

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

INSIDE ...

▸ Main Feature
▸ Legal Reform

▸ Case Files
▸ Heard on the Web

Main Feature

Secured Transactions Law Reform in China Can a commercial law serve the needs of the market?

Su Lin Han
Editor

For the past two years, the author has worked as legal consultant for the World Bank on an access to credit and secured transactions law reform project in China. The project coincided with efforts from within China to reform the existing secured financing system, including revising provisions of the 1995 Security Law (《担保法》, the "PRC Security Law") to become part of the new Property Law. During this time, the World Bank team has worked closely in China with key stakeholders interested in and with the power to effect legal and institutional changes to improve access to credit by Chinese businesses. In this article, the author will share some personal observations about the reform process, including the background, the forces supporting the reform and the obstacles encountered.¹

The World Bank-PBOC Project

In 2004, the World Bank Group launched an access to credit and secured transactions law reform project with a team of researchers from China's central bank, the People's Bank of China (中国人民银行, PBOC, hereinafter referred to as the "WB-PBOC Project"). The project's task was to investigate and analyze the extent to which movable assets such as equipment, inventory and receivables were being used as collateral to enable businesses, especially small and medium enterprises (SMEs), to obtain credit in China. Experts from the World Bank and the PBOC conducted extensive field interviews with Chinese banks, trade creditors, businesses (both state and privately-owned), as well as officials from movable collateral registries at the central and local levels. The project also included a survey of Chinese banks on current secured lending practices, the first of its kind for China. In January 2006, reports containing the project's findings and recommendations by both the Chinese and World Bank teams were published in Chinese.² The World Bank report is scheduled to be published in English later this year.

¹ All views expressed in this Article are strictly personal and do not represent the views of those organizations for which the author has worked. Except as otherwise noted, this article is based primarily on information made public by the project report (see discussion below) as well as knowledge gained through the course of the project.

² The Research Bureau of the People's Bank of China, the Foreign Investment Advisory Services of the World Bank Group and the China Project Development Facility of the International Finance Corporation, "Secured Transactions Reform and Credit Market Development in China" 《中国动产担保物权与信贷市场的发展》 (hereinafter referred to as the "WB-PBOC Report"), published by the China CITIC Press (2006).

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

During the course of the WB-PBOC project, a series of high-level seminars on international best practice in secured financing were also held. The aim was to build awareness among China's key stakeholders, including government agencies, banks, legal scholars and most importantly, officials from the National People's Congress (NPC), on the need to reform the existing legal and institutional infrastructure in order to support a modern secured financing system capable of providing easy and inexpensive access to credit for businesses. NPC was already in the process of drafting the Property Law 《物权法》, China's first comprehensive law on ownership and use of different types of property rights. The draft Property Law includes a chapter on security in real and personal property and NPC officials welcomed the opportunity to explore ways to make changes to the relevant provisions governed by the existing Security Law. In addition, the World Bank team submitted comments to the NPC when a draft of the Property Law was made public in July 2005.

Modern Secured Financing vs. Current Practice in China

The focus of the WB-PBOC Project is to encourage the use of movable property as collateral. In most developed economies, movable assets play a major role in securing financing for businesses. This is particularly important for small and medium firms that do not own significant real property but hold inventory and receivables as their primary assets instead. In the U.S., for example, 70% of small business financing is secured solely by movable property.³

Such a high level of movable collateral financing is made possible by a legal infrastructure designed to facilitate rather than to regulate secured transactions. First, modern secured transactions laws give contracting parties maximum flexibility to structure their commercial transactions. The range of movable collateral is broad. Movable property of any kind, tangible or intangible, presently-owned or future-acquired, can be used as collateral. A borrower may also continue to use the collateral during the course of a loan. This so-called "non-possessory secured financing" allows the debtor to retain possession and control of the collateral after the loan is made so that it can be used to generate revenue and service the debt. With such flexibility, a manufacturer may pledge its equipment and/or products as collateral while retaining use of the equipment and selling its products to buyers. A car dealer may use its inventory, including cars it already owns and those that it plans to acquire in the future, as collateral while continuing to sell cars in the normal course of business. A service provider or supplier of goods may borrow against its income stream generated by payments due from its customers (receivables), regardless of whether the receivables have already been earned but not yet paid or will be earned in the future.

Second, modern movable secured financing laws recognize that in an efficient market secured lending should be low cost and low risk. Otherwise lenders would not be willing to lend against movable collateral. As a result, the law makes sure that it is easy to create a security interest by contract, requiring minimum formalities. No registration is required for the security interest to become valid and enforceable, nor is the secured transaction subject to review by government officials. Registration of minimum identifying information at a centralized electronic registry serves to disclose the existence of the security interest to third parties and to assure its priority status against the claims of other creditors. When a debtor defaults, a secured creditor is given the option, either contractually or by law, to enforce its rights by taking possession and selling the collateral without needing to obtain a court order.

³ World Bank-PBOC Report, p.195.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Secured financing in China tells a different story. Movable assets offer little value as security. According to the survey conducted by the WB-PBOC Project, only 4% of commercial loans are secured solely by movable assets.⁴ This is the direct result of a secured financing legal system which gives the government too much control over what can be used as collateral and how secured transactions can be conducted. The problem is particularly acute in the area of non-possessory secured financing where the law is so restrictive and the requirements so cumbersome that the secured financing arrangement can generate little benefit for a lender. Under Article 34 of the PRC Security Law, a non-possessory security interest may only be created in two types of movable assets: equipment and motor vehicles. A pool of fluctuating assets such as inventory or receivables cannot be used as collateral because under the Security Law, the types, amount, nature and location of such assets must be specifically described at the time of contract,⁵ i.e., they must be fixed at the time of the contract. The result is “16 trillion RMB in dead capital—assets owned by private firms, SMEs and farmers that cannot be used to generate loans to fund business investment and growth”.⁶

To the extent movable assets are used as collateral, the government’s heavy-hand makes the process of creating, registering and enforcing the security interest unduly cumbersome, expensive and often uncertain. Under the Security Law, a security interest must be registered with a government-run registry to become valid and enforceable. However, because there is no centralized registry in China for all types of movable collateral, a lender must navigate through a registration system comprised of more than a dozen individual registries differentiated by the types of movable assets and the status of the debtor. The three general registries are operated by the Administration of Industry and Commerce (工商局), which registers charges over movable assets of enterprises; the Public Security Bureau (公安局) which registers charges over motor vehicles; and Public Notary Offices (公证处) which register security interests in non-enterprise assets (as well as any other types of charges where there is no other place to register). In addition, a number of specialized registries handle charges over specific types of assets, e.g., farm tractors by the Agricultural Management Bureau (农业管理局) and standing timber by the Bureau of Forestry (林业局). As a result, multiple registrations are required when more than one type of asset is involved. A foreign lender taking security over all of an enterprise borrower’s assets reportedly spent more than one year registering its interests with the appropriate registries.⁷

In addition, the registration itself is subject to intensive scrutiny by registry officials. Lenders are required to submit excessive amounts of documentation, including loan and security agreements, all of which must be examined by registry officials to determine the legality of the transaction.

Registry officials also determine whether the secured loan amount exceeds the value of the collateral, regardless of whether lenders are satisfied with their own valuation.⁸ Valuation by registry-appointed appraisers are routinely required and their fees borne by lenders. In some locales, when the collateral consists of multiple assets, the registries even require separate

⁴ WB-PBOC Report, pp. 195-196.

⁵ Security Law, article 39.

⁶ WB-PBOC Report, p. 195.

⁷ WB-PBOC Report, p. 259.

⁸ Under Article 35 of the Security Law, a secured loan may not exceed the value of the mortgage property. Many registries interpreted this provision as requiring third-party appraisals even if parties have agreed to the value of the collateral.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

contract documentation and appraisal for each asset component. Some lenders reported that registration-related costs could run as high as 1/3 of the loan amount. The process also gives registry officials wide discretion in accepting or rejecting registration applications. In the city of Shanghai, the local Administration for Industry and Commerce in charge of registering mortgages for movable property of enterprises accepts an average of only 1,000 registrations a year. The number is even lower in many other major cities.⁹ In the U.S. and Canada, because registration does not create substantive property rights, a security interest filing requires only minimum information sufficient for third parties to identify the existence of the security interest. This allows for instant electronic registration which does not involve registry officials reviewing the underlying transaction. Such electronic filings often take a few minutes to complete and cost less than US\$20.

Chinese courts also play a central role in the enforcement of security interest. Upon default, unless the debtor is willing to cooperate, the secured creditor must seek a judgment and an execution order from the court in order to take possession of the collateral. The seizure and sale of the collateral must also be carried out by court officials. Approximately 75% of the enforcement actions take more than a year, some even longer.¹⁰ Since movable assets depreciate much faster than real property, the value of the movable collateral is likely to be greatly reduced during the long enforcement process. The prolonged enforcement also gives debtors the opportunity to hide or fraudulently transfer the collateral. When asked about how much a lender can recover from equipment collateral, one Chinese banker curtly replied, "Scrap metal". The cost to a secured creditor is not limited to low recovery rate. Court fees, execution fees, taxes, appraisals and judicial auctions can consume more than 20% of the outstanding claims.¹¹ As a result, many Chinese banks do not pursue default cases and simply write them off as bad debt. In comparison, enforcement time in developed economies can take as little as 7 days and cost less than 1% of the secured debt.¹²

It is clear that the secured financing system in China is not working. The legal and institutional infrastructure must be changed to allow inventory and receivables to help generate financing for business growth so that secured transactions can be undertaken with flexibility and efficiency. In order for changes to take place, however, a number of obstacles have to be overcome. The question remains whether a demonstrated need of the market is sufficient to generate a political mandate for reform and whether it can be a driving force in shaping a commercial law aimed at promoting secured lending in China.

Recognizing the Need for Reform: A Crucial First Step

Although key decision-making within the Chinese government is often a collective matter, the success of a legal reform of this magnitude often hinges on whether the "right" individuals can be convinced of the need for change. The presence of an interested government agency spearheading the reform efforts and willing to use its political capital to lobby for reform appears to be critical. In the case of secured financing law reform, the central bank's focus on the financing woes of SMEs has led to its recognition that reforming the country's movable secured

⁹ WB-PBOC Report, p. 263. More detailed discussions about China's movable registry practice can be found in the same report.

¹⁰ WB-PBOC Report, p. 284.

¹¹ WB-PBOC Report, *id.*

¹² WB-PBOC Report, *id.*

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

financing legal system will not only improve access to credit for SMEs, but it will also likely improve the profitability of domestic Chinese banks.

In a study released in 2004, the PBOC found widespread financing difficulties among SMEs, which account for 80% of all enterprises in China.¹³ Unlike state-owned enterprises which can rely on state-subsidized credit and large private companies with proven creditworthiness, SMEs have little access to bank loans. One of the biggest hurdles for SME financing is the requirement to provide real property as security.¹⁴ Under China's land system, only use rights of state-owned urban land and buildings can be taken as collateral. Rural land use rights cannot be mortgaged.¹⁵ Because 90% of China's SMEs are rural township and village enterprises,¹⁶ most SMEs have little to offer in terms of real property collateral. Even when factory buildings have value, lenders are unwilling to accept buildings on rural land because they are not transferable. Meanwhile, inventory and receivables, which account for approximately 50% of SME assets in China,¹⁷ cannot be used as security due to restrictions under the Security Law. The PBOC concluded that reform of the secured financing system, particularly allowing greater use of movable collateral such as inventory and receivables, would be critical for improving SME access to bank loans.

The feedback from Chinese banks is equally compelling. In the survey conducted by the WB-PBOC Project, 98% of the banks supported reforming the system.¹⁸ Many Chinese banks, especially those in the more developed coastal regions, are already pushing the limits of the law in their lending practices. Some of these banks' best customers have been able to borrow against their future income streams generated from highway toll collection, cable TV services, real estate management contracts, etc. However, Chinese bankers understand their risks. In the words of one banker, "These deals are done by gentlemen's handshakes. The banks have no legal protection if something goes wrong." Moreover, the scope of such lending is still limited. For example, in receivables financing, transactions typically involve the bank purchasing a single receivable due from a single customer. The transaction generally requires a three-party agreement under which the customer consents to the sale of the receivable. Such arrangement is necessary because lenders in China are required by law to notify the customer of the sale.¹⁹ In most advanced economies, bulk receivables financing against both earned and future receivables due from a large number of known and unknown customers (e.g., mobile phone accounts) can easily be executed because lenders are not required to notify the customers.

Backed by these studies and reports, the PBOC has been active in sharing its findings with other key government departments as well as the NPC, the national legislative body currently in the process of formulating the secured transactions section under the draft Property Law. A series of high-level seminars on secured financing law reform provided a platform for government officials, lawmakers, bankers, judges, lawyers and academics to discuss and debate the merits of reform and to compare the existing system against international best practice benchmarks. In collaboration with the World Bank, the PBOC also developed detailed recommendations for

¹³ PBOC, "Survey of the Financing Mechanisms for China's Small and Medium Enterprises", China CITIC Press (2005) (hereinafter referred to as the "PBOC SME Report").

¹⁴ PBOC SME Report, *id.*

¹⁵ Security Law, articles 34 and 37.

¹⁶ PBOC SME Report, *id.*

¹⁷ WB-PBOC Report, p. 196.

¹⁸ WB-PBOC Report, p. 199.

¹⁹ PRC Contract Law 《合同法》, article 80.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

reforming the legal system, including adopting principles of modern secured financing law in the draft Property Law. This effort to expand the scope of permissible movable collateral will improve both the movable security registry and the enforcement systems necessary to make secured transactions cost effective. In fact, a version of the Property Law released last July by the NPC drafting committee expanded the scope of permissible collateral to include presently-owned and future-acquired inventory. However, broader and more systematic changes are needed in order to remove the major legal and institutional obstacles to secured transactions in China. A reform mandate from the top leadership must also coincide with a different mind-set for those involved in implementing the changes.

Instituting Changes: The Role of the Market

In designing a legal structure for secured transactions in China, participants in the reform process must decide whether to adopt the market-oriented approach which forms the basis of modern secured transactions systems. Inherent in that approach is the belief that the market, i.e., contracting parties, are capable of assessing and managing their own business risks and that the role of the law is to set parameters within which secured transactions can be structured to the benefit of parties based on their particular needs. Adopting such an approach would be a significant departure from the Security Law's control-oriented framework. It would require a re-evaluation of the relationship between government regulation and market activities and a better understanding of the practical effect of legal rules on financing transactions. Based on discussions with people involved in the legislative process, including many legal scholars who wield much influence as government advisors,²⁰ resistance to adopting a market-oriented model is still quite strong, underscoring the challenges ahead.

First, the idea of allowing parties to control how secured transactions are structured and conducted troubles many people, who often cite "transaction safety" as their chief concern. To many, the law (and government officials implementing the law) should be responsible for ensuring that commercial transactions are safe, fair and legal to all parties concerned. There is fear that if parties are allowed to create a security interest without going through the government-mandated registration and review process, banks could face excessive risk exposure. There is also fear that by empowering creditors more so than the courts with control over the enforcement of security interests in commercial loan default cases, powerful lenders would have an unfair advantage over small Mom-and-Pop borrowers. Although protecting the interests of third parties is part and parcel of a market-based secured transactions legal system and has been successfully undertaken in other countries without much of the feared problems, many remain unconvinced that such a market-driven model could and should be adopted by China.

Another source of concern is fraud. In today's China, fraud of all sorts is extremely common and often goes unpunished despite the numerous government rules specifically promulgated against fraud. Many fear that expanding the scope of permissible collateral to include inventory and receivables would invite fraud because lenders might be incapable of determining the value of fluctuating and intangible assets and of monitoring the collateral after a loan is made.

²⁰ Even those who are not formally invited to participate in the legislative process can exert influence by voicing their doubts and opposition. A case in point: The decision by the NPC to postpone the passing of the Property Law in March 2006 was reported to be at least partially the result of oppositions led by a Beijing University professor on issues unrelated to the secured transactions chapters of the draft law.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Arguments have also been made that simplifying the registration process as well as making it inexpensive and accessible to the public would open the door to more fraud. Indeed, the following question is commonly asked: "What would stop anyone from registering a fictitious security interest against someone they do not like?" Still others blame China's bad credit culture and entertain the notion that Chinese debtors would be more likely to cheat. One legal scholar even proclaimed that the modern secured transactions enforcement mechanism would not work in China because it simply would not be compatible with the Chinese culture.

Interestingly, the same fears are not shared by bankers and many other participants, particularly younger, mid-level bank representatives and officials from government agencies who have shown a remarkable openness towards a legal system that gives more freedom to parties. Nor do they think that either banks or commercial borrowers in China lack the business acumen to protect their interests in a secured loan transaction. These differing reactions on the part of scholars and others may stem from lack of practical experience with and knowledge of how secured transactions are conducted as well as the economics behind these transactions. In one instance, after learning how foreign lenders use contract mechanisms to monitor the collateral and the debtor's financial health, a law professor declared, "That's exactly how Western lenders practiced hegemony on the poor Latin borrowers!" A banker, however, showed us his loan and security agreement which contained the standard warranty and covenant provisions commonly seen in transactions in developed financial markets.

Chinese bankers will need not only the protection of contract mechanisms, but a law which allows parties to define a breach of a covenant or warranty as an event of default so that a secured creditor can take action against the collateral at the first sign of trouble, thereby reducing the risk of loss. Under the Security Law, a secured creditor can only sue a defaulting debtor in court for damage, a position no better than that of an unsecured creditor. Such disparities in the practical implications of the law, however, are often lost on lawmakers. Commercial lawmaking has a strong paternalistic bias due to the fundamental mistrust of the risk management capabilities of transacting parties. It is therefore not uncommon to encounter well-intentioned but ill-suited legislative provisions with potentially disastrous effects on secured financing transactions.

Another persistent view is that China, as a civil law country, should look to civil law jurisdictions for reform inspiration and must not deviate from certain civil law principles already in place under the Security Law. Germany is often cited as a possible model, including the use of title retention for non-possessory secured financing. However, such discussions tend to focus on the mechanics of certain legal concepts, rather than the history and context under which the German system evolved, its progress vis-à-vis other countries and the implications of importing specific elements of the German experience into the Chinese system.

In many countries, development of modern secured transactions laws has often resulted in a blurred distinction between civil law and common law. Changes to the law are driven by the practical need of improving access to credit not by legal traditions. Fifty years ago, the United States abandoned many traditional legal concepts inherited from English common law and developed a codified commercial law system (Article 9 of the Uniform Commercial Code) which makes it possible for secured transactions to be conducted with maximum flexibility and efficiency. The detailed and comprehensive legislation was intentionally designed to reduce both potential litigation and judicial interpretation. Such an approach has been followed in other common law jurisdictions such as Canada and New Zealand. In recent years, many Central and

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Eastern European countries with long civil law traditions also have embraced key principles of the Uniform Commercial Code in their effort to develop modern secured financing systems. Although the German Civil Code still does not recognize non-possessory security interests, German courts have liberally interpreted the statute to allow secured transactions to be structured by way of title retention, achieving the same effect of non-possessory security interests by transferring ownership of the collateral to the creditor. The downside of such judge-made law is that Germany does not have a publicity system for security interests.

To some extent, China's Security Law has progressed beyond the traditional civil law limitations. The Security Law already recognizes non-possessory security interest in equipment and motor vehicles and provides for publicity of the security interest through registration. At the same time, however, the negative impact of traditional civil law principles is evident. For example, the Security Law relies on the principle of *numerous clausus* in defining the scope of permissible collateral, setting forth a narrow list of assets which may be used as security. Only assets specifically permitted by law may be used as collateral, thus prohibiting security interests in any other form of movable property. Similarly, the requirement to specifically describe the collateral in the contract prevents the use of future-acquired property as security. In reforming the laws, Chinese lawmakers must weigh the pragmatic needs of China's modernizing economy against the constraints of these traditional legal principles. To this end, a better understanding by lawmakers of what motivates commercial transactions, i.e., how market participants assess risks and analyze the benefits of individual transactions, as well as input from those whose business is directly affected by the law would be crucial.

Conclusion

China's secured financing law must keep pace with the demands of the country's rapidly growing economy or otherwise will risk being obsolete, hindering economic growth. Experience elsewhere has demonstrated that the development of a market-oriented modern secured financing system is key to making secured lending more efficient and to improving the overall credit market. However, the extent to which market forces foster change to existing laws will likely be subject to the constraints of China's overall political and economic environment. Additionally, the pace and scope of reform undoubtedly will be influenced by exogenous factors as well. In order to advance the reform process, key stakeholders face the difficult task of designing a legal system capable of addressing both market needs and political realities in China.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Case Files

Notable Legal Cases

Voices against Discrimination: An Update of Recent Cases and Developments. In the June 2004 issue, we featured an article entitled "Voices against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices. (See story in the "Main Feature" column of Issue No. 2.) Since then, there has been increasing attention in China on discrimination and its negative impact on individual rights. It is also encouraging that new types of cases, such as discrimination based on place of origin, have also emerged. Although these cases are few in number and largely unsuccessful, they have inspired the public and fomented discussion at all levels, including within the government.

The following is an update on the recent cases and developments in areas where discriminatory practices continue to be most egregious:

Hepatitis B Virus Status

One of the first cases to receive national attention of employment discrimination against carriers of the Hepatitis B virus (HBV) involved a young man from Wuhu, Anhui Province (安徽省芜湖市), Mr. Zhang Xianzhu (张先著), who sued the local municipal personnel bureau for refusing to hire him based on his positive HBV status. Although Mr. Zhang won the case on technical grounds, the local people's court declined to rule on the issue of whether the regulations which the defendant relied on to reject HBV carriers from the ranks of civil servants violated his constitutional rights of equality and political participation. In May 2005, the Intermediate Municipal People's Court of Wuhu (芜湖市中级法院) upheld the lower court's decision.¹

On January 20, 2005, China's Ministry of Personnel (人事部) and the Ministry of Health (卫生部) jointly issued a set of new regulations² (hereinafter referred to as the "General Standards") which stated that an applicant for civil servant position would be disqualified if infected with HBV but those who are carriers of the virus should pass the physical examination so long as a contagious infection can be ruled out through further tests. Many in China welcomed the new regulations, hailing them as a solution offered by policy makers towards resolving the issue of discriminatory hiring practices against HBV carriers.³ According to experts, approximately 10% of the population are either carriers of the HBV or are infected by the virus.⁴

Despite the central government's new regulations, the difficulty with implementation at the local level will likely undercut the regulations' intended reach. Prior to the adoption of the General Standards, civil servant hiring practices by the central and local governments had been decided by rules separately issued by various levels of government agencies. Officials from the Ministry of Health stated that the General Standards were only applicable to lower level civil servant

¹ See People's Net (人民网), "China's First Case on HBV Discrimination: Judgment Affirmed on Appeal" (中国乙肝歧视第一案二审维持原判), June 1, 2005. (<http://www.people.com.cn/GB/shehui/1061/2535652.html>).

² See "General Standards on Physical Examinations relating to the Employment of Civil Servants (Trial Implementation)" 《公务员录用体检通用标准（试行）》.

³ See People's Net, "General Standards on Civil Servant Physical Examination Adopt Scientific View of HBV" (公务员体检通用标准对乙肝作出科学表述), January 20, 2005. (<http://politics.people.com.cn/GB/1026/3133765.html>)

⁴ See Beijing Youth Daily 《北京青年报》, December 18, 2003.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

positions and should be viewed as the "least stringent standards" that the local governments were to use as reference in implementing the new regulations.⁵

Already, in March 2005, Zhejiang Province (浙江省) chose to impose more stringent HBV testing on its civil servant applicants,⁶ which immediately raised questions about the effective reach of the national rules. According to China's Law on Legislation (立法法), regulations issued by the central government ministries are on par with those issued by local governments, each to be "implemented within their respective jurisdictions".⁷ Any conflicts or inconsistencies between the two can only be resolved by the State Council (国务院),⁸ the country's highest executive authority.

Judicial oversight of any disputes resulting from such conflicts or inconsistencies is limited to reviewing the legality of specific "administrative actions" of the local government and not the legality of the local regulations which conflict with national-level rules.⁹ Even in the small number of cases under which courts do review such administrative actions, plaintiffs face an uphill battle. In August 2005, a civil servant applicant in Hunan Province (湖南省) brought the country's first legal action involving violations of the HBV provisions according to the General Standards against the hiring practices of the provincial tax bureau. In this case, the plaintiff, who placed first in the qualifying examination was rejected after being tested positive for HBV. The plaintiff contended that because the medical results established conclusively that he was a HBV carrier and not infected, he should not therefore have been disqualified pursuant to the General Standards and that the defendant's "administrative action" in refusing to hire him violated such rules. In August 2005, the trial court ruled against the plaintiff, stating that the defendant's action was within the bounds of the General Standards and that the recruitment process as it related to the plaintiff did not show any discrimination.¹⁰ In December 2005, the Changsha Municipality Intermediate Court (长沙市中级法院) upheld the lower court's decision, further confirming the legality of the defendant's action.¹¹

The effect of the General Standards is also limited to the employment practices of civil servants. For the vast majority of China's job seekers, discrimination against HBV carriers continues to be widespread. There have been calls from the HBV community to adopt similar rules affecting other areas of employment. In 2006, when the National People's Congress (全国人大, NPC) solicited public comments to the draft Labor Law (劳动法), many urged the NPC to adopt rules

⁵ See People's Net, "Local Implementation in the Case of HBV Regulations" (从乙肝歧视看规则在地方的变形), January 21, 2006. (<http://opinion.people.com.cn/GB/1036/3342046.html>)

⁶ See Beijing Youth Daily, "New Controversies Surrounding HBV Testing in Physical Examinations for Zhejiang Civil Servant Applicants" (浙江公务员体检乙肝条款又惹争议), April 18, 2005. (<http://msn.ynet.com/view.jsp?oid=5102688>)

⁷ See Law on Legislation, art. 82.

⁸ See Law on Legislation, art. 86.

⁹ See Administrative Adjudication Law (行政诉讼法), art. 11 and 12.

¹⁰ See Hunan Education Net (湖南教育网), "Ruling on the First HBV Discrimination in the Nation: Provincial Tax Bureau Wins" (全国首例乙肝歧视案一审宣判: 省国税局胜诉), August 9, 2006. (<http://www.hnedu.cn/web/0/200508/09090825281.html>)

¹¹ See Xinhua Net (新华网), "Final Judgment in the First Hunan Province HBV Discrimination Case: Plaintiff's Appeal Rejected" (湖南省首例乙肝歧视案审结 原告上诉被驳回), December 23, 2005. (http://news3.xinhuanet.com/legal/2005-12/23/content_3960207.htm)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

which would prohibit all employers from rejecting job applicants on the basis of positive HBV status and to limit the types of occupations which may require HBV testing.¹²

Gender

Gender discrimination remains egregious in China's labor market. One issue in particular—the different retirement age requirements for men and women—has captured much public interest in recent years.

For many years, Chinese government agencies and state-owned companies have set different retirement ages for male and female employees. For example, according to a series of regulations issued by the State Council, female civil servants may retire at age 55 while males may do so at 60. Similarly, a female worker at a state-owned enterprise must retire at the age of 50 while her male counterpart must do so at 60.¹³ In practice, retirement ages for both types of state employees appear to be mandatory.

In August 2005, a female employee of the China Construction Bank (中国建设银行) became the first to challenge the constitutionality of the mandatory retirement age requirement for female workers. The plaintiff, Ms. Zhou Xianghua (周香华), first sought arbitration from the Pingdingshan Municipal Labor Arbitration Tribunal in Henan Province (河南省平顶山市劳动争议仲裁委员会), claiming that she should have the same right to retire at age 60 as her male coworkers. The labor tribunal refused to accept her claim on jurisdictional ground. Ms. Zhou then brought a civil action in the Zhaihe District People's Court in Pingdingshan (平顶山市湛河人民法院) against her employer, alleging that her mandatory retirement initiated by the defendant violated her constitutional right to gender equality.¹⁴ Under the Chinese Constitution (宪法), males and females have equal rights to employment.¹⁵ The local court rejected the claim for lack of legal support, although many in China viewed this case as significant in that the court actually adjudicated the claim instead of simply refusing to hear the case on jurisdictional grounds, a common tactic employed by local courts in handling cases with potential political sensitivity.

In March 2006, the Beijing University Women's Legal Research and Services Center (北京大学法学院妇女法律研究与服务中心) formally submitted a request to the NPC to review the constitutionality of the State Council regulations on retirement age.¹⁶ Having exhausted her legal remedies, Ms. Zhou also submitted a similar request to the NPC signed by over 70 supporters.¹⁷ Since December 2005, the NPC has promulgated new rules under which

¹² See NPC Net (人大网), "Public Comments on the Draft Labor Contract Law" (各地人民群众对劳动合同法草案的意见(一)), March 27, 2006. (<http://www.npc.cn/zgrdw/common/zw.jsp?label=WXZLK&id=348050&pdm=1503>)

¹³ See State Council, "Temporary Measures regarding Aging, Sick and Disabled Cadres and Temporary Measures regarding Retirement and Discharge of Workers", Order No. 104, 1978 (国发〔1978〕104号文件, 《国务院关于安置老弱病残干部的暂行办法》和《国务院关于工人退休、退职的暂行办法》).

¹⁴ See Xinhua Net, "Plaintiff in Henan Retirement Age Discrimination Case Appeals Arbitration Decision" (河南退休性别歧视案申诉人不服仲裁递交起诉状), November 4, 2005. (http://news3.xinhuanet.com/legal/2005-11/14/content_3777683.htm)

¹⁵ See PRC Constitution, article 48.

¹⁶ See Xinhua Net, "Beijing University Research Center Proposes Constitutional Review of Retirement Age for Males and Females" (北大研究中心: 对男女退休年龄规定提违宪审查), March 8, 2006. (http://news3.xinhuanet.com/legal/2006-03/08/content_4275608.htm)

¹⁷ See People's Net, "Pingdingshan Retirement Age Case: Proposing Constitutional Review" (平顶山男女同龄退休案提违宪审查建议), July 24, 2006. (<http://ha.people.com.cn/news/2006/07/24/116445.htm>)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

organizations and individual citizens may request the national legislative body to review the constitutionality of laws and regulations.¹⁸

Residency (户籍)

Discrimination on the basis of residency has its origin in China's age-old household registration system which assigns all citizens rural or urban residency based on their parents' place of origin. For millions of rural migrant workers seeking employment in China's more developed urban areas, their rural residency status has caused them to face widespread discrimination in such areas as wages, housing, healthcare and education, effectively turning them into second-class citizens in the cities.

Recently, a string of cases, referred to in the Chinese media as the "same life, different prices" cases, underscored the impact of one aspect of the residency discrimination. In April 2006, the Beijing Chaoyang District People's Court (北京市朝阳区人民法院) handed out vastly different amounts of monetary awards to families of two passengers who died from the same car accident—RMB410,000 for the urban resident and RMB170,000 for the rural resident. The Beijing court's ruling relied on a set of judicial interpretations issued by China's Supreme People's Court (最高人民法院) in 2004 which provided that compensation for deaths resulting from personal injury cases should be calculated based on the average annual "disposable income of urban residents or net income of rural residents".¹⁹ The case, along with a number of similar cases elsewhere, drew wide public criticism. In July 2006, a different ruling by the Gaoxin District People's Court in Chengdu, Sichuan Province (四川省成都市高鑫区人民法院) was hailed by the media as a major breakthrough in tackling residency discrimination. In that case, the court held that even though the victim had rural residency, the fact that he had lived in the urban area as a migrant worker for 10 years meant that his standard of living was the same as that of an urban resident and that, therefore, he should be entitled to compensation at the same level.²⁰

There are signs that changes may be underway beyond the single Chengdu court ruling. In June 2006, the Henan Provincial High Court issued to its lower courts the "Opinion regarding Improving the Adjudication of Cases Involving Interests of Rural Migrant Workers to Better Protect their Legal Rights" 《关于加强涉及农民工权益案件审理工作, 切实保护农民工合法权益的意见》. In it the Henan Provincial High People's Court expressly provided that the standard of compensation in personal injury cases for urban residents shall be applicable to rural migrant workers who reside primarily in an urban area and earn their income from working in the same area.²¹ Henan Province is among China's biggest exporter of rural migrant workers to urban areas. The Anhui Provincial High People's Court is reported to have issued similar rules.²²

¹⁸ See the Beijing News 《新京报》, "The NPC Standing Committee Clarifies Procedures for Constitutionality Review" (全国人大常委会明确违宪审查程序), December 20, 2005. (<http://news.sina.com.cn/c/2005-12-20/02017747956s.shtml>).

¹⁹ Supreme People's Court, "Judicial Interpretation of Issues concerning the Application of Law in Adjudicating Cases Involving Personal Injury Compensation" 《关于审理人身损害赔偿案件适用法律若干问题的解释》 (2004).

²⁰ See China Youth Daily 《中国青年报》, "Chengdu Breaks Away from Same Life Different Price" (成都打破交通事故-同命不同价), July 18, 2006. (http://zqb.cyol.com/content/2006-07/18/content_1449906.htm)

²¹ See SinoNet (中法网), "SPC Interpretation said to be Cause for Same Life Different Price [Decisions]" (最高法院解释被指造成同命不同价), July 3, 2006. (<http://news.1488.com/news/legality/2006/7-3/15-18-22-1.shtml>)

²² See China Youth Daily, "Anhui Provincial High Court Set Uniform Standard for Personal Injury Awards" (安徽省高法制定人身损害赔偿统一赔偿标准), March 23, 2006. (http://zqb.cyol.com/content/2006-03/23/content_1340796.htm)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

According to another report, the Supreme People's Court also began to consider revising its current rules on the disparate compensation standards for urban and rural residents.²³ Such efforts, however, are likely to offer little relief for China's rural migrant workers who face a variety of discrimination in their daily lives. In the words of one commentator, the root of the discrimination lies not in the laws, but in China's two-tiered residency system which resulted in "severe inequity in the social status of urban and rural residents ... an inequality which is manifested in almost all aspects of a citizen's social, economic and political rights".²⁴

Place of Origin (籍贯)

Discrimination against people from particular regions first became the focus of litigation in 2005. Regional stereotyping and prejudice against outsiders are nothing new in a culturally and geographically diverse country like China. In recent years, natives of one region in particular, Henan Province, seem to have fared worse than others. Henan, China's most populous province (with an estimated population of nearly 100 million²⁵), is also one of its less developed economically. Large numbers of peasants from Henan work as migrant workers in urban areas throughout China, often performing menial jobs. Both in the media and among the general public, people from Henan are often portrayed as being dishonest or less cultured. There are reports of job ads stating that Henan people need not apply²⁶ and landlords rejecting Henan tenants.²⁷

In April 2005, two Henan natives filed a lawsuit in a Henan court against the Shenzhen police, alleging discrimination against people from Henan and damage to their reputation.²⁸ The plaintiffs, one of them a lawyer, were outraged by a news report about police in Longgang District, Shenzhen (深圳龙岗区) posting banners in the neighborhoods calling for the crackdown of "Henan criminal gangs".²⁹ According to Shenzhen police, the specific area involved had a large Henan population who were linked to most of the reported crime.³⁰ The case was settled in 2006 with the defendant issuing formal apologies to the plaintiffs.³¹ It is also reported that the Shenzhen police also offered apologies to many Henan natives living in the area. This case, the

²³ See Workers Daily 《工人日报》, "Unfairness in Life and Death" 《活着的不公与死后的不平》, July 3, 2006. (http://www.grb.com.cn/news/news_detail.asp?news_id=259444&type_id=11)

²⁴ See Zhong Kai (钟凯), "The Key to Resolving the Same Life and Different Price Problem Lies Outside the Law" 《破解同命不同价的钥匙在法律之外》, May 26, 2006. (<http://www.xschina.org/show.php?id=7034>)

²⁵ Source: China Statistical Yearbook 2005 《中国统计年鉴-2005》. (<http://en.wikipedia.org/wiki/Henan>)

²⁶ See Nanhu Evening News 《南湖晚报》, "Henan People Need not Apply: Place of Origin Discrimination by Jiaxing Employers" (河南人不要 嘉兴市企业招工存在地域歧视?), August 23, 2006. (http://www.zj.xinhuanet.com/newscenter/2006-08/23/content_7857125.htm)

²⁷ See CRI Online 《中国国际广播电台国际在线》, "Shenzhen Village Refuses Housing to Henan People" (深圳小村子房屋集体不租河南人), June 13, 2006. (<http://gb.cri.cn/8606/2006/06/16/1545@1092651.htm>)

²⁸ See Xinhua Net, "Two Henan Residents Sued Shenzhen Police for Posting Discriminatory Banners" (河南两名公民状告深圳警方悬挂地域歧视横幅), April 27, 2006. (<http://cul.book.sina.com.cn/s/2005-04-27/1910124119.html>)

²⁹ See Southern Metropolis 《南方都市报》, "Police Banner Calling for Crack Down on Henan Criminal Gangs Said to be Discriminatory" (派出所高悬打击河南籍犯罪团伙横幅被指有歧视), March 30, 2006. (<http://news.163.com/05/0330/01/1G29MFJ40001122B.html>)

³⁰ See Chendu Commercial Times 《成都商报》, "First Place of Origin Discrimination Case Expected to Settle" (全国首例地域歧视案有望和解), April 25, 2005. (<http://news.sina.com.cn/c/2005-04-25/04426480383.shtml>)

³¹ See China Youth Daily, "First Place of Origin Discrimination Case in the Nation Settles" (全国首例地域歧视案调解结案), February 9, 2006. (http://zqb.cvol.com/content/2006-02/09/content_1312353.htm)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

first of its kind in China, has encouraged many observers by the fact that the court, albeit an obviously sympathetic Henan court, agreed to hear the case. Further such cases advancing through the courts may depend, according to some legal experts, on whether lawyers can sufficiently establish one of the more difficult elements of these lawsuits: damages resulting from the discriminatory practices.

Research memo in Chinese contributed by Ms. Liu Haiye (刘海叶), a program officer at China Law & Development Consultants.

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Legal Reform

Recent Developments at China's Legal Forefront

Returning Death Penalty Review to the Supreme People's Court: How will the Court Staff the New Death Penalty Review Divisions? On October 31, 2006, the Standing Committee of the National People's Congress (全国人民代表大会常务委员会) adopted an amendment proposed by the Supreme People's Court (SPC, 最高人民法院) to revise Article 13 of the Law on the Organization of People's Courts (人民法院组织法) so that the SPC will have exclusive jurisdiction over the final review and approval of all death penalty cases.¹ This amendment replaces the existing language in Article 13 which requires the SPC to delegate its authority to review certain death penalty sentences (those relating to serious crimes such as murder, rape, robbery and the criminal use of explosives) to provincial-level high people's courts when necessary. The change has been anticipated for some time. In October 2005, the SPC announced that it would reinstate its authority to review and approve such death penalty sentences from the provincial high people's courts within the next five years.² The legislative amendment is seen as removing a major legal hurdle to SPC's plan.

In the early 1980's, the SPC delegated its authority to review such death penalty sentences to provincial high people's courts, the highest court at the provincial level, in response to increased workload resulting from a series of nationwide government campaigns to crack down on crimes and maintain social order. This move, deemed "temporary" at the time, continued for more than 20 years. The inconsistent application of the death penalty by different provincial high courts, along with a number of well-publicized wrongful convictions, has drawn considerable criticism both from within and outside of China. Amnesty International estimates that based on public reports available, at least 1,770 people were executed and 3,900 people were sentenced to death in China during 2005.³ Foreign non-governmental organizations believe the actual number is much higher. In addition, because provincial-level high courts also serve as appellate courts for appeals of death penalty sentences, the prevailing practice at many such courts is to rubber-stamp their own appellate decisions.⁴

This lack of oversight by provincial high courts, combined with the inconsistent application of the death penalty in different provinces, appears to have been the chief factors behind the large number of wrongful convictions handed down by local courts.⁵ In delivering the SPC Working Report to the National People's Congress in 2004, Xiao Yang, the President of the SPC, reported that of the 300 cases reviewed by the SPC during the previous year, 94 cases were reversed by the SPC and 24 cases were ordered to be retried by lower courts. Based on such statistics, legal experts in China predict that the SPC's reclaiming its death penalty review power will decrease death penalty cases overall by one third.⁶

¹ See Guangming Daily 《光明日报》, "Death Penalty Review Reverts to SPC" (死刑核准权收归最高法院), November 1, 2006. (http://www.gmw.cn/01gmr/2006-11/01/content_501314.htm)

² See SPC, "The Second Five-Year Reform Outlines for the People's Court" (《人民法院第二个五年改革纲要》), October 26, 2005.

³ See Amnesty International, "China: The Death Penalty, A Failure Of Justice" (2006) (http://asiapacific.amnesty.org/apro/apoweb.nsf/pages/appeals_adpan_china)

⁴ See the Beijing News 《新京报》, "The SPC Increases Staffing in Preparation for Death Penalty Reviews" (Possible Hearings for Review of Significant Cases) (最高法院扩编备战死刑复核重大案件复核可能听证), November 3, 2005. (<http://news.sina.com.cn/c/2005-11-03/04467341590s.shtml>)

⁵ The Beijing News, *id.*

⁶ The Beijing News, *id.*

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Currently, 90% of the death sentence review cases are handled by the provincial high courts.⁷ To shift such review to the SPC would substantially increase its criminal case workload. This anticipated increase has prompted plans to establish three new criminal divisions (刑事审判庭) at the SPC to handle exclusively death penalty review⁸ and will necessitate the hiring of 300-400 new personnel, including judges, judge's assistants and court clerks.⁹

Despite official discussions about reinstating the SPC's full death penalty review authority for a number of years, one of the main reasons for the SPC delay in making the change apparently was due to insufficient staffing. Until the recent announcement, the SPC had only two criminal divisions. Given that this change will require significant reorganization at the SPC and will likely involve a large increase in personnel allocation (编制) within the government bureaucracy, the proposed change shows a major commitment by the party leadership to make improvements in death penalty application.

In the past, many judges in China were drawn from the ranks of decommissioned military personnel or court clerks, most of whom lack formal legal education. As recently as the early 1980's, one did not need any formal education to become a judge.¹⁰ Any Chinese citizen over the age of 23 and who has not been deprived of his or her political rights was eligible. Beginning in the mid-1990s, there was a push to professionalize the judicial ranks and improve the quality of judges. The Judges Law 《法官法》, revised in 2001, now requires judicial candidates to have a law degree or to have passed the state judicial examination. To become a judge of the SPC, one must now have at least an undergraduate degree in law and a minimum of three years of legal professional experience.¹¹

To recruit the large number of judges needed for its three new criminal divisions, the SPC has mounted unprecedented recruitment efforts. According to Nanfang Weekend 《南方周末》¹², the new SPC judges will primarily come from three sources: (1) judges from the provincial-level court systems who have at least an undergraduate law degree and five years of adjudication experience; (2) recent law graduates with at least a master's degree, who are then required to undergo a one-year training program in the provincial-level court systems before assuming their posts; and (3) lawyers and law professors.

Recruiting judges, especially SPC judges directly from the ranks of practicing lawyers, is still extremely rare for China's judiciary. This group likely will represent only a small percentage of the SPC's new recruits, even though government agencies at many levels have experimented with recruiting outside experts to fill certain high-level technical posts. (See China Law and Governance, Issue 2, "Provincial Governments Hire High-Priced 'Contract Advisors'").

⁷ The Beijing News, *id.*

⁸ See People's Net (人民网), "SPC to Add Three Criminal Divisions" (最高人民法院将增设3个刑事审判庭), September 26, 2006. (legal.people.com.cn/GB/42735/3728438.html)

⁹ The Beijing News, *id.*

¹⁰ See the Law on the Organization of People's Court (1978).

¹¹ See Judges Law, art. 9.

¹² "SPC Selects Judges from Various Provinces in Preparation for the Establishment of Death Penalty Review Panels" (最高法院选调各地法官筹建死刑复核机构), March 30, 2006. (<http://www.nanfangdaily.com.cn/zm/20060330/xw/tb/200603300003.asp>)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Between 1999 and 2000, the SPC had experimented unsuccessfully with recruiting judges from academia and through an examination process open to qualified applicants.¹³ It will be interesting to see this time how many practicing lawyers (most likely experienced criminal defense lawyers) eventually will sit on the SPC death penalty review panels and what perspective they may bring to the court given their experience and insights from the other side of the bench. While some lawyers based outside of Beijing might be attracted to the SPC's physical location in the nation's capital, it is unlikely that more accomplished lawyers will be willing to give up their private practice to become SPC judges. Although private lawyers in China do not have nearly the same prestige as legal academics or judges, the country's exploding economic growth has generated significant business opportunities. Judges, on the other hand, are paid as civil servants according to a strictly hierarchical scale. Becoming a judge, even at the SPC level, would mean a dramatic pay cut for experienced private lawyers.¹⁴ As one scholar observed, "Given that the pay for judges is low and that some local courts even have to rely on court fees...to pay for salaries and benefits due to the lack of funding from local governments, the judicial profession in our country does not nearly garner the respect and social status it deserves".¹⁵ In addition, there is still a gulf between being a lawyer who has the freedom to decide how to pursue his or her practice and being a judge at the SPC where there is little judicial independence.

One potential draw for lawyers to join the judiciary may be the higher status offered by top leadership positions at various levels of the courts. For example, there have been reports of rare instances in which lawyers were appointed as vice presidents in the provincial high people's courts (e.g., the Shanxi and Anhui Provincial High People's Courts 陕西省和安徽省最高人民法院).¹⁶ Given that this apparently is not the intent behind the SPC's current recruitment effort, nor does it appear to be offering salaries and benefits commensurate with private practice, it will be a challenge for the SPC to draw the most experienced and talented lawyers to the bench. Nevertheless, even if a small number of lawyers do take up positions in the newly created criminal divisions, it still would be a noteworthy departure from past practice.

Research memo in Chinese contributed by Mr. Zhang Zheng (张铮), formerly a program officer at China Law & Development Consultants.

¹³ See Jing Hanchao (景汉朝), "Judicial Threshold" (从法院的围城说起), (<http://www.civillaw.com.cn/weizhang/default.asp?id=22456>)

¹⁴ See Jing Hanchao, *id.*

¹⁵ See Zhong Jian (钟坚), "Lawyers Becoming Judges" (从律师到法官), (<http://www.chinalawedu.com/news/2005%5C12%5C1990834563519221500216416.html>)

¹⁶ See Legal Daily 《法制日报》, "From Lawyers to Judges: Interview with Wang Songmin, Vice President of the Shaanxi Provincial High People's Court" (从律师到法官-访陕西省高级人民法院副院长王松敏), September 22, 2004. (http://www.legalinfo.gov.cn/flfw/2005-05/18/content_134768.htm)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

Heard on the Web

Excerpts of Online Postings in China

Beijing Police Abandons "Quota". In July 2004, Ma Zhenchuan (马振川), the chief of the Beijing Municipal Public Security Bureau (北京市公安局), announced that his agency would abandon its long-standing quota system for traffic fines and criminal arrests and would adopt instead a system identifying hot spots of crime and public safety concerns based on periodic historical data assessments.¹ Excessive and overzealous issuance of traffic fines by local police is among one of the top complaints among Chinese motorists. According to the Beijing News (新京报), Ma revealed that his agency's past practice of imposing quota for giving out traffic fines and making criminal arrests has been the prime target of public complaints. The quota system supposedly was adopted to motivate those law enforcement agents who were too lazy to do their jobs diligently (such as the "traffic cop who hides under the shade on a hot summer day"). The result, however, is that an entire month's quota tends to be filled either at the beginning or the end of the month, giving the public the impression that the "police are thinking of every which way to fine people", according to Ma. The following are excerpts of readers' reaction to the Beijing News report:²

□ Public security bureaus are not business enterprises. They should work on how to benefit the public who will only be satisfied when they feel safe. The "Traffic Safety Law" (交通安全法) clearly prohibits imposing quotas on traffic fines but the police practice still exists at the local level, only under a different disguise. To say that there is no more traffic fine quota is simply a joke.

□ Science and pragmatism have finally prevailed. I hope that not only Beijing will abandon the inappropriate quota system, but the Ministry of Public Security will also abolish the practice throughout the country. The primary responsibilities of public security bureaus should be preventing crime and protecting the legal rights of the public. Nowadays however, because most regions do not allocate sufficient funding for police operations, public security bureaus have to find money for themselves. This inevitably leads to the wrong focus of law enforcement, abuse of police power and fines instead of arrests. I have never heard of the police in any other country needing to fund their own operating budget. The reason for the tension between the police and the public is largely due to the fact that the primary goal of the police's work is on imposing fines.. I recommend adopting a pragmatic approach in solving real problems and no longer imposing fines. This also represents the views of the majority of ordinary policemen.

□ According to the police's logic, drivers should be treated by traffic cops like thieves—the more violators get caught, the more the fines and therefore higher profits. It appears that the beneficiary of traffic violations is really the police themselves. They are least inclined to improve traffic safety. They use the sovereign rights of the state as means to make money for themselves, at the expense of the interests of the state and the public. This explains why [the police impose] strange rules such as super low speed limits, etc.

¹ See the Beijing News 《新京报》, "Beijing Public Security Bureau Abandons 'Quota System'" (北京公安废弃指标制), July 31, 2006. (<http://news.thebeijingnews.com/0554/2006/07-31/018@198293.htm>)

² See Sina.com 《新浪网》, August, 2006. (<http://comment4.news.sina.com.cn/comment/skin/default.html?channel=gn&newsid=1-1-10579699&style=0>)

CHINA LAW AND GOVERNANCE REVIEW

www.chinareview.info

A Periodical of China Law and Development Consultants (Hong Kong)

December 2006 Issue No. 3

- [The police] had always insisted that there were no quotas. Now they are talking about abolishing the quota system. It was clearly a lie to begin with. How many more of such “currently non-existent but will be abolished in the future” type of rules are there that are being used to punish the ordinary folks?

- I am a policeman from a local police station. I applaud the new policy of the Beijing Municipal Public Security Bureau. My office’s job should have been to ensure public safety and to prevent crimes in our precinct; however, because of the quotas we have for making criminal arrests, we focus on meeting the quotas all year round. Also, because the criminals in our precinct already know us well, they are hard to track. We had to go to other precincts to round up the criminals, which makes it impossible for us to focus on crime prevention in our own precinct. My office has a staff of over 40 and we have a quota of arresting 108 criminals a year. I wish we could also abolish the quota system and focus instead on maintaining public safety in our precinct.

- Quotas are actually not so bad. It would be great if we can set quotas for central government level or ministry-level agencies on a regular basis every year. [They] can be fired if they do not meet the quotas.

- The admission that “the police are thinking of every which way to fine people” is a reflection that the [Beijing] public security bureau is responding to public’s criticism. It has recognized its problems and is willing to make corrections. Other provinces and municipalities must also recognize the same problems in order to gain the support of drivers and the public, to improve the relationship between the police and the public and to build a harmonious society.

- There should be an index for public safety not compiled by the police themselves, but one that would be more objective. According to requirements of ISO9000, the most basic [performance] measurement is customer satisfaction. The public’s sense of safety should be the most basic measurement.

- There should be a rule that says whichever region or city imposes the highest traffic fines should be deemed to have the worst traffic safety and its head of traffic police should bear responsibility.