Jueding (全国人大常委会关于香港特别行政区行政长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 13, 2014, effective Aug. 31, 2014) (Chinalawinfo).

<sup>78</sup> Li Fei (李飞), Guanyu “Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti he 2016 Nian Lifahui Chansheng Banfa de jueding (Caoan)” de Shuoming (关于《全国人民代表大会常务委员会关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定(草案)》的说明) [Explanation on “Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method (draft)”] Aug 27, 2014.

(1) To limit candidates to two or three can guarantee the true competition of the election and avoid complex procedures and high cost brought by election with too many candidates.

(2) The HK Administrator has always been elected among two or three candidates ever since its return. So this system fits HK's actual situation.

SCNPC also explains the reason why candidates need a majority endorsement<sup>79</sup>:

(1) The Nomination Committee as a special institution must conduct as a whole. Therefore according to democratic procedures and principle of majority rule, it is reasonable that candidate must get majority endorsement.

(2) To get a majority endorsement, candidates must seek support from every sector that represents the interests indifferent social stratum. This guarantees balanced participation.

(3) The consultation held by HK government shows that there are quite a lot of people hoping that candidates must get support from the Nomination Committee by certain proportion; the consultation by the Office of SCNPC shows that the proportion had better be made specific. As response to these opinions, the SCNPC now clearly specify the proportion to 1/2.

*(c) Universal Suffrage*

Before 2017, the election of Administrator has always been within an Election Committee, which is the model for the Nomination Committee. In the Election Committee, no less than 100 members of the Election Committee can make a joint nomination of candidate and each member can only nominate one. The Administrator is elected under the principle of "one person one vote."<sup>80</sup>

In 2017, all qualified constituents in HK will have the right to elect the Administrator from the candidates.<sup>81</sup> Qualified constituents refers to those 1) who are permanent residents; 2) whose rights of abode are in HK; 3) who are not less than 18; 4) who have got personal identification document; 5) whose election qualifications

<sup>79</sup> *Id.*

<sup>80</sup> Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa Fujian Yi (中华人民共和国香港特别行政区基本法附件一) [Appendix I of The Basic Law of Hong Kong Special Administrative Region] (promulgated by Nat'l. People's Cong., Apr. 04, 1990, effective July. 1, 1997) art.4, 5 (Chinalawinfo).

<sup>81</sup> Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhanguan Puxuan Wenti he 2016 Lifahui Chansheng Banfa de Jueding (全国人大常委会关于香港特别行政区长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 13, 2014 effective Aug. 31, 2014) (Chinalawinfo).

have not been deprived.<sup>82</sup> The universal suffrage enables every citizen in HK to directly participate in the election, which shows the spirit of equal and popularized election right and the development of HK's democracy.<sup>83</sup>

*(d) The appointment by Beijing*

The elected Administrator must be appointed by the central government.<sup>84</sup> The right of appointment is substantial: the central government can approve the candidate as well as deny him / her.<sup>85</sup>

*(e) Other situation*

If the specific method of universal suffrage is not passed under statutory procedures, the 2017 selection shall apply the preceding method.

### 3. The formation of the Legislative Council

*(a) The decision*

According to the report submitted by Mr. Leung Chun-ying, it is a consensus in HK society that the universal suffrage of the Administrator is preoccupation and focus of present work. And since the Legislative Council has just had a big reform in 2012, there is little need to change in 2016.<sup>86</sup>

Therefore, the SCNPC decides that:

(1) The forming method and voting procedures of the Legislative Council in Appendix II of the Basic Law remains unchanged.

(2) The 2016 Legislative Council is formed in the same way with the 5<sup>th</sup> Legislative Council.

<sup>82</sup> *Xuanmin Zige* (选民资格) [Qualification of Constituent], <http://www.voterregistration.gov.hk/sim/register-gc.html>.

<sup>83</sup> Li Fei (李飞), Guanyu “Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti he 2016 Nian Lifahui Chansheng Banfa de jue ding (Caoan)” de Shuoming (关于《全国人民代表大会常务委员会关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定(草案)》的说明) [Explanation on “Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method (draft)”] Aug. 27, 2014.

<sup>84</sup> Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzhengqu Zhangguan Puxuan Wenti he 2016 Lifahui Chansheng Banfa de Jue ding (全国人大常委会关于香港特别行政区行政长官普选问题和2016立法会产生办法的决定) [Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method] (promulgated by Standing Comm., Nat'l. People's Cong., Aug. 13, 2014, effective Aug. 31, 2014) (Chinalawinfo).

