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中国与2021年

今年是否会为中国和世界其他地区带来新的方法，增进彼此的了解？答案可从《中国法律连接》中找到。该期刊是一个值得信赖的消息来源，并已经与全球200,000多人分享了鲜为人知的事实和见解。

China and 2021

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编辑短笺*
Editor's Note**

熊美英博士
Dr. Mei Gechlik

尊敬的读者：

确保中国规则的一致性

中国法院缺乏审查法律、行政法规和其他重要规则合宪性的权力。这往往令人有此想法：该国的宪法是否仅仅是一份表达抱负的文件？事实上，中国法院甚至不能审查行政法规和其他重要规则，以确保它们不与国家法律相冲突。那么，谁能呢？

其实，《中华人民共和国立法法》（2000 年颁布、2015 年修正）已概述了立法审查机制。然而，有关该机制的细节一直不太清晰，要到 2019 年 12 月《法规、司法解释备案审查工作办法》（"《办法》"）通过后，情况才有很大的改变。在本期《中国法律连接》（"《中法连》"）中，我和中国指导性案例项目（"CGCP"）资深编辑罗雯撰写了一篇题为"《法治中国建设规划（2020—2025年）》：确保中国法制统一的备案审查制度"的文章，讨论《办法》所规定的内容（例如：审查范围、审查标准和纠正措施）和其影响。

两位专利专家解释指导案例20号失去指导作用的原因

上一期的《中法连》出版了最高人民法院（"最高法"）高级法官兼研究室执行主任郭锋法官撰写的文章。在该文章中，郭法官简要说明了为什么指导案例20号（《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》）失去指导作用。

在本期《中法连》中，两位专利专家张思悦和马越详细分析了该指导性案例如何与新的司法解释和《中华人民共和国专利法》新的规定存在冲突。两位作者还评论了指导案例 20 号的其他不足之处。

Dear Readers,

Ensuring Consistency of Chinese Legal Rules

Chinese courts' lack of authority to review the constitutionality of laws, administrative regulations, and other important rules often prompts one to wonder: is the country's Constitution merely an aspirational document? In fact, Chinese courts cannot even review administrative regulations and other important rules to ensure that they are not in conflict with national laws. So, who can?

The *Legislation Law of the People's Republic of China* (enacted in 2000 and amended in 2015) does outline a mechanism for the review of legislation. However, details about the mechanism remained largely unclear until the adoption in December 2019 of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations* (the "*Measures*"). In this issue of *China Law Connect* ("*CLC*"), I, together with Wen Luo, a senior editor of the China Guiding Cases Project (the "CGCP"), contributed an article titled Plan for the Construction of a Rule of Law China (2020–2025)*: A Recordation and Review System that Ensures the Uniformity of China's Legal System* to discuss the *Measures* (e.g., the scope of review, standards of review, and corrective measures) and its impact.

Two Patent Experts Explain Why Guiding Case No. 20 Lost Its Guiding Effect

The last issue of *CLC* published a commentary written by Judge GUO Feng, a senior judge of the Supreme People's Court (the "SPC") and the Executive Director of the SPC's Research Office, in which he briefly explains why Guiding Case No. 20 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*) lost its guiding effect.

In this issue of *CLC*, two patent experts, Jacob Zhang and Matthew Ma, provide more details to analyze why the Guiding Case is in conflict with a new judicial interpretation and a new provision of the *Patent Law of the People's Republic of China*. The authors also comment on other shortcomings of Guiding Case No. 20.

指导案例24号如何帮助中国塑造“蛋壳脑袋规则”的中国版本

“蛋壳脑袋规则”是普通法体系下一项已确立的侵权法规则。指导案例24号是后续案件引用最多的指导性案例之一；其指导原则与“蛋壳脑袋规则”非常相似。事实上，最高法案例指导工作办公室明确表示指导案例24号是“‘蛋壳脑袋理论’在交通事故责任纠纷案件中的具体适用”。

这个规则的中国版本如何通过后续案件作出演变？例如，此规则是否已扩大适用于其他人身伤害的案件？在题为“指导案例24号及其数百个后续裁判如何塑造中国版的‘蛋壳脑袋规则’”的评论中，CGCP的编辑谭子文和沈馨分享了他们对从500多个后续裁判精心挑选的23个裁判作出的研究结果。

中国“线上纠纷解决”是否仅仅是线上的“替代性纠纷解决”？

浙江省绍兴市是“枫桥经验”的发源地。“枫桥经验”是指1960年代初，枫桥镇（现属于绍兴市管治范围）创造了用基层力量解决基层矛盾的方法。过去几年，绍兴市法院基于“枫桥经验”和一些不同的创新机制，逐步构建了被称为“一体两翼三维度”的纠纷解决和诉讼服务体系。由于这线上纠纷解决（online dispute resolution；“ODR”）的绍兴模式为中国法院诉讼服务体系的完善提供了新方案，葛继光法官、姚瑶博士在题为“绍兴线上纠纷解决模式：完善中国诉讼服务体系的新方案”的文章中，对该模式作出介绍，并说明其成效。此外，两位作者亦分析绍兴市法院如何实现了从线上ADR走向司法ODR。

本期《中法连》还收录了第四届斯坦福CGCP学生写作竞赛的获奖者所撰写的三篇优秀作品。我们希望您喜欢本期《中法连》所分享的见解和信息！

敬祝 顺心

熊美英博士
中国指导性案例项目创办人、总监
《中国法律连接》主编辑

* 熊美英博士，编辑短笺，《中国法律连接》，第13期，第v页（2021年6月），http://cgc.law.stanford.edu/zh-hans/clc-13-202106。

How Guiding Case No. 24 Helps China Develop Its Version of the Eggshell-Skull Rule

The eggshell-skull rule is a well-established rule of tort law under the common law system. The guiding principle of Guiding Case No. 24, one of the most frequently cited Guiding Cases in subsequent cases, is very similar to this rule. In fact, the Office for the Work on Case Guidance of the SPC clearly stated that this Guiding Case represents "the specific application of [the eggshell-skull rule] in disputes over liability for traffic accidents".

How has the Chinese version of this rule evolved through subsequent cases? For example, has this rule been expanded for application in other personal injury cases? In the commentary titled *How Guiding Case No. 24 and Its Hundreds of Subsequent Cases Have Shaped the Chinese Version of the Eggshell-Skull Rule*, Ziwen Tan and Xin Shen, editors of the CGCP, share the results of their study based on 23 subsequent judgments or rulings carefully selected from more than 500.

Is China's ODR (Online Dispute Resolution) Nothing More than Online ADR (Alternative Dispute Resolution)?

Shaoxing Municipality, Zhejiang Province, is the birthplace of the "Fengqiao Experience", which refers to the approach created in the early 1960s in Fengqiao Town (now governed by Shaoxing Municipality) that uses the strength of the grassroots level to resolve conflicts at that level. In the past few years, based on the "Fengqiao Experience" and a few different innovative mechanisms, the courts in Shaoxing Municipality have gradually built the so-called "One Body, Two Wings, and Three Dimensions" system for dispute resolution and litigation services. Since this Shaoxing online dispute resolution model provides a new solution for the improvement of the litigation services system in courts across China, Judge GE Jiguang and Dr. YAO Yao introduce the model in the article titled *The Shaoxing Online Dispute Resolution Model: A New Approach to Improving China's Litigation Services System* to explain its effectiveness and how Shaoxing courts have accomplished the goal of progressing from "online ADR" to "judicial ODR".

This issue of *CLC* also features three outstanding pieces written by winners of the Fourth Stanford CGCP Student Writing Contest. We hope you like the insights and information shared in this *CLC*!

Sincerely,

Dr. Mei Gechlik
Founder and Director, China Guiding Cases Project
Editor-in-Chief, *China Law Connect*

** Dr. Mei Gechlik, *Editor's Note*, 13 China Law Connect v (June 2021), http://cgc.law.stanford.edu/clc-13-202106.

Plan for the Construction of a Rule of Law China (2020–2025): A Recordation and Review System that Ensures the Uniformity of China's Legal System*

Dr. Mei Gechlik & Wen Luo

Abstract

In January 2021, the Central Committee of the Communist Party of China printed and issued the *Plan for the Construction of a Rule of Law China (2020–2025)* to make the recordation and review system an important part of the development of the rule of law in China. This article first explains how China established a recordation and review system and has gradually improved the system. The article proceeds to discuss the *Measures for the Recordation and Review of Regulations and Judicial Interpretations*, which was passed by the Chairman's Meeting of the Standing Committee of the National People's Congress on December 16, 2019, with a particular focus on provisions regarding the scope of review, standards of review, and corrective measures. The article then shows the main results produced by the Measures. Based on the above-mentioned content, the authors make in the Concluding Remarks section three suggestions that will help the long-term development of China's recordation and review work.

Introduction

In January 2021, the Central Committee of the Communist Party of China printed and issued the *Plan for the Construction of a Rule of Law China (2020-2025)*,[1] (the "Plan") requiring all regions and departments to earnestly implement the Plan. The Plan identifies various tasks, including "strengthening and improving the Guiding Cases System to ensure uniform application of law". In addition, the Plan also emphasizes "strengthening the implementation and supervision of the Constitution" and points out that "the recordation and review work should focus on reviewing whether there is content that does not conform to the provisions of the Constitution or the spirit of the Constitution". With respect to the recordation and review work, the Plan provides additional details:

> Strengthening **the recordation and review system** and capacity building to achieve [an outcome] where **every document is recorded, every recorded document is reviewed, and every error is corrected**. Improving the recordation and review procedures by defining the **scope of review, standards of review, and corrective measures**. Strengthening the recordation and review of administrative regulatory documents of local governments at all levels and government departments at or above the county level as well as the recordation and review of supervisory regulatory documents of local supervisory committees at all levels. Strengthening the recordation and supervision of judicial interpretations [...]. (emphasis added)

Since the founding of the People's Republic of China ("China") in 1949, laws, administrative regulations, local regulations, local government rules, and different types of regulatory documents have become numerous, and inconsistencies among them are not uncommon. Strengthening the recordation and review system and capacity building will be able to solve this problem so as to ensure the uniformity of China's legal system and promote the development of the rule of law.

Although the recordation and review system is an important part of the development of the rule of law in China, little is known about the system. This article first introduces how China established the system and has gradually improved it. During this development process, the release of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations* in December 2019 is particularly important.[2] Therefore, the authors focus on discussing the provisions of the Measures regarding the scope of review, standards of review, and corrective measures, as well as the main results produced by the release of the Measures. Based on this discussion, the authors put forward, in the Concluding Remarks section, some suggestions for improving the recordation and review system.

The Development Process of China's Recordation and Review System

1. Before the 2015 Amendment to the Legislation Law

(1) 1982: *Constitution of the People's Republic of China*

In December 1982, the National People's Congress (the "NPC") passed the *Constitution of the People's Republic of*

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China (the "*Constitution*").[3] That version of the *Constitution* did not explicitly use the term "recordation and review", but Articles 100 and 116 both mentioned "recordation" (see **Sidebar 1**). The *Constitution* went through five amendments and the current version does not use the term "recordation and review" either. Except for the addition of the second paragraph to Article 100, the contents of Article 100 and Article 116 remain unchanged.[4]

Sidebar 1:

Constitution of the People's Republic of China

Article 100

The people's congresses of provinces and municipalities directly under the Central Government and their standing committees may formulate local regulations, on the premise that [the local regulations] are not in conflict with the Constitution, laws, or administrative regulations, and shall report [the local regulations] to the Standing Committee of the National People's Congress for **recordation**.

Sidebar 1

Article 116

The people's congresses of ethnic autonomous areas have the power to formulate autonomous regulations and separate regulations in accordance with the political, economic, and cultural characteristics of the local ethnic groups. Autonomous regulations and separate regulations of autonomous regions shall come into effect after they are reported to and approved by the Standing Committee of the National People's Congress. Autonomous regulations and separate regulations of autonomous prefectures and autonomous counties shall come into effect after they are reported to and approved by the standing committees of the people's congresses of the provinces or autonomous regions; [these autonomous regulations and separate regulations of autonomous prefectures and autonomous counties] shall be reported to the Standing Committee of the National People's Congress for **recordation**.

(emphasis added)

Wen Luo
Associate Managing Editor, China Guiding Cases Project

Wen Luo is the managing partner of Luo & Associates Law Group, P.C. located in Manhattan, New York. Ms. Luo mainly provides legal services on work visas and permanent residence permits (e.g., H-1B, L-1, EB2, EB3) for foreign employees of multinational companies and small and medium-sized enterprises. Her clients are from various fields, including scientific research, non-profit services, academia, finance, and technology. Prior to joining Luo & Associates Law Group, Ms. Luo was a practicing attorney at Grandway Law Offices in Shenzhen, China, and provided equity financing consulting services for many well-known listed companies and multinational companies in Shenzhen. Ms. Luo received a Bachelor of Laws degree from Guangdong University of Foreign Studies, a Master of Law degree (with Distinction) from City University of Hong Kong, and a Juris Doctor degree (with Honors) from American University Washington College of Law.

(2) 2000: *Legislation Law of the People's Republic of China*

In March 2000, the NPC passed the *Legislation Law of the People's Republic of China* (the "*Legislation Law*").[5] At the time, the law did not explicitly mention "recordation and review", but Chapter 5 of the law (i.e., Articles 78 to 92) was entitled "Application and Recordation" and Articles 89 and 92 set forth details regarding "recordation" (see **Sidebar 2**).

Sidebar 2:

***Legislation Law of the People's Republic of China* (2000)**

Article 89

Administrative regulations, local regulations, autonomous regulations, separate regulations, and rules should, within 30 days of their issuance and in accordance with the following provisions, be reported to relevant organs for **recordation**:

(1) **Administrative regulations** are to be reported to the Standing Committee of the National People's Congress for **recordation**.

(2) **Local regulations** formulated by the people's congresses of provinces, autonomous regions, or municipalities directly under the Central Government or their standing committees are to be reported to the Standing Committee of the National People's Congress and the State Council for **recordation**; and **local regulations** formulated by the people's congresses of larger cities or their standing committees are to be reported by the standing committees of the people's congresses of provinces or autonomous regions to the Standing Committee of the National People's Congress and the State Council for **recordation**.

(3) **Autonomous regulations** and **separate regulations** formulated by autonomous prefectures or autonomous counties are to be reported by the standing committees of the people's congresses of provinces, autonomous regions, or municipalities directly under the Central Government to the Standing Committee of the National People's Congress and the State Council for **recordation**.

(4) **Departmental rules** and **local government rules** are to be reported to the State Council for **recordation**; local government rules should be concurrently reported to the standing committees of the people's congresses at the same level for **recordation**; and rules formulated by the people's governments of larger cities should be concurrently reported to the standing committees of the people's congresses and the people's governments of provinces or autonomous regions for **recordation**.

(5) **Regulations formulated according to authorization** should be reported to the organs specified in the decisions of authorization for **recordation**.

Article 92

With respect to the procedures for reviewing local regulations, autonomous regulations, separate regulations, or rules submitted to other organs accepting [these documents] for **recordation**, these organs shall prescribe [the procedures] in accordance with the principle of maintaining the uniformity of the legal system.

(emphasis added)

(3) 2000 and 2005: The *Work Procedures for the Recordation and Review of Administrative Regulations, Local Regulations, Autonomous Regulations, Separate Regulations, and Regulations of Special Economic Zones* and the *Work Procedures for the Recordation and Review of Judicial Interpretations*

In October 2000, the Standing Committee of the NPC released the *Work Procedures for the Recordation and Review of Administrative Regulations, Local Regulations, Autonomous Regulations, Separate Regulations, and Regulations of Special Economic Zones*.[6] The procedures were formulated "in accordance with the Constitution, Legislation Law, and other relevant laws",[7] covering the recordation and review of "administrative regulations formulated by the State Council, local regulations formulated by the people's congresses of provinces, autonomous regions, municipalities directly under the Central Government, or larger cities, or their standing committees, autonomous regulations and separate regulations formulated by autonomous prefectures and autonomous counties, and regulations formulated, in accordance with authorization, by special economic zones".[8] Five years later, in December 2005, the Standing Committee of the NPC issued the *Work Procedures for the Recordation and Review of Judicial Interpretations* to cover the recordation and review of judicial interpretations formulated by the Supreme People's Court or the Supreme People's Procuratorate.[9]

2. *The 2015 Amendment to the* Legislation Law

In 2015, the amendment to the *Legislation Law* marked the first time when the term "recordation and review" was used in a national law of China.[10] Chapter 5 of the amended *Legislation Law* (i.e., Articles 87 to 102) is entitled "Application & Recordation and Review", and Articles 98–102, and 104 provide more specific details regarding "recordation" and "review" (see **Sidebar 3**).

Sidebar 3:

***Legislation Law of the People's Republic of China* (2015)**

Article 98

Administrative regulations, local regulations, autonomous regulations, separate regulations, and rules should, within 30 days of their issuance and in accordance with the following provisions, be reported to relevant organs for **recordation**:

(1) **Administrative regulations** are to be reported to the Standing Committee of the National People's Congress for **recordation**.

(2) **Local regulations** formulated by the people's congresses of provinces, autonomous regions, or municipalities directly under the Central Government or their standing committees are to be reported to the Standing Committee of the National People's Congress and the State Council for **recordation**; and **local regulations** formulated by the people's congresses of cities divided into districts or autonomous prefectures or their standing committees are to be reported by the standing committees of the people's congresses of provinces or autonomous regions to the Standing Committee of the National People's Congress and the State Council for **recordation**.

(3) **Autonomous regulations** and **separate regulations** formulated by the people's congresses of autonomous prefectures or autonomous counties are to be reported by the standing committees of the people's congresses of provinces, autonomous regions, or municipalities directly under the Central Government to the Standing Committee of the National People's Congress and the State Council for **recordation**; and when autonomous regulations or separate regulations are submitted for **recordation**, the circumstances in which laws, administrative regulations, or local regulations have been modified should be explained.

Sidebar 3 ⟶

(4) **Departmental rules** and **local government rules** are to be reported to the State Council for **recordation**; local government rules should be concurrently reported to the standing committees of the people's congresses at the same level for **recordation**; and rules formulated by the people's governments of cities divided into districts or autonomous prefectures should be concurrently reported to the standing committees of the people's congresses and the people's governments of provinces or autonomous regions for **recordation**.

(5) **Regulations formulated according to authorization** should be reported to the organs specified in the decisions of authorization for **recordation**; and when **regulations of special economic zones** are submitted for **recordation**, the circumstances in which laws, administrative regulations, or local regulations have been modified should be explained.

Article 99

Where the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, or the standing committee of the people's congresses of a province, autonomous region, or municipality directly under the Central Government believes that an **administrative regulation, local regulation, autonomous regulation, or separate regulation** is in conflict with the Constitution or a law, it may submit to the Standing Committee of the National People's Congress a written request for **review**, and the work division of the Standing Committee shall refer such a request to the relevant specialized committee for conducting a **review** and providing opinions.

[Any] state organ other than those as mentioned in the preceding paragraph, social organization, enterprise, public institution, or citizen that believes that an **administrative regulation, local regulation, autonomous regulation, or separate regulation** is in conflict with the Constitution or a law may submit to the Standing Committee of the National People's Congress a written suggestion for **review**, and the work division of the Standing Committee shall conduct research and shall, when necessary, refer such a suggestion to the relevant specialized committee for conducting a **review** and providing opinions.

The relevant specialized committee and the work division of the Standing Committee may, on their own initiative, **review** the regulatory documents submitted for **recordation**.

Sidebar 3

TRADITIONAL COMMENTARY 传统评论

Article 100

Where, during the **review** and research, a specialized committee of the National People's Congress and the work division of the Standing Committee believe that an **administrative regulation, local regulation, autonomous regulation, or separate regulation** is in conflict with the Constitution or a law, they may offer written **review** and research opinions to the formulating organ; or the Law Committee, together with the relevant specialized committee and the work division of the Standing Committee, may convene a joint **review** meeting to require the formulating organ to attend the meeting and provide an explanation, and then offer written **review** opinions to the formulating organ. The formulating organ should, within two months, conduct research, offer an opinion on whether to amend [the regulation], and provide feedback to the Law Committee of the National People's Congress as well as the relevant specialized committee or the work division of the Standing Committee.

Where the Law Committee of the National People's Congress, the relevant specialized committee, and the work division of the Standing Committee offer, in accordance with the preceding paragraph, **review** and research opinions to the formulating organ, and the formulating organ amends or repeals, in accordance with the offered opinions, the administrative regulation, local regulation, autonomous regulation, or separate regulation, the **review** shall be terminated.

Where, after the **review** and research, the Law Committee of the National People's Congress, the relevant specialized committee, and the work division of the Standing Committee believe that an **administrative regulation, local regulation, autonomous regulation, or separate regulation** is in conflict with the Constitution or a law, and the formulating organ does not amend [the regulation], they should submit a proposal and suggestions for revocation of the regulation to the Chairman's Meeting [of the Standing Committee of the National People's Congress], which shall decide whether to submit [the proposal and suggestions] to a meeting of the Standing Committee for deliberation and decision.

Article 101

The relevant specialized committee of the National People's Congress and the work division of the Standing Committee [of the National People's Congress] should, according to the prescribed requirements, provide feedback on the **review** and research to the state organ, social organization, enterprise, public institution, or citizen suggesting the **review**, and may announce this to society.

Article 102

With respect to the procedures for **reviewing** local regulations, autonomous regulations, separate regulations, or rules submitted to other organs accepting [these documents] for **recordation**, these organs shall prescribe [the procedures] in accordance with the principle of maintaining the uniformity of the legal system.

Article 104

The interpretations issued by the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws in adjudicative or procuratorial work should primarily focus on specific legal provisions and conform to the purposes, principles, and original intent of legislation. Under a circumstance set out in Article 45 Paragraph 2 of this Law, a request for legal interpretation or a proposal for formulating or amending a relevant law should be submitted to the Standing Committee of the National People's Congress.

The interpretations issued by the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws in adjudicative or procuratorial work should, within 30 days of their issuance, be reported to the Standing Committee of the National People's Congress for **recordation**.

Adjudicative and procuratorial organs other than the Supreme People's Court and the Supreme People's Procuratorate must not issue interpretations on the specific application of laws.

(emphasis added)

3. *After the 2015 Amendment to the* Legislation Law

In October 2019, the Standing Committee of the NPC passed the *Decision of the Standing Committee of the National People's Congress on the Formulation of Supervisory Regulations by the National Supervisory Commission,*[11] formally giving the

National Supervisory Commission, which was established as a result of the 2018 amendment to the *Constitution*, the power to "formulate supervisory regulations in accordance with the Constitution and laws", and including "supervisory regulations" within the scope of China's recordation and review work. For example, the Decision provides: "[s]upervisory regulations should, within 30 days of their issuance, be reported to the Standing Committee of the National People's Congress for recordation" and "[t]he Standing Committee of the National People's Congress has the power to revoke a supervisory regulation that is in conflict with the Constitution or a law".

In December of the same year, the Standing Committee of the NPC passed the *Measures for the Recordation and Review of Regulations and Judicial Interpretations*[12] to combine the two documents mentioned above, namely, the *Work Procedures for the Recordation and Review of Administrative Regulations, Local Regulations, Autonomous Regulations, Separate Regulations, and Regulations of Special Economic Zones* and the *Work Procedures for the Recordation and Review of Judicial Interpretations*. Improvements are also made in the Measures by providing more uniform and detailed provisions on the recordation and review of the regulations and judicial interpretations covered.

Key Provisions of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations*: Scope of Review, Standards of Review, and Corrective Measures

Article 1 of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations* (the "*Recordation and Review Measures*") explicitly states that the formulation of the Measures was "to regulate the recordation and review work, strengthen the recordation and review system as well as capacity building, and perform the supervisory duties conferred on the National People's Congress and its Standing Committee by the Constitution and laws". Article 3 continues to state that the recordation and review work is to "safeguard the implementation of the Constitution and laws, protect the legal rights and interests of citizens, maintain the uniformity of the country's legal system, and increase the competence of formulating organs in formulating regulations and judicial interpretations".

With respect to the recordation and review of those regulations and judicial interpretations covered by the *Recordation and Review Measures*, the document provides specific provisions on five aspects, including recordation, review, handling, feedback and disclosure, and reporting. Article 4 of the *Recordation and Review Measures* emphasizes that "the recordation and review work should be in accordance with statutory powers and procedures and should adhere to the principles of **recording every document, reviewing every recorded document, and correcting every error**". (emphasis added)

Article 5 of the *Recordation and Review Measures* explains that the General Office of the Standing Committee of the NPC "is responsible for the receipt, registration, distribution, and archiving of regulations and judicial interpretations submitted for recordation", while the specialized committees of the NPC (the "specialized committees") and the Legislative Affairs Committee of the Standing Committee of the NPC (the "Legislative Affairs Committee") "are responsible for the review of and research on the regulations and judicial interpretations submitted for recordation". According to Article 9, "regulations and judicial interpretations should, within 30 days of their issuance, be submitted to the Standing Committee of the National People's Congress for recordation". According to Article 34, under normal circumstances, a specialized committee and the Legislative Affairs Committee should, within three months of the initiation of the review process, complete the review and research work and submit a written review and research report. However, the *Recordation and Review Measures* does not specify the time limit for a specialized committee and the Legislative Affairs Committee to decide whether the review process is initiated.

This section focuses on the discussion of the scope of review, standards of review, and corrective measures as prescribed in the *Recordation and Review Measures*. Based on this discussion, the authors will make, in the Concluding Remarks section, suggestions for improving the recordation and review system.

1. Scope of Review

Article 2 of the *Recordation and Review Measures* provides:

> These Measures shall apply to the recordation and review of administrative regulations, supervisory regulations, local regulations, autonomous regulations and separate regulations of autonomous prefectures and autonomous counties, and regulations of special economic zones (hereinafter collectively referred to as "regulations") and [the recordation and review of] interpretations issued by the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws in adjudicative or procuratorial work (hereinafter collectively referred to as "judicial interpretations").

It can be seen from Article 2 that the scope of review of the *Recordation and Review Measures* covers the "regulations" and "judicial interpretations" as defined in the provision.

In addition, Articles 54–56 of the *Recordation and Review Measures* provide that the Measures are to be "referenced and applied" in the recordation and/or review of a few other types of documents (see **Sidebar 4**). Strictly speaking, the recordation and/or review of these documents are not within the scope of review of the *Recordation and Review Measures*. However, the fact that the Measures are to be "referenced and applied" in practice is a type of *de facto* application, through which the scope of review of the *Recordation and Review Measures* has been expanded.[13]

Sidebar 4:

Measures for the Recordation and Review of Regulations and Judicial Interpretations

Article 54

Relevant provisions of these Measures are to be referenced and applied in the review of decisions and orders of the State Council, resolutions and decisions of the people's congresses of provinces, autonomous regions, and municipalities directly under the Central Government and their standing committees, and regulatory documents of the Supreme People's Court and the Supreme People's Procuratorate other than [their] judicial interpretations.

Article 55

The standing committees of local people's congresses at all levels are to **refer to these Measures** to conduct **recordation and review** of relevant regulatory documents formulated by local governments, supervisory committees, people's courts, people's procuratorates, and other state organs that are, according to law, subject to the supervision of the standing committees of the people's congresses at the corresponding levels.

Article 56

These Measures are to be referenced and applied in the recordation and review of those laws of the Hong Kong Special Administrative Region and those laws of the Macao Special Administrative Region that are, in accordance with law, reported to the Standing Committee of the National People's Congress for recordation.

(emphasis added)

2. Standards of Review

Chapter 3 Section 3 of the *Recordation and Review Measures* (i.e., Articles 36–39) provides the standards of review. Some standards of review are clear, such as "contrary to the provisions of the Constitution" and "contrary to legal provisions". However, some standards of review are rather ambiguous, such as "contrary to the principles of the Constitution", "contrary to the spirit of the Constitution", "inconsistent with the major decision-making arrangements of the Party Central Committee or not in line with the directions of the country's major reforms", "clearly contrary to the legislative purposes or principles of the law", and "to have clearly inappropriate problems" (see **Sidebar 5**). These ambiguous standards of review will lead to uncertainty in the review process.

3. Corrective Measures

During the review, a specialized committee and the Legislative Affairs Committee determine whether a circumstance stated in Chapter 3 Section 3 of the *Recordation and Review Measures* exists in the reviewed regulation or judicial interpretation (i.e., whether the standards stated in that section are met). Three results are plausible: the circumstances stated in Chapter 3 Section 3 do not exist, may exist, or do exist. In response to these three plausible results, Articles 40–45 of the *Recordation and Review Measures* provide different handling approaches, including corrective measures.

(1) Circumstances Stated in Chapter 3 Section 3 Do Not Exist

Article 45 of the *Recordation and Review Measures* states:

> Where, after review and research, it is considered that the problems stated in Chapter 3 Section 3 of these Measures **do not exist** in the [reviewed] regulation or judicial interpretation, **but there are other tendencies or problems that may cause different understandings, improper implementation, etc.**, [the specialized committee and the Legislative Affairs Committee] may write to the formulating organ to **give it a reminder or put forward relevant opinions and suggestions**. (emphasis added)

(2) Circumstances Stated in Chapter 3 Section 3 May Exist

Article 40 of the *Recordation and Review Measures* states:

> Where the specialized committee and the Legislative Affairs Committee discover, during the review and

Sidebar 5:

Measures for the Recordation and Review of Regulations and Judicial Interpretations

Article 36

Where, in conducting the review of and research on a regulation or judicial interpretation, the regulation or judicial interpretation is found to be contrary to **the provisions of the Constitution, the principles of the Constitution, or the spirit of the Constitution**, opinions should be provided.

Article 37

Where, in conducting the review of and research on a regulation or judicial interpretation, the regulation or judicial interpretation is found to be inconsistent with **the major decision-making arrangements of the Party Central Committee** or not in line with **the directions of the country's major reforms**, opinions should be provided.

Article 38

Where, in conducting the review of and research on a regulation or judicial interpretation, the regulation or judicial interpretation is found to be contrary to **legal provisions** and one of the following circumstances exists, opinions should be provided:

(1) Violating Article 8 of the *Legislation Law* by regulating matters which only laws can be formulated to regulate;

(2) Exceeding authority by illegally establishing the rights and obligations of citizens, legal persons, or other organizations, or illegally setting the powers and duties of state organs;

(3) Illegally establishing administrative licenses, administrative penalties, or administrative compulsions, or illegally making adjustments and changes to administrative licenses, administrative penalties, or administrative compulsions that are set by law;

(4) Clearly inconsistent with legal provisions, or clearly contrary to **the legislative purposes or principles of the law** for the purpose of offsetting, changing, or circumventing legal provisions;

(5) Violating the authorization decision and exceeding the scope of authorization;

(6) Making modifications to matters that, according to law, cannot be modified, or the modified provisions are contrary to the basic principles of the law;

(7) Violating legal procedures;

(8) Other circumstances in which legal provisions are violated.

Article 39

Where, in conducting the review of and research on a regulation or judicial interpretation, the regulation or judicial interpretation is found to **have clearly inappropriate problems** and one of the following circumstances exists, opinions should be provided:

(1) Clearly contrary to the core socialist values as well as public order and good customs.

(2) The provision on the rights and obligations of citizens, legal persons, or other organizations is clearly unreasonable, or the means prescribed for achieving a legislative purpose is clearly incompatible with the legislative purpose.

(3) It is not appropriate to continue the implementation due to major changes in the actual situation.

(4) A modification is clearly unnecessary or unfeasible, or there is an improper exercise of the power to formulate a regulation of a special economic zone, autonomous regulation, or separate regulation.

(5) **Other clearly inappropriate** circumstances.

(emphasis added)

research, that a circumstance stated in Chapter 3 Section 3 of these Measures **may exist** in the [reviewed] regulation or judicial interpretation, they **may communicate with the formulating organ or inquire to the formulating organ in written form**. (emphasis added)

(3) Circumstances Stated in Chapter 3 Section 3 Do Exist

Article 41 Paragraph 1 of the *Recordation and Review Measures* states:

> Where, after review and research, it is considered that a circumstance stated in Chapter 3 Section 3 of these Measures **exists** in the [reviewed] regulation or judicial interpretation and [the regulation or judicial interpretation] needs to be **corrected, communication with the formulating organ may, prior to the provision of written review and research opinions, be made to request that the formulating organ revise or repeal [the regulation or judicial interpretation] in a timely manner**. (emphasis added)

After the specialized committee and the Legislative Affairs Committee communicate with the formulating organ, if the formulating organ agrees to revise or repeal the regulation or judicial interpretation and presents, in writing, a clear plan and time limit for handling the regulation or judicial interpretation, the review shall be suspended (see **Article 41 Paragraph 2**).

If the communication does not produce results, the specialized committee and the Legislative Affairs Committee should, in accordance with Article 100 of the *Legislation Law* (see **Sidebar 3**), provide the formulating organ with written review and research opinions and require the formulating organ to provide, within two months, opinions about how to handle the situation. (see **Article 41 Paragraph 3**). If the formulating organ fails to provide such opinion regarding the handling within two months of its receiving the review and research opinions, the specialized committee and the Legislative Affairs Committee may urge, through a letter, or may interview the relevant person in charge to request that the formulating organ submit the handling opinions within the time limit (see **Article 42**).

If the formulating organ revises or repeals the regulation or judicial interpretation in accordance with the written review and research opinions, the review shall be terminated (see **Article 43**). However, if the formulating organ fails to revise or repeal a regulation in accordance with the written review and research opinions, the specialized committee and the Legislative Affairs Committee may, in accordance with law, submit a proposal and suggestions to the Chairman's Meeting [of the Standing Committee of the NPC] regarding the revocation of the regulation, and the Chairman's Meeting [then] decides whether to submit the matter to a meeting of the Standing Committee for deliberation (see **Article 44 Paragraph 1**). If the formulating organ fails to revise or repeal a judicial interpretation in accordance with the written review and research opinions, the specialized committee and the Legislative Affairs Committee may, in accordance with law, propose that the Supreme People's Court or the Supreme People's Procuratorate revise or repeal the judicial interpretation, or propose that a legal interpretation be made by the Standing Committee of the NPC, and the Chairman's Meeting [then] decides whether to submit the matter to a meeting of the Standing Committee for deliberation (see **Article 44 Paragraph 2**).

Main Results of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations*

After the *Recordation and Review Measures* was issued in December 2019, formulating organs submitted in 2020 a total of 1,293 regulations and judicial interpretations to the Standing Committee of the NPC for recordation. This is less than the quantity in 2019, but more than those in 2018 and 2017 (see **Table 1**).[14]

	2020	**2019**	**2018**	**2017**
Administrative Regulations	25	53	40	18
Local Regulations of Provinces	500	516	640	358
Local Regulations of Cities Divided into Districts	563	718	483	444
Autonomous Regulations & Separate Regulations	109	99	33	25
Regulations of Special Economic Zones	80	58	24	24
Judicial Interpretations	16	41	18	20
Total	**1293**	**1485**	**1238**	**889**

Table 1: Number of Regulations and Judicial Interpretations Submitted by Formulating Organs to the Standing Committee of the National People's Congress for Recordation (Item)

In the past four years, the numbers of regulations and judicial interpretations submitted for recordation have basically shown an upward trend, which is primarily attributed to two developments. First, at the end of 2016, an information platform of the NPC on recordation and review was put into operation. All effective administrative regulations, local regulations, and judicial interpretations have been submitted, electronically and in a uniform format, for recordation through the platform. Second, in 2019, except for a few remote places, information platforms of local people's congresses on

recordation and review were extended to all cities divided into districts, autonomous prefectures, and autonomous counties. This now allows more regulations to be submitted for recordation through these platforms.[15]

In addition, the Legislative Affairs Committee began in 2020 to include the number of laws of the Hong Kong Special Administrative Region and the Macao Special Administrative Region submitted to the Standing Committee of the NPC for recordation in the statistics of legal documents submitted to the committee for recordation. This seems to indicate that although Article 56 of the *Recordation and Review Measures* merely provides that "[t]hese Measures are to be referenced and applied" in the recordation and review of the laws of these two special administrative regions, the Measures are basically "followed and applied" in actual operation. According to the statistics, in 2020, 20 laws of the Hong Kong Special Administrative Region and 21 laws of the Macao Special Administrative Region were submitted to the Standing Committee of the NPC for recordation.[16]

Concluding Remarks: Suggestions for Improvement

The recordation and review system is a significant system that is conducive to maintaining the uniformity of China's legal system. China has a vast territory and many regulations and judicial interpretations are formulated every year. It is difficult to efficiently complete the recordation and review of all regulations and judicial interpretations by solely relying on the efforts of the Legislative Affairs Committee. Therefore, public participation is extremely important. In return, the public's active participation in the work of legislative supervision helps cultivate citizens' legal awareness of abiding by discipline and law, so as to more effectively realize the construction of the rule of law in China.

In light of the benefits of public participation, the content of Articles 22 and 51 of the *Recordation and Review Measures* should be recognized. Article 22 states:

> A written **review suggestion** on a regulation or judicial interpretation submitted, in accordance with law, by a state organ, social organization, enterprise, public institution, or **citizen** to the Standing Committee of the National People's Congress shall be accepted and registered by the Legal Affairs Committee.
>
> The Legislative Affairs Committee shall conduct, in accordance with law, a review of and research on the review suggestion received according to the preceding paragraph and shall, when necessary, refer such a suggestion to the relevant specialized committee for conducting a **review** and providing opinions. (emphasis added)

Article 51 states:

> The specialized committee and the work division of the Standing Committee should **disclose, in proper manner, to society** the status of the recordation and review work. (emphasis added)

Based on this good foundation, the authors make the following three suggestions, in the hope that public participation in legislative supervision can be further improved:

- The annual report on the recordation and review work issued by the Legislative Affairs Committee should explain the reasons for prominent data changes and development trends, so that the public can better understand how this work is intertwined with other developments. For example, in 2020, a total of 80 regulations of special economic zones were submitted for recordation, which is a significant increase from 2019 (see **Table 1**). The report, however, does not provide relevant details and reasons for the significant increase.

- Specialized committees and the work division of the Standing Committee should consider providing specific content of the regulations and judicial interpretations that have been corrected after recordation and review. The disclosure of the comparison of the contents before and after the corrections allows all sectors of society to understand the reasons for the corrections, and also educates other formulating organs so as to avoid making similar mistakes in the future.

- Specialized committees and the work division of the Standing Committee should also consider providing the review suggestions made by citizens and organizations in accordance with Article 22 of the *Recordation and Review Measures* and related content of the regulations and judicial interpretations. For example, in 2020, the Legislative Affairs Committee received 5,146 review suggestions from citizens and organizations,[17] but other information such as the content of the suggestions, the handling results, and the means through which the suggestions were submitted (e.g., online[18] or offline submission) were not disclosed.

In summary, the authors believe that if the recordation and review work can be more open and transparent, it will be more conducive to public participation and help promote the long-term development of the recordation and review system. ■

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[1] 《法治中国建设规划（2020–2025年）》 (*Plan for the Construction of a Rule of Law China (2020–2025)*), issued on and effective as of Jan. 10, 2021, http://www.gov.cn/zhengce/2021-01/10/content_5578659.htm.

[2] 《法规、司法解释备案审查工作办法》 (*Measures for the Recordation and Review of Regulations and Judicial Interpretations*), passed by the Chairman's Meeting of the Standing Committee of the National People's Congress on Dec. 16, 2019, issued on and effective as of Dec. 16, 2019, http://www.njrd.gov.cn/gfxwjbasc_0/flfgzd_66723/202103/t20210302_2835520.html.

[3] 《中华人民共和国宪法》 (*Constitution of the People's Republic of China*), passed on, issued on, and effective as of Dec. 4, 1982, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4421.htm (amended).

[4] 《中华人民共和国宪法》 (*Constitution of the People's Republic of China*), passed on, issued on, and effective as of Dec. 4, 1982, amended five times, most recently on Mar. 11, 2018, effective as of Mar. 11, 2018, http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm. Article 100 Paragraph 2 of the current version of the *Constitution Law of the People's Republic of China* provides:

> The people's congresses of cities divided into districts and their standing committees may formulate local regulations in accordance with provisions of laws, on the premise that [the local regulations] are not in conflict with the Constitution, laws, administrative regulations, or local regulations of their own province or autonomous region. [Any local regulation so formulated] shall be implemented after it is reported to and approved by the standing committee of the people's congress of the province or autonomous region [where the city divided into districts is located].

[5] 《中华人民共和国立法法》 (*Legislation Law of the People's Republic of China*), passed and issued on Mar. 15, 2000, effective as of July 1, 2000, http://www.npc.gov.cn/wxzl/wxzl/2000-11/29/content_4764.htm (amended).

[6] 《行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序》 (*Work Procedures for the Recordation and Review of Administrative Regulations, Local Regulations, Autonomous Regulations, Separate Regulations, and Regulations of Special Economic Zones*), passed by the Chairman's Meeting of the Standing Committee of the National People's Congress on Oct. 16, 2000, issued and entered into effect on Oct. 16, 2000, ineffective as of Dec. 16, 2019, http://search.chinalaw.gov.cn/law/searchTitleDetail?LawID=333370&Query=.

[7] *Id.* Article 1.

[8] *Id.* Article 2.

[9] 人大常委会建立健全法规和司法解释备案审查制度 (*Standing Committee of the National People's Congress Establishes and Improves a System for the Recordation and Review of Regulations and Judicial Interpretations*), 《中国政府门户网站》 (www.gov.cn), Dec. 19, 2005, http://www.gov.cn/jrzg/2005-12/19/content_130950.htm.

[10] 《中华人民共和国立法法》 (*Legislation Law of the People's Republic of China*), passed and issued on Mar. 15, 2000, effective as of July 1, 2000, amended on and effective as of Mar. 15, 2015, http://www.npc.gov.cn/zgrdw/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm.

[11] 《全国人民代表大会常务委员会关于国家监察委员会制定监察法规的决定》 (*Decision of the Standing Committee of the National People's Congress on the Formulation of Supervisory Regulations by the National Supervisory Commission*), passed by the Standing Committee of the National People's Congress on Oct. 26, 2019, issued on Oct. 26, 2019, effective as of Oct. 27, 2019, http://www.npc.gov.cn/npc/c30834/201910/911aed040a7948a3b2679568d6216140.shtml.

[12] *Measures for the Recordation and Review of Regulations and Judicial Interpretations*, *supra* note 2.

[13] *See infra* the part titled "Main Results of the *Measures for the Recordation and Review of Regulations and Judicial Interpretations*", where the recordation and review of some laws of the Hong Kong Special Administrative Region and the Macao Special Administrative Region are discussed.

[14] 全国人民代表大会常务委员会法制工作委员会关于2020年备案审查工作情况的报告 (*Report of the Legislative Affairs Committee of the Standing Committee of the National People's Congress on the Status of Recordation and Review in 2020*), 《中国人大网》 (www.npc.gov.cn), Jan. 27, 2021, http://www.npc.gov.cn/npc/c30834/202101/239178b5d03944c7b453ddc6bdd7c087.shtml; 全国人民代表大会常务委员会法制工作委员会关于2019年备案审查工作情况的报告 (*Report of the Legislative Affairs Committee of the Standing Committee of the National People's Congress on the Status of Recordation and Review in 2019*), 《中国人大网》 (www.npc.gov.cn), Dec. 31, 2019, http://www.npc.gov.cn/npc/c30834/201912/24cac1938ec44552b285f0708f78c944.shtml; 全国人民代表大会常务委员会法制工作委员会关于2018年备案审查工作情况的报告 (*Report of the Legislative Affairs Committee of the Standing Committee of the National People's Congress on the Status of Recordation and Review in 2018*), 《中国人大网》 (www.npc.gov.cn), Dec. 29, 2018, http://www.npc.gov.cn/npc/c12491/201812/afbfcb16af1d455b86dfb0cb4175ba2a.shtml; 全国人民代表大会常务委员会法制工作委员会关于十二届全国人大以来暨2017年备案审查工作情况的报告 (*Report of the Legislative Affairs Committee of the Standing Committee of the National People's Congress on the Status of Recordation and Review Since 2017 [Covered by] the Term of the 12th National People's Congress*), 《中国人大网》 (www.npc.gov.cn), Dec. 27, 2017, http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-12/27/content_2035723.htm.

[15] 让信息化建设为备案审查持续"加码" (*Let the Informatization Construction Continue to "Upgrade" Recordation and Review*), 《中国人大网》 (www.npc.gov.cn), Jan. 23, 2020, http://www.npc.gov.cn/npc/c30834/202001/12c5726a344a454cae760e32b1bd5ad4.shtml.

[16] *Report of the Legislative Affairs Committee of the Standing Committee of the National People's Congress on the Status of Recordation and Review in 2020*, *supra* note 14.

[17] *Id.*

[18] 宪法日，备案审查网络直通车正式开通：公民可一键提交审查建议 (*On Constitution Day, the Recordation and Review Network Was Officially Launched: Citizens Can Submit Review Suggestions with One Click*), 《中国人大网》 (www.npc.gov.cn), Dec. 5, 2019, http://www.npc.gov.cn/npc/c30834/201912/e52670b8c5324ec8a64620ee247b28d4.shtml. In 2019, China's national unified recordation and review information platform was officially opened for use, and, in addition, the function of submitting review suggestions online officially began on the website of the National People's Congress, making it possible for citizens to submit review suggestions online.

关于中国指导性案例项目

使命

斯坦福法学院的中国指导性案例项目（“CGCP”）旨在通过与世界各地的专家和其他利益相关者共同完善我们独特的知识库、为法律工作人员开展能力建设活动，以及促进公共教育和参与，提升对中国和中国法律的理解，并且帮助中国建立一个更加透明、更有问责性的司法制度。

历史简介

2010年11月，中国最高人民法院（“最高法”）建立了开创性的制度，把中国各级人民法院的案例经过遴选并提炼成为具有事实约束力的指导性案例，以指导类似的后续案件的审判工作，确保法律的统一适用。2011年2月，熊美英博士创立了CGCP，展开该项目的历史性使命。CGCP在这段短时间内，建立了一个拥有超过20万全球用户的网站，出版了双语季刊《中国法律连接》，为5,000多名中国法官和律师提供了培训，并主办了多次国际会议，其中有美国和中国的法官以及其他杰出的演讲者。

团队

CGCP拥有一支由法学院学生、其他研究生、律师、专业翻译人员组成的约200位成员的国际团队，并有包括美国联邦最高法院和中国最高人民法院法官在内的50多位杰出的专家顾问。

About the CGCP

Mission

The China Guiding Cases Project (the "CGCP") of Stanford Law School aims to advance the understanding of China and Chinese law and to help develop a more transparent and accountable judiciary in China by engaging experts and other stakeholders around the world to contribute to a unique knowledge base, undertaking capacity-building activities for legal actors, and promoting public education and participation.

Brief History

In November 2010, the Supreme People's Court of China (the "SPC") established a ground-breaking system in which certain Chinese court judgments are selected and re-issued as *de facto* binding Guiding Cases ("GCs"; 指导性案例) to guide the adjudication of similar subsequent cases and ensure the uniform application of law. In February 2011, Dr. Mei Gechlik founded the CGCP to carry out its historic mission. Within this short period of time, the CGCP has developed a website that has over 200,000 global users, published a bilingual quarterly journal, *China Law Connect*, provided training programs to more than 5,000 Chinese judges and lawyers, and hosted multiple international conferences featuring U.S. and Chinese judges and other distinguished speakers.

The Team

The CGCP team has grown to nearly 200 law students, other graduate students, lawyers, and translation professionals working across the globe and is advised by more than 50 distinguished experts, including justices from the U.S. Supreme Court and the SPC.

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《法治中国建设规划（2020—2025年）》：确保中国法制统一的备案审查制度*

熊美英博士、罗雯

摘要

2021年1月，中国共产党中央委员会印发了《法治中国建设规划（2020—2025年）》，将备案审查制度纳入中国法治发展的重要一环。本文首先介绍中国如何逐步建立和完善备案审查制度，继而重点讨论全国人民代表大会常务委员会委员长会议于2019年12月16日通过的《法规、司法解释备案审查工作办法》关于审查范围、标准和纠正措施的规定，最后展示了该办法出台后的主要成果。在此基础上，作者在结语处提出了三项有利于推动中国备案审查工作长远发展的建议。

引言

2021年1月，中国共产党中央委员会印发《法治中国建设规划（2020—2025年）》，[1] 要求各地区、各部门认真贯彻落实。该规划确定了各项工作，包括"加强和完善指导性案例制度，确保法律适用统一"。此外，该规划亦强调"加强宪法实施和监督"，并指出"在备案审查工作中，应当注重审查是否存在不符合宪法规定和宪法精神的内容"。关于备案审查工作，该规划的内容更具体：

> 加强**备案审查制度**和能力建设，实现**有件必备、有备必审、有错必纠**。完善备案审查程序，明确**审查范围、标准和纠正措施**。强化对地方各级政府和县级以上政府部门行政规范性文件、地方各级监察委员会监察规范性文件的备案审查。加强对司法解释的备案监督[…]。（强调后加）

自1949年立国以来，中华人民共和国（"中国"）的法律、行政法规、地方性法规、地方政府规章和不同种类的规范性文件多如繁星，而他们之间的不一致并不罕见。加强备案审查制度和能力建设将能针对这一问题，确保中国法制统一，推进法治发展。

尽管备案审查制度是中国法治发展的重要一环，但是各界对该制度所知不多。本文先介绍中国如何逐步建立和完善备案审查制度。在这发展历程中，2019年12月出台的《法规、司法解释备案审查工作办法》尤为重要。[2] 所以，笔者集中讨论该办法关于审查范围、标准和纠正措施的规定，以及其出台后的主要成果。基于上述讨论，笔者在结语部分提出完善备案审查制度的建议。

中国备案审查制度的发展历程

1.《立法法》2015年修正前

（1）1982年：《中华人民共和国宪法》

1982年12月，全国人民代表大会（"全国人大"）通过《中华人民共和国宪法》（"《宪法》"）。[3]《宪法》没有明确使用"备案审查"一词，但是第一百条、第一百一十六条均提及"备案"（见**侧边栏1**）。《宪法》经过五次修正后，现行的版本亦没有提及"备案审查"；除了第一百条增加了第二款外，第一百条、第一百一十六条的内容均保持不变。[4]

侧边栏1：

《中华人民共和国宪法》

第一百条

省、直辖市的人民代表大会和它们的常务委员会，在不同宪法、法律、行政法规相抵触的前提下，可以制定地方性法规，报全国人民代表大会常务委员会**备案**。

第一百一十六条

民族自治地方的人民代表大会有权依照当地民族的政治、经济和文化的特点，制定自治条例和单行条例。自治区的自治条例和单行条例，报全国人民代表大会常务委员会批准后生效。自治州、自治县的自治条例和单行条例，报省或者自治区的人民代表大会常务委员会批准后生效，并报全国人民代表大会常务委员会**备案**。

（强调后加）

熊美英博士
中国指导性案例项目创办人与总监

熊美英博士是斯坦福法学院中国指导性案例项目（“CGCP”）的创办人与总监。她曾于香港任终身教授，并于2011年2月创立CGCP。在2007年加入斯坦福法学院教授有关中国法律和商务的课程之前，熊博士于2001至2005年期间担任华盛顿智囊机构卡内基国际和平基金会的研究员。熊博士在英格兰、威尔士和香港均有出庭律师执业资格，同时也是纽约和哥伦比亚特区的律师。她获得宾夕法尼亚大学沃顿商学院金融学工商管理硕士（MBA）和斯坦福法学院法律科学博士（JSD）学位。

侧边栏2：

《中华人民共和国立法法》（2000）

第八十九条

行政法规、地方性法规、自治条例和单行条例、规章应当在公布后的三十日内依照下列规定报有关机关**备案**：

（一）**行政法规**报全国人民代表大会常务委员会**备案**；

（二）省、自治区、直辖市的人民代表大会及其常务委员会制定的**地方性法规**，报全国人民代表大会常务委员会和国务院**备案**；较大的市的人民代表大会及其常务委员会制定的**地方性法规**，由省、自治区的人民代表大会常务委员会报全国人民代表大会常务委员会和国务院**备案**；

（三）自治州、自治县制定的**自治条例**和**单行条例**，由省、自治区、直辖市的人民代表大会常务委员会报全国人民代表大会常务委员会和国务院**备案**；

（四）**部门规章和地方政府规章**报国务院**备案**；地方政府规章应当同时报本级人民代表大会常务委员会**备案**；较大的市的人民政府制定的规章应当同时报省、自治区的人民代表大会常务委员会和人民政府**备案**；

（五）根据**授权制定的法规**应当报授权决定规定的机关**备案**。

第九十二条

其他接受**备案**的机关对报送**备案**的地方性法规、自治条例和单行条例、规章的审查程序，按照维护法制统一的原则，由接受**备案**的机关规定。

（强调后加）

（2）2000年：《中华人民共和国立法法》

2000年3月，全国人大通过《中华人民共和国立法法》（“《立法法》”）。[5] 该法没有明确提到“备案审查”，但是第五章（即：第七十八条至第九十二条）题为“适用与备案”，而第八十九条和第九十二条对“备案”都作出规定（见**侧边栏2**）。

（3）2000年与2005年：《行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序》、《司法解释备案审查工作程序》

罗雯
中国指导性案例项目副执行编辑

罗雯是纽约曼哈顿罗森律师事务所（Luo & Associates Law Group, P.C.）的执行合伙人。罗律师主要为跨国公司、中小型企业的外籍员工提供工作签证和永久居住许可方面（如H-1B，L-1，EB2，EB3）的法律服务。她的客户覆盖了科学研究、非营利服务学术机构、金融技术公司等各个领域。在加入罗森律师事务所之前，罗律师是深圳国枫律师事务所的执业律师，曾为深圳多家知名上市公司和跨国企业提供股权融资咨询服务。罗律师拥有广东外语外贸大学的法学学士学位、香港城市大学的（荣誉）法学硕士学位和美国大学华盛顿法学院的（荣誉）法学博士学位。

2000年10月，全国人大常务委员会发布《行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序》。[6] 该程序是"根据宪法、立法法和其他有关法律"而制定，[7] 涵盖"国务院制定的行政法规，省、自治区、直辖市和较大的市的人大及其常委会制定的地方性法规，自治州和自治县制定的自治条例和单行条例，经济特区根据授权制定的法规"[8]的备案和审查工作。五年后，即2005年12月，全国人大常务委员会发布《司法解释备案审查工作程序》，对最高人民法院、最高人民检察院制定的司法解释的备案审查作出规定。[9]

2.《立法法》2015年的修正

2015年，《立法法》的修正将"备案审查"一词首次用于中国全国性法律。[10] 修正后的《立法法》第五章（即：第八十七条至第一百零二条）题为"适用与备案审查"，而第九十八条至第一百零二条、第一百零四条对"备案"和"审查"作出较具体的规定（见**侧边栏3**）。

3.《立法法》2015年修正后

2019年10月，全国人大常务委员会通过了《全国人民代表大会常务委员会关于国家监察委员会制定监察法规的决定》，[11] 正式给予《宪法》2018修正后而成立的国家监察委员会"根据宪法和法律，制定监察法规"的权力，并把"监察法规"纳入中国的备案审查工作的范围。例如，该决定规定："监察法规应当在公布后的三十日内报全国人民代表大会常务委员会备案"和"全国人民代表大会常务委员会有权撤销同宪法和法律相抵触的监察法规"。

同年12月，全国人大常务委员会委员长会议通过了《法规、司法解释备案审查工作办法》，[12] 将上述的《行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序》和《司法解释备案审查工作程序》合并、完善，对涵盖的法规和司法解释的备案审查作出较统一、详细的规定。

《法规、司法解释备案审查工作办法》的重点规定：审查范围、标准和纠正措施

《法规、司法解释备案审查工作办法》（"《备案审查工作办法》"）第一条明确指出该办法的制定是"为了规范备案审查工作，加强备案审查制度和能力建设，履行宪法、法律赋予全国人民代表大会及其常务委员会的监督职责"。而根据第三条，备案审查工作是要"保障宪法法律实施，保护公民合法权益，维护国家法制统一，促进制定机关提高法规、司法解释制定水平"。

侧边栏3：

《中华人民共和国立法法》(2015)

第九十八条

行政法规、地方性法规、自治条例和单行条例、规章应当在公布后的三十日内依照下列规定报有关机关**备案**：

（一）**行政法规**报全国人民代表大会常务委员会**备案**；

（二）省、自治区、直辖市的人民代表大会及其常务委员会制定的**地方性法规**，报全国人民代表大会常务委员会和国务院**备案**；设区的市、自治州的人民代表大会及其常务委员会制定的**地方性法规**，由省、自治区的人民代表大会常务委员会报全国人民代表大会常务委员会和国务院**备案**；

（三）自治州、自治县的人民代表大会制定的**自治条例**和**单行条例**，由省、自治区、直辖市的人民代表大会常务委员会报全国人民代表大会常务委员会和国务院**备案**；自治条例、单行条例报送**备案**时，应当说明对法律、行政法规、地方性法规作出变通的情况；

（四）**部门规章**和**地方政府规章**报国务院**备案**；地方政府规章应当同时报本级人民代表大会常务委员会**备案**；设区的市、自治州的人民政府制定的规章应当同时报省、自治区的人民代表大会常务委员会和人民政府**备案**；

（五）根据**授权制定的法规**应当报授权决定规定的机关**备案**；**经济特区法规**报送**备案**时，应当说明对法律、行政法规、地方性法规作出变通的情况。

第九十九条

国务院、中央军事委员会、最高人民法院、最高人民检察院和各省、自治区、直辖市的人民代表大会常务委员会认为**行政法规、地方性法规、自治条例和单行条例**同宪法或者法律相抵触的，可以向全国人民代表大会常务委员会书面提出进行**审查**的要求，由常务委员会工作机构分送有关的专门委员会进行**审查**、提出意见。

前款规定以外的其他国家机关和社会团体、企业事业组织以及公民认为**行政法规、地方性法规、自治条例和单行条例**同宪法或者法律相抵触的，可以向

全国人民代表大会常务委员会书面提出进行**审查**的建议，由常务委员会工作机构进行研究，必要时，送有关的专门委员会进行**审查**、提出意见。

有关的专门委员会和常务委员会工作机构可以对报送**备案**的规范性文件进行主动**审查**。

第一百条

全国人民代表大会专门委员会、常务委员会工作机构在**审查**、研究中认为**行政法规**、**地方性法规**、**自治条例和单行条例**同宪法或者法律相抵触的，可以向制定机关提出书面**审查**意见、研究意见；也可以由法律委员会与有关的专门委员会、常务委员会工作机构召开联合**审查**会议，要求制定机关到会说明情况，再向制定机关提出书面**审查**意见。制定机关应当在两个月内研究提出是否修改的意见，并向全国人民代表大会法律委员会和有关的专门委员会或者常务委员会工作机构反馈。

全国人民代表大会法律委员会、有关的专门委员会、常务委员会工作机构根据前款规定，向制定机关提出**审查**意见、研究意见，制定机关按照所提意见对行政法规、地方性法规、自治条例和单行条例进行修改或者废止的，**审查**终止。

全国人民代表大会法律委员会、有关的专门委员会、常务委员会工作机构经**审查**、研究认为**行政法规**、**地方性法规**、**自治条例和单行条例**同宪法或者法律相抵触而制定机关不予修改的，应当向委员长会议提出予以撤销的议案、建议，由委员长会议决定提请常务委员会会议审议决定。

第一百零一条

全国人民代表大会有关的专门委员会和常务委员会工作机构应当按照规定要求，将**审查**、研究情况向提出**审查**建议的国家机关、社会团体、企业事业组织以及公民反馈，并可以向社会公开。

第一百零二条

其他接受**备案**的机关对报送**备案**的地方性法规、自治条例和单行条例、规章的**审查**程序，按照维护法制统一的原则，由接受**备案**的机关规定。

第一百零四条

最高人民法院、最高人民检察院作出的属于审判、检察工作中具体应用法律的解释，应当主要针对具体的法律条文，并符合立法的目的、原则和原意。遇有本法第四十五条第二款规定情况的，应当向全国人民代表大会常务委员会提出法律解释的要求或者提出制定、修改有关法律的议案。

最高人民法院、最高人民检察院作出的属于审判、检察工作中具体应用法律的解释，应当自公布之日起三十日内报全国人民代表大会常务委员会**备案**。

最高人民法院、最高人民检察院以外的审判机关和检察机关，不得作出具体应用法律的解释。

（强调后加）

《备案审查工作办法》从备案、审查、处理、反馈与公开、报告工作等五个方面对涵盖的法规、司法解释的备案审查作出了具体的规定。该办法的第四条强调“备案审查工作应当依照法定权限和程序，坚持**有件必备**、**有备必审**、**有错必纠**的原则”（强调后加）。

《备案审查工作办法》第五条说明全国人大常务委员会办公厅“负责报送备案的法规、司法解释的接收、登记、分送、存档等工作”，而全国人大专门委员会（“专门委员会”）、全国人大常务委员会法制工作委员会（“法制工作委员会”）“负责对报送备案的法规、司法解释的审查研究工作”。根据第九条，“法规、司法解释应当自公布之日起三十日内报送全国人大常委会备案”，而根据第三十四条，专门委员会、法制工作委员会在一般情况下，应在审查程序启动后三个月内完成审查研究工作，提出书面审查研究报告。至于专门委员会、法制工作委员会何时决定审查程序是否启动，《备案审查工作办法》没有说明。

本部分重点讨论《备案审查工作办法》所规定的审查范围、标准和纠正措施。基于此讨论，笔者会于结语部分作出完善备案审查制度的建议。

1. 审查范围

《备案审查工作办法》第二条规定：

> 对行政法规、监察法规、地方性法规、自治州和自治县的自治条例和单行条例、经济特区法规（以下统称法规）以及最高人民法院、最高人民检察院作出的属于审判、检察工作中具体应用法律的解释（以下统称司法解释）的备案审查，适用本办法。

从上述的规定可以看出，《备案审查工作办法》的审查范围包括该规定所指的“法规”和“司法解释”。

此外，《备案审查工作办法》第五十四条至第五十六条还规定了数类文件的备案和/或审查“参照适用”该办法（见**侧边栏4**）。严格而言，这些文件的备案和/或审查不在《备案审查工作办法》的审查范围内。但是实践中对该办法的“参照适用”是一种事实上的适用，间接扩大了该办法的审查范围。[13]

2. 审查标准

《备案审查工作办法》第三章第三节（即：第三十六条至第三十九条）提供了审查标准。其中，部分审查标准清晰，如“违背宪法规定”和“违背法律规定”。但是有些审查标准却比较模糊，如违背“宪法原则或宪法精神”、“与党中央的重大决策部署不相符或者与国家的重大改革方向不一致”、“与法律的立法目的、原则明显相违背”以及“存在明显不适当问题”（见**侧边栏5**）。这些较模糊的审查标准会导致审查过程的不确定性。

3. 纠正措施

在审查中，专门委员会和法制工作委员会决定法规、司法解释是否存在上述《备案审查工作办法》第三章第三节规定的情形（即：是否符合该节所规定的标准）。审查研究的结果有三种可能性：不存在、可能存在或存在第三章第三节规定的情形。针对这三种可能性，《备案审查工作办法》第四十条至第四十五条规定了不同的处理方法，包括纠正措施。

（1）不存在第三章第三节规定的情形

《备案审查工作办法》第四十五条规定：

> 经审查研究，认为法规、司法解释**不存在**本办法第三章第三节规定问题，**但存在其他倾向性问题或者可能造成理解歧义、执行不当等问题**的，可以函告制定机关**予以提醒，或者提出有关意见建议**。（强调后加）

（2）可能存在第三章第三节规定的情形

《备案审查工作办法》第四十条规定：

> 专门委员会、法制工作委员会在审查研究中发现法规、司法解释**可能存在**本办法第三章第三节规定情形的，**可以与制定机关沟通，或者采取书面形式对制定机关进行询问**。（强调后加）

（3）存在第三章第三节规定的情形

《备案审查工作办法》第四十一条第一款规定：

> 经审查研究，认为法规、司法解释**存在**本办法第三章第三节规定情形，需要予以**纠正**的，在**提出书面审查研究意见前，可以与制定机关沟通，要求制定机关及时修改或者废止**。

专门委员会、法制工作委员会与制定机关沟通后，该制定机关同意修改或者废止法规、司法解释，并书面提出明确处理计划和时限，审查中止（见**第四十一条第二款**）。经沟通没有结果的，专门委员会、法制工作委员会应当依照《立法法》第一百条规定（见**侧边栏3**），向制定机关提出书面审查研究意见，要求制定机关在两个月内提出书面处理意见（见**第四十一条第三款**）。制定机关收到审查研究意见后没有在两个月内提出书面处理意见的，专门委员会、法制工作委员会可以通过发函督促或者约谈有关负责人，要求制定机关限期报送处理意见（见**第四十二条**）。

如果制定机关按照书面审查研究意见修改、废止法规、司法解释，审查终止（见**第四十三条**）。但是，如果制定机关未按照书面审查研究意见修改、废止法规，

侧边栏4：

《法规、司法解释备案审查工作办法》

第五十四条

对国务院的决定、命令和省、自治区、直辖市人大及其常委会的决议、决定以及最高人民法院、最高人民检察院的司法解释以外的其他规范性文件进行的**审查，参照适用本办法有关规定**。

第五十五条

地方各级人大常委会**参照本办法**对依法接受本级人大常委会监督的地方政府、监察委员会、人民法院、人民检察院等国家机关制定的有关规范性文件进行**备案审查**。

第五十六条

对香港特别行政区、澳门特别行政区依法报全国人大常委会备案的法律的**备案审查，参照适用本办法**。

（强调后加）

侧边栏5：

《法规、司法解释备案审查工作办法》

第三十六条

对法规、司法解释进行审查研究，发现法规、司法解释存在违背**宪法规定、宪法原则或宪法精神**问题的，应当提出意见。

第三十七条

对法规、司法解释进行审查研究，发现法规、司法解释存在与**党中央的重大决策部署**不相符或者与**国家的重大改革方向**不一致问题的，应当提出意见。

第三十八条

对法规、司法解释进行审查研究，发现法规、司法解释违背**法律规定**，有下列情形之一的，应当提出意见：

（一）违反立法法第八条，对只能制定法律的事项作出规定；

（二）超越权限，违法设定公民、法人和其他组织的权利与义务，或者违法设定国家机关的权力与责任；

（三）违法设定行政许可、行政处罚、行政强制，或者对法律设定的行政许可、行政处罚、行政强制违法作出调整和改变；

（四）与法律规定明显不一致，或者与**法律的立法目的、原则**明显相违背，旨在抵消、改变或者规避法律规定；

（五）违反授权决定，超出授权范围；

（六）对依法不能变通的事项作出变通，或者变通规定违背法律的基本原则；

（七）违背法定程序；

（八）其他违背法律规定的情形。

第三十九条

对法规、司法解释进行审查研究，发现法规、司法解释**存在明显不适当问题**，有下列情形之一的，应当提出意见：

（一）明显违背社会主义核心价值观和公序良俗；

（二）对公民、法人或者其他组织的权利和义务的规定明显不合理，或者为实现立法目的所规定的手段与立法目的明显不匹配；

（三）因现实情况发生重大变化而不宜继续施行；

（四）变通明显无必要或者不可行，或者不适当地行使制定经济特区法规、自治条例、单行条例的权力；

（五）**其他明显不适当**的情形。

（强调后加）

专门委员会、法制工作委员会可以依法向委员长会议提出撤销该法规的议案、建议，由委员长会议决定提请常务委员会会议审议（见**第四十四条第一款**）。如果制定机关未按照书面审查研究意见修改、废止司法解释，专门委员会、法制工作委员会可以依法提出要求最高人民法院或者最高人民检察院修改、废止该司法解释的议案、建议，或者提出由全国人大常务委员会作出法律解释的议案、建议，由委员长会议决定提请常务委员会会议审议（见**第四十四条第二款**）。

《法规、司法解释备案审查工作办法》的主要成果

2019年12月《备案审查工作办法》出台后，制定机关于2020年向全国人大常务委员会报送备案1293 件法规、司法解释，比2019年的数量少，但较2018、2017年的数量多（见**表1**）。[14]

	2020年	**2019年**	**2018年**	**2017年**
行政法规	25	53	40	18
省级地方性法规	500	516	640	358
设区的市地方性法规	563	718	483	444
自治条例、单行条例	109	99	33	25
经济特区法规	80	58	24	24
司法解释	16	41	18	20
合计	**1293**	**1485**	**1238**	**889**

表1：制定机关向全国人大常务委员会报送备案法规、司法解释数量（件）

过去四年，法规、司法解释的备案数量基本呈现上升的趋势，这主要受益于两项发展。第一，2016年底，全国人大备案审查信息平台开通运行。所有有效的行政法规、地方性法规和司法解释都已全部按统一格式通过该平台完成电子报送备案。第二，2019年，除个别偏远地方外，地方人大备案审查信息平台已延伸到所有设区的市、自治州、自治县，让更多的法规通过这些平台进行备案。[15]

此外，法制工作委员会于2020年开始将香港特别行政区和澳门特别行政区法律纳入报送全国人大常务委员会备案法律文件的统计中。这似乎表明，尽管《备案审查工作办法》第五十六条规定，两个特别行政区法律的备案审查仅是"参照适用本办法"，但实际运行时，基本上是"依照适用"该办法。据统计，2020年，报送全国人大常务委员会备案的香港特别行政区法律和澳门特别行政区法律分别有20件和21件。[16]

结语：完善建议

备案审查制度是有利于维护中国法制统一的一项重要制度。中国幅员辽阔，每年制定的法规、司法解释众多，单单依靠法制工作委员会的力量很难有效率地完成所有法规、司法解释的备案审查工作。因此，公众的参与极为重要。反过来，公众积极参与立法监督工作有利于培养公民的遵纪守法的法律意识，从而更有效地实现中国法治的建设。

鉴于公众参与的好处，《备案审查工作办法》第二十二条和第五十一条所规定的内容值得肯定。第二十二条规定：

> 国家机关、社会团体、企业事业组织以及**公民**依照法律规定向全国人大常委会书面提出的对法规、司法解释的**审查建议**，由法制工作委员会接收、登记。
>
> 法制工作委员会对依照前款规定接收的审查建议，依法进行审查研究。必要时，送有关专门委员会进行**审查**、提出意见。
> （强调后加）

第五十一条规定：

> 专门委员会、常委会工作机构应当将开展备案审查工作的情况**以适当方式向社会公开**。
> （强调后加）

在此好的基础上，笔者有以下三项建议，希望公众参与立法监督工作能够进一步得到完善：

- 法制工作委员会每年发布的备案审查工作情况的报告应当针对突出的数据变化、发展趋势说明原因，让公众更明白此工作如何跟其他发展相互交织。例如，2020年，经济特区报送备案的法规共80件，较2019年有大幅的提升（见**表1**），但报告没有提及相关细节和大幅提升的原因。

- 专门委员会、常务委员会工作机构应当考虑提供备案审查后得到纠正的法规、司法解释的具体内容。公开比较纠正前后的内容能让社会各界明白纠正的原因，对其他制定机关起到教育作用，避免日后犯类似的错误。

- 专门委员会、常务委员会工作机构也应考虑提供公民、组织依照《备案审查工作办法》第二十二条提出的对法规、司法解释的审查建议和相关内容。例如，2020年，法制工作委员会收到公民、组织提出的审查建议5146件，[17]但是其他信息如建议内容、处理结果、提交建议的方式（线上[18]、线下提交）等都没有公开。

综上，笔者认为如果备案审查工作能够更加公开透明，将更有利于公众的参与，协助推动备案审查制度的长远发展。■

* 此评论的引用是：熊美英博士、罗雯，《法治中国建设规划（2020—2025年）》：确保中国法制统一的备案审查制度，《中国法律连接》，第13期，第13页（2021年6月），亦见于斯坦福法学院中国指导性案例项目，2021年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-13-202106-35-gechlik-luo。载于本评论中的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

[1]《法治中国建设规划（2020–2025年）》，2021年1月10日公布，同日起施行，http://www.gov.cn/zhengce/2021-01/10/content_5578659.htm。

[2]《法规、司法解释备案审查工作办法》，2019年12月16日由全国人民代表大会常务委员会委员长会议通过，2019年12月16日公布，同日起施行，http://www.njrd.gov.cn/gfxwjbasc_0/flfgzd_66723/202103/t20210302_2835520.html。

[3]《中华人民共和国宪法》，1982年12月4日通过和公布，同日起施行，http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4421.htm（已修正）。

[4]《中华人民共和国宪法》，1982年12月4日通过和公布，同日起施行，经五次修正，最新修正于2018年3月11日，同日起施行，http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm。现行的《中华人民共和国宪法》第一百条第二款规定：

> 设区的市的人民代表大会和它们的常务委员会，在不同宪法、法律、行政法规和本省、自治区的地方性法规相抵触的前提下，可以依照法律规定制定地方性法规，报本省、自治区人民代表大会常务委员会批准后施行。

[5]《中华人民共和国立法法》，2000年3月15日通过和公布，2000年7月1日起施行，http://www.npc.gov.cn/wxzl/wxzl/2000-11/29/content_4764.htm（已修正）。

[6]《行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序》，2000年10月16日由全国人民代表大会常务委员会委员长会议通过，2000年10月16日公布，同日起施行，2019年12月16日起失效，http://search.chinalaw.gov.cn/law/searchTitleDetail?LawID=333370&Query=。

[7] 同上，第一条。

[8] 同上，第二条。

[9] 人大常委会建立健全法规和司法解释备案审查制度，《中国政府门户网站》，2005年12月19日，http://www.gov.cn/jrzg/2005-12/19/content_130950.htm。

[10] 《中华人民共和国立法法》，2000年3月15日通过和公布，2000年7月1日起施行，并于2015年3月15日修正，同日起施行，http://www.npc.gov.cn/zgrdw/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm。

[11] 《全国人民代表大会常务委员会关于国家监察委员会制定监察法规的决定》，2019年10月26日全国人民代表大会常务委员会通过和公布，2019年10月27日起施行，http://www.npc.gov.cn/npc/c30834/201910/911aed040a7948a3b2679568d6216140.shtml。

[12] 《法规、司法解释备案审查工作办法》，注释2。

[13] 见下文"《法规、司法解释备案审查工作办法》的主要成果"部分，内容涉及对香港特别行政区、澳门特别行政区的法律的备案审查。

[14] 全国人民代表大会常务委员会法制工作委员会关于2020年备案审查工作情况的报告，《中国人大网》，2021年1月27日，http://www.npc.gov.cn/npc/c30834/202101/239178b5d03944c7b453ddc6bdd7c087.shtml；全国人民代表大会常务委员会法制工作委员会关于2019年备案审查工作情况的报告，《中国人大网》，2019年12月31日，http://www.npc.gov.cn/npc/c30834/201912/24cac1938ec44552b285f0708f78c944.shtml；全国人民代表大会常务委员会法制工作委员会关于2018年备案审查工作情况的报告，《中国人大网》，2018年12月29日，http://www.npc.gov.cn/npc/c12491/201812/afbfcb16af1d455b86dfb0cb4175ba2a.shtml；全国人民代表大会常务委员会法制工作委员会关于十二届全国人大以来暨2017年备案审查工作情况的报告，《中国人大网》，2017年12月27日，http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-12/27/content_2035723.htm。

[15] 让信息化建设为备案审查持续"加码"，《中国人大网》，2020年1月23日，http://www.npc.gov.cn/npc/c30834/202001/12c5726a344a454cae760e32b1bd5ad4.shtml。

[16] 全国人民代表大会常务委员会法制工作委员会关于2020年备案审查工作情况的报告，注释14。

[17] 同上。

[18] 宪法日，备案审查网络直通车正式开通：公民可一键提交审查建议，《中国人大网》，2019年12月5日，http://www.npc.gov.cn/npc/c30834/201912/e52670b8c5324ec8a64620ee247b28d4.shtml。2019年，中国全国统一备案审查信息平台正式开通使用，并在中国人大网上正式推出在线提交审查建议的功能，让公民在线提交审查建议。

The Shaoxing Online Dispute Resolution Model: A New Approach to Improving China's Litigation Services System*

Judge GE Jiguang & Dr. YAO Yao

Abstract

The trends in the development of the litigation services system in contemporary China are that the system is becoming more online and integrated. These trends stem from the difficult situation that courts in China face with respect to their large number of cases but inadequate staff and from the fact that people yearn for better lives. The Supreme People's Court's concept of "governance of sources of litigation" has led to a new round of reforms, which, based on the practice of smart judicial platforms, have enabled the acquisition of judicial big data, the convergence of resources for diversified dispute resolution, and the smooth connection between litigation and mediation. The above developments have allowed China's online dispute resolution ("ODR") model to break through the traditional perception that "ODR is just online ADR ('alternative dispute resolution')", resulting in the accomplishment of the goal of progressing from "online ADR" to "judicial ODR".

Beginning with the "Internet +" litigation and mediation connection mechanism, courts in Shaoxing Municipality have explored and established four innovative mechanisms, namely the "Pre-Litigation Mediation Mechanism for Handling Typified Disputes", the "Mechanism for Impartially Evaluating Civil and Commercial Disputes", the "Mechanism for Recording Undisputed Facts", and the "Autonomous Negotiation Mechanism for Major Commercial Disputes". These mechanisms have formed the Shaoxing model of China's judicial ODR, providing a new plan for the improvement of the litigation services system in the country's courts. The authors of this article are a judge and a scholar in Shaoxing Municipality. Based on their relevant judicial experience and research, they, in this article, introduce the Shaoxing model and explain its effectiveness and reasons for its success.

Introduction

After the *Opinions Concerning the Implementation of the Reform of the Case Registration System by People's Courts* came into effect on May 1, 2015,[1] any case applying for litigation that meets the formal requirements can be registered for litigation immediately. This is based on one of the "guiding ideologies of the reform of the case registration system", as stated in the document:

> Persist in registering every case and handling every lawsuit. A court must accept, in accordance with law, a case that meets the legal requirements, and no entity or individual may use any excuse to obstruct the court from accepting the case.

Since then, the number of cases entering the judicial process has increased sharply and courts in China have been in the difficult situation of having many cases but inadequate staff. For example, the Supreme People's Court accepted a total of 11,210 cases in 2014, an increase of 1.8% from 11,016 in 2013.[2] However, in 2015, the first year of the reform of the case registration system, the Supreme People's Court accepted 15,985 cases, an increase of 42.6% from 11,210 in 2014.[3] This upward trend has been continuing, with more than 30 million cases accepted by Chinese courts in 2020 and the average number of cases handled by each judge in that year being 225.[4]

Given this growing trend of litigation, the efficiency and quality of China's litigation services system need to be improved. Therefore, in the *Opinions of the Supreme People's Court on Deepening the Comprehensive and Supporting Reforms of the Judicial System of People's Courts—The Fifth Five-Year Reform Outline of People's Courts (2019–2023)*, the Supreme People's Court has proposed for the first time "governance of sources of litigation" as the core concept of the reform of China's litigation services system. Specifically, the Supreme People's Court has proposed:[5]

> 13. Deepen the reform of the diversified dispute resolution mechanism. Innovate the development of the **"Fengqiao Experience"** in the new era,[6] improve the **"governance of sources of litigation"** mechanism, persist in putting the non-litigation dispute resolution mechanism in the forefront, and **promote from the sources the reduction of increases in litigation** […]. (emphasis added)

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Since 2016, Judge GE Jiguang has been in charge of the specific work of the courts in Shaoxing Municipality concerning the diversified dispute resolution mechanism and has been committed to promoting the connection between litigation and non-litigation mechanisms through judicial practices. In 2016, Judge Ge organized the selection of the first batch of specially invited mediation organizations and mediators for the courts in Shaoxing Municipality. Since 2017, he has actively participated in the operation and promotion of an online dispute resolution platform in Shaoxing Municipality. Related articles written by Judge Ge include two pieces titled *Integrating the Use of Blockchain Concepts and "Internet+" Technology in Diversified Dispute Resolution: Practices and Prevention of Legal Risks* and *Shaoxing's Two-Level Courts are Building the New "One Body, Two Wings, and Three Dimensions" Mechanism for Litigation Services*, respectively.

The term "Fengqiao Experience" refers to the approach created in the early 1960s by cadres and masses of Fengqiao Town, Zhuji County, Shaoxing Municipality, Zhejiang Province (Zhuji is now a county-level municipality under the jurisdiction of Zhejiang Province and governed by Shaoxing Municipality) that uses the strength of the grassroots level to resolve conflicts at that level. The approach is expressed as "mobilizing and relying on the masses, persisting in not passing conflicts to upper[-level authorities], and solving them on the spot so as to realize [the goals of] arresting fewer people and having good law and order". As for the term "governance of sources of litigation", the above reform outline does not provide an explanation. Based on the authors' judicial experience and research, this term should cover the following three aspects:[7]

- Prevention of disputes: Through analyzing judicial big data and improving the public legal services system, prevent disputes at the point where they begin and promptly eliminate and investigate hidden causes of disputes;

- Resolution of disputes before litigation: Before litigation, guide the parties to disputes to choose non-litigation forms such as reconciliation, people's mediation, and arbitration, so as to effectively resolve disputes before litigation;

- Substantive resolution of disputes by litigation: For cases that proceed to litigation, use materials accumulated at the pre-litigation stage to complete the adjudication on judicial online platforms and to successfully resolve the disputes.

To produce the above three results of "governance of sources of litigation", it is necessary to integrate society's resources for public legal services and pre-litigation mediation services and build a one-stop diversified dispute resolution mechanism

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and an integrated litigation services system. The difficulties involved in doing so, however, are tremendous.

In the past few years, taking advantage of their strengths as the birthplace of the "Fengqiao Experience" and beginning with the "Internet+" litigation and mediation connection mechanism, the courts at two levels in Shaoxing Municipality, Zhejiang Province, have overcome many difficulties and explored four innovative mechanisms, i.e., the "Pre-Litigation Mediation Mechanism for Handling Typified Disputes", the "Mechanism for Impartially Evaluating Civil and Commercial Disputes", the "Mechanism for Recording Undisputed Facts", and the "Autonomous Negotiation Mechanism for Major Commercial Disputes". On the basis of these four innovative mechanisms, the courts in this municipality have gradually built the "One Body, Two Wings, and Three Dimensions" system for dispute resolution and litigation services. Since this Shaoxing model of online dispute resolution ("ODR") provides a new solution for the improvement of the litigation services system in Chinese courts, the authors introduce the model in this article and explain its effectiveness as well as the reasons for its success.

Four Innovative Mechanisms of the Shaoxing Model: On the Basis of the Online Development of Alternative Dispute Resolution and the Construction of Smart Courts

In China, the development of traditional alternative dispute resolution ("ADR") is led by the judicial administrative departments, with people's mediation, judicial mediation, and administrative mediation being the backbone that comprehensively uses various resources to resolve social conflicts.[8] With the advancement of Internet technology, ADR has gradually shifted online, forming online negotiation, mediation, and arbitration.

At the same time, under the construction of smart courts, litigation services have also shifted online. Through the construction of judicial platforms, electronic archives and judicial big data are formed to simplify traditional litigation procedures and increase litigation efficiency. For example, the establishment of Internet courts in Hangzhou, Beijing, and Guangzhou[9] has fully implemented on the Internet every aspect of litigation, including initiation of a lawsuit, pre-litigation mediation, case registration, evidentiary matters, trial and judgment, service, and enforcement.[10]

Combining the above two developments, courts in Shaoxing Municipality connect the online ADR system and resources with the courts, forming a judicial ODR model led by courts and reconstructing the municipality's litigation services system. Thus, the ODR model has been gradually established and improved, with its basis being the four innovative mechanisms discussed below.

1. The Pre-Litigation Mediation Mechanism for Handling Typified Disputes

The Pre-Litigation Mediation Mechanism for Handling Typified Disputes of the courts in Shaoxing Municipality is mainly divided into two parts: the establishment of professional and industry-based mediation institutions and the recruitment of specially invited mediators. Regarding the former, since 2012, the courts in Shaoxing Municipality have been actively guiding qualified chambers of commerce, industry associations, mediation associations, and commercial arbitration institutions to set up commercial mediation organizations and industry mediation organizations, and, based on the types of disputes that frequently and are likely to occur in different regions, establish professional and industry-based mediation institutions.

With respect to the recruitment of specially invited mediators, beginning from September 2020, the courts in Shaoxing Municipality have actively recruited retired judges and prosecutors to be specially invited mediators and have formed the so-called "balance mediation organizations" through which these mediators participate in ODR. Retired judges and retired prosecutors who serve as specially invited mediators can fully leverage their professional advantages as judicial personnel and can combine their professional talents with the functions of the smart ODR platforms to promote the resolution of disputes before litigation. From September 2020 to the end of the same year, specially invited mediation organizations composed of retired judges and retired prosecutors mediated 6,014 disputes on