<sup>85</sup> Li Fei (李飞), Guanyu “Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti he 2016 Nian Lifahui Chansheng Banfa de jue ding (Caoan)” de Shuoming (关于《全国人民代表大会常务委员会关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定(草案)》的说明) [Explanation on “Decisions of SCNPC on Universal Suffrage of HK Administrator and the 2016 Legislative Council Formation Method (draft)”] Aug. 27, 2014.

<sup>86</sup> *Id.*

(3) After the Administrator is elected by universal suffrage, all members of the Legislative Council can also be elected by universal suffrage.

(4) At an appropriate time before the universal suffrage of the Legislative Council, a report concerning the amendment to the formation of the Legislative Council needs to be submitted to the SCNPC; and the determination shall be made by SCNPC.

*(b) Brief introduction to the method of the formation of 5<sup>th</sup> Legislative Council*

According to the Basic Law, members of the Legislative Council are elected in two paralleled systems: half elected by functional parties and half directly elected by constituents in different precincts,<sup>87</sup> as the 5<sup>th</sup> Legislative Council elected in 2012 has 70 members, 35 from precincts, and 35 from functional parties.<sup>88</sup>

According to “Regulations of Legislative Council”, there are 29 functional fields such as labor, insurance, shipping and transportation etc. The constituent includes individuals and groups as juridical person. And there are 5 precincts with different quota of legislative member according to the population. The election adopts the simple-plurality principle, and each candidate can only be nominated once in the election.<sup>89</sup>

#### 4. Conclusion

In this decision, universal suffrage of the Administrator catches more attention than the formation of Legislative Council; and among regulations concerning the universal suffrage, the Nomination Committee is the most heatedly discussed. On the central government’s perspective, the Nomination Committee more or less gives some control over HK politics and is seen as a guarantee to the “one country, two systems” policy; but as HK citizens see it, the Nomination Committee means the election is not really democratic. After the Decisions were issued, many HK citizens began to protest and occupied the “mid-ring.” Whether this will bring HK democracy still needs time to see.

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<sup>87</sup> Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa Fujian Er (中华人民共和国香港特别行政区基本法附件二) [Appendix II of The Basic Law of Hong Kong Special Administrative Region] (promulgated by Nat’l. People’s Cong., Apr. 4, 1990, effective July. 1, 1997) art.1 (Chinalawinfo).

<sup>88</sup> Lifahui Tiaoli (立法会条例) [Regulations on the Legislative Council] (promulgated by Temporary Legislative Council, Oct. 3, 1997, effective Oct. 3, 1997).

<sup>89</sup> Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jiben Fa Fujian Er (中华人民共和国香港特别行政区基本法附件二) [Appendix II of The Basic Law of Hong Kong Special Administrative Region] (promulgated by Nat’l. People’s Cong., Apr. 4, 1990, effective July. 1, 1997) art.1 (Chinalawinfo).

*C. Highlights of The Decision of the CPC Central Committee on the Comprehensive Promotion of Several Major Issues of the Rule of Law*<sup>90</sup>

1. Background

On October 23, 2014, the fourth plenary session of the 18th Communist Party of China (CPC) Central Committee has released the decision of the CPC Central Committee on the comprehensive promotion of several major issues of the rule of law (the Decision), forming the first and particular decisions on how to strengthen legal system building by CPC. The decision, which set the blueprint for the rule of law in China, is expected to create a better legal environment for China to deepen its all-around reform and better protect the achievements of the country's reform and opening-up process.

The Decision was drafted by a group headed by Xi Jinping and his two deputies, Zhang Dejiang, top legislator, and Wang Qishan, secretary of the Central Commission for Discipline Inspection of the CPC.<sup>91</sup>

The CPC released the notification on asking for opinions for the comprehensive promotion of the rule of law on January 27, 2014, since which relevant investigations has been conducted in 14 provinces by the drafting group. On Aug. 19, the CPC Central Committee held a symposium with representatives from non-Communist parties, the All-China Federation of Industry and Commerce, as well as people with no party affiliation to listen to their opinions and suggestions regarding the draft decision.<sup>92</sup>

2. Contents

*(a) Principles*

The first section clearly states that we must insist on walking the path of the rule of law with Chinese characteristics and building the socialist legal system with Chinese characteristics, and building a socialist country under the rule of law. The section addressed the significances, guiding theory, general goals and principles of comprehensively advancing the rule of law.

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<sup>90</sup> This update is prepared by Zhang Yiran, LL.B. Candidate, Tsinghua Law School.

<sup>91</sup> *China Stresses Authority of Constitution, Pledges Judicial Reform*, International Department Central Committee (Oct. 28, 2014), <http://www.idcpc.org.cn/english/events/141028.htm>.

<sup>92</sup> *Non-CPC Members' Opinions Heard Before Rule-of-Law Decision*, XINHUA NET (Oct. 24, 2014), [http://news.xinhuanet.com/english/china/2014-10/24/c\\_133740409.htm](http://news.xinhuanet.com/english/china/2014-10/24/c_133740409.htm).

*(b) Rule of Constitution and Legislation*

The second part of the Decision addresses how to perfect the constitution-centered socialist legal system with Chinese characteristics, and how to strengthen the execution of the constitution.

The Decision has stressed the role of National People's Congress and its standing committee in Constitution interpretation and supervision. All regulatory documents shall be registered and reviewed, while the unconstitutional ones shall be repealed or revised.

December 4<sup>th</sup> is set as the national Constitution Day and all officials elected or appointed by people's congresses or their standing committees, at all levels, must now take a public oath of allegiance to the Constitution, underlining the authority of Constitution.

According to the Decision, CPC's leadership over legislation is to be reinforced, and its procedure to be completed. Constitution amendments shall first be raised by Central Committee of CPC. All significant legislations or law amendments shall be reported to Central Committee of CPC by the NPC standing committee.

The Decision urges the legislation to be more democratic and rationalized through various approaches, including special committees and professional consultants under NPC, more participation by representatives to People's Congress at each level, authorizing third party to law drafting, exploring discussion mechanism involving democratic parties, social organizations and scholars and setting up public feedback system.

To prevent departmental interest and regional protectionism entering the law, the boundary of legislation power is to be set straightly. A third-party evaluation system is to be introduced for the substantial legislation disputes between departments.

A noticeable stipulation in the Decision is that individual articles drafting with substantial significance may be voted separately.

*(c) Reform of the Justice System*

The reform of the justice system is aimed at setting up a fair, efficient and authoritative socialist judicial system, safeguarding judicial justice and improving judicial credibility. There are several points significant to the ongoing judicial system in China in the Decision.<sup>93</sup>

A mechanism will be set up to record officials who interfere with judicial cases and name them publicly to hold them accountable,

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<sup>93</sup> SCIO Briefing on the Decisions of the 4th Plenary Session of the 18th CPC Central Committee, China.org.cn (Oct.30, 2014), [http://www.china.org.cn/china/2014-10/30/content\\_33921900\\_2.htm](http://www.china.org.cn/china/2014-10/30/content_33921900_2.htm).

which will improve the adjudication system and the system to protect judicial staff when carrying out their statutory duties. Those officials influencing judicial activities or meddling in a particular case will receive party disciplinary penalty and will even be found guilty criminally.

The Decision explores some approaches to optimize the structure of the judicial organs and allocation of their functions and power. Unified standards for executing legal punishments are to be established. Administrative tasks of courts and prosecuting bodies should be separated from jurisdictional and prosecutorial power. The Supreme People's Court will set up circuit courts and explore the possibility of establishing cross-administrative region courts and procuratorates. The court's lawsuit acceptance system will be transformed from review system to register system, enlarging court's protection of litigious rights. Prosecutors are enabled to file litigation cases relating to public interests.

The Decision set up a lifelong liability accounting system for case handling and a retrospective mechanism for wrong decisions. Individual judges and prosecutors will be held responsible for every judicial decision that they make. This mechanism is aimed to create incentives for judges to resist the interventions from within the judicial system.

Supervision by prosecuting bodies is strengthened by the Decision. A system of lifetime bans from all legal professions is also set up under the superintendence of prosecutors.

*(d) Government by law*

The third part addresses how to greatly improve the administration by law and speed up building a government by law.

The Decision reiterates that the boundary of administrative power is the law, without which government shall not make any decisions undermining individuals' rights. The country will set up a list of government powers and ban administrative authorities from any extralegal activity.<sup>94</sup> Especially the power division between different levels of government shall be legalized.

The decision set up a lifelong accounting system for significant policy decision, under which governors or any other officials found responsible for substantial policy failure or administrative non-performance resulting in adverse impact are to be recorded.

The decision launches further reform on law enforcement system. The focus of which is to enhance enforcement efficiency. A comprehensive one, along with which trans-department enforcement

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<sup>94</sup> *China Stresses Authority of Constitution, Pledges Judicial Reform*, International Department Central Committee (Oct. 28, 2014), <http://www.idcpc.org.cn/english/events/141028.htm>.

is encouraged, shall replace the multiple category enforcement teams. The standard and procedure shall be specified and quantified. The qualification of law enforcement personnel shall be strictly carried out, urges the Decision.

A system to put major government decisions through checks and reviews will be established and authorities will have legal advisors to ensure their decisions and administrative works are in line with the law

The Decision demands a stricter restriction and supervisory mechanism within the government, especially for those departments with extremely intense power.

*(e) Legal profession building*

The sixth part addresses how to strengthen the building of a rule of law work team.

The Decision sets up the guideline to select legislation contributors, judges and prosecutors from qualified lawyers and legal scholars. It builds a legal personnel management system catering to the characteristics of legal professions, including safeguard mechanism and career hierarchy.

The Decision stipulates that judges and prosecutors shall be selected step by step, which means that all beginning judges and prosecutors shall be recruited at the province level and serve at the primary level. Higher courts and prosecutions will recruit excellent personnel from lower ones.

Government and social organizations at each level shall set the positions for public lawyers, whom will participate in policy making for government and for entities. The coverage of legal aid systems shall be widened, ensuring citizens' rights to justice.

*(f) Party leadership*

The seventh part addresses how to strengthen and improve the Party's leadership on comprehensively advancing rule of law. The Decision makes it clear that CPC's leadership is the foundation for the system of socialist rule of law and a systemic guarantee for comprehensively promoting the rule of law.

Zhengfawei, according to the Decision, is to be sustained in the long term as the way to realize party leadership over rule of law issues. The focus of Zhengfawei at each level is to determine the political direction, to coordinate different parties, to build the law work team and to create a justice judicial environment.

The Decision requires strengthening regulatory document system building within CPC, reinforcing its review and interpretation and coordinating them with national law.

### 3. Discussion

This is the first time a plenary session of the CPC Central Committee has taken rule of law as its central theme. The term “rule of law” appears over fifty times in the Decision, demonstrating CPC’s resolution and determination on comprehensively promoting the rule of law in China.<sup>95</sup>

The term “rule of constitution” first applied in CPC’s official document is widely deemed as the most meaningful movement of the Decision. The words mirrored a speech of Xi in late 2012 when he stressed, “no organization or individual has the special right to overstep the Constitution and law, and any violation of the Constitution and the law must be investigated.”

Scholar believes that the terms “rule of Constitution” and “governing in line with Constitution” are an important step ahead in the rule of law construction, as they present a deeper and more profound sense of rule of law.<sup>96</sup>

According to Professor Han Dayuan, the implementation of constitution has been very disappointing in the current situation. It has been widely ignored by civil servants, especially by senior civil servants. Civil rights are under-protected while public powers are abused. Lack of constitutional review mechanism is the main cause for the current “constitution nihilism”.<sup>97</sup>

NPC and its stand committee has been shouldered the responsibility to interpret and supervise the enforcement of constitution, repealing unconstitutional laws and other regulatory documents in the Decision. Yet it has not been clarified in the Decision on the procedure of constitutional review and constitutional interpretation.

The Law on Legislation adopted in 2000 first established the mechanism of constitutional review of regulations. In 2004, NPC set up the Regulation Review and Registration Office, the organ for constitutional review of regulations. Despite the continuous enthusiastic promotion of constitutional review by legal scholars

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<sup>95</sup> “Fazhi” Chuxian 50 Yuci Toulu le Naxie Xinhao?—Sizhongquanhui Gongbao Jiedu (“法治”出现 50 余次透露了哪些信号?—四中全会公报解读) [What Signal Does the over 50 Appearance of the Term “Rule of Law” Tell?—Interpretation of the Decision], XINHUA NET (Oct. 23, 2014), [http://news.xinhuanet.com/legal/2014-10/23/c\\_127134490.htm](http://news.xinhuanet.com/legal/2014-10/23/c_127134490.htm).

<sup>96</sup> CPC Sets New Blueprint for Rule of Law, ASECORP CHINA (Oct. 27, 2014), <http://www.asecorpchina.com.cn/en/news/242-cpc-sets-new-blueprint-for-rule-of-law>.

<sup>97</sup> “Jianchi Yixian Zhiguo” Shouci Xiejin Zhonggong Jueyi (“坚持依宪治国”首次写进中共决议) [“Insisting Rule of Constitution” First be Written into CPC Decision], TENCENT NEWS (Oct. 24, 2014), <http://news.qq.com/a/20141024/003047.htm>.

over the past decade, the existing mechanism does not operate at all due to various reasons.<sup>98</sup>

Since the abstract constitutional review approach reinforced by the Decision has excluded judiciary branch from the authority of interpreting constitution, how to strengthen and ensure NPC's role is the key step to "rule by constitution". Several suggestions have been made. First, a regular independent institution with more professional capacity and political authority shall be created to shoulder the responsibility. Second, the procedure of constitution supervising shall be developed, including the standard of review and operation of registration. Third, the subject and procedure of initiating constitution supervising shall be stipulated with more details. The Judiciary branch shall be authorized the power to refer unconstitutional documents to NPC or its stand committee.<sup>99</sup>

The Decision's endorsement of the ongoing judicial reform is another highlight. According to President Xi, the main problem in justice system is its lack of standards, justice and the integrity and has lost public credibility.<sup>100</sup> Accordingly, the Decision focuses on solving the problems that impede a just judiciary and the capability of judicial organs.

After the third plenary session of the 18th Communist Party of China (CPC) Central Committee launched the comprehensive reform in the justice system, various measures are being carried out in all judicial organs, the most significant of which is the pilot reform in six provinces.

Most of the measures such as judge selection system and purposed circuit courts set up by Supreme People's Court are all aimed at relieving courts from their current all-rounded dependence on the local government and therefore control local officials and other powers' intervention and manipulation of lawsuits, which is a widespread phenomenon throughout the country. The lifelong liability accounting system for case handling and a retrospective mechanism for wrong decisions set by the Decision, is deemed as the

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<sup>98</sup> Tian Feilong (田飞龙), *Yixian Zhiguo Xu Qianghua Jizhi* (依宪治国需强化机制) [*Rule of Constitution Calls for Strengthening the System*].

<sup>99</sup> *Yixian Zhiguo: Liuda Zhizhuxing Zhidu* (依宪治国：六大支柱性制度) [*Rule of Constitution: Six Cornerstone Institutions*], BEIJING YOUTH DAILY (Nov. 3, 2014), [http://epaper.yinet.com/html/2014-11/03/content\\_94252.htm?div=-1](http://epaper.yinet.com/html/2014-11/03/content_94252.htm?div=-1).

<sup>100</sup> Xi Jinping Guanyu Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding de Shuoming (习近平关于《中共中央关于全面推进依法治国若干重大问题的决定》的说明) [Xi Jinping's Interpretation on The decision of the CPC Central Committee on the comprehensive promotion of several major issues of the rule of law] (Oct. 28, 2014) (Chinalawinfo).

most significant step because it gives the judges incentives and pressure to make judicial decision by their consciousness.<sup>101</sup>

Increasing the social status and authority of judiciary branch is another aim pursued through professionalization of judges and building legal professional community.

Despite the endorsement in the decision, the reform is faced with many challenges ahead. Judge's lifetime tenure and unchangeable wages are not mentioned in the pilot reforms and the Decision, without which judges are always vulnerable to other powers within the system.

"Unified administration of finance, human resources and powers on the provincial level", the current direction of reform in court system, falls victim to some researchers' criticism.

It may make the court system more vulnerable to political control at the highest levels and risks reinforcing a much-criticized tendency of the judiciary to behave more like another hierarchical Chinese bureaucracy and less like an independent body as favored by proponents of more fundamental reform, according to Professor Jacques deLisle.<sup>102</sup>

Party's leadership emphasized throughout the Decision draws considerable attentions. The Decision says, "The CPC's leadership is consistent with the socialist rule of law". Prof. Ma from China University of Political Science and Law stressed that to advance the rule of law is also to reinforce the leadership by the CPC, not to weaken it.<sup>103</sup>

The powers of raising Constitutional amendment suggestions and supervising legislation were first stipulated in formal document by CPC though it has been routinely practiced for years in reality. The formal confirmation of this constitutional convention is meaningful for the "rule of constitution" promoted in the Decision.

The Decision also called for improving regulations and system of the Party to strengthen self-discipline and required Party members to take the lead in abiding by state laws, which is in line with the anti-corruption policy pursued by CPC and the country in the past two years.

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<sup>101</sup> Wang Jianxun (王建勋), *Tan Fazhi* (谈法治) [*On Rule of Law*].

<sup>102</sup> Jacques deLisle, *Legal Reform Promised in China, Though the Party is Still the Law*, NIKKEI ASIA REVIEW (Oct. 30, 2014), <http://asia.nikkei.com/magazine/20141030-CP-Group-in-full-flower/Politics-Economy/Jacques-deLisle-Legal-reform-promised-in-China-though-the-party-is-still-the-law>.

<sup>103</sup> *The CPC Sets New Blueprint for Rule of Law*, ASECORP CHINA (Oct. 27, 2014), <http://www.asecorpchina.com.cn/en/news/242-cpc-sets-new-blueprint-for-rule-of-law>.

Generally, the Decision released a positive signal for promoting rule of law in the coming years. The detailed policy coming afterwards is expected to see to what extent the reform can reach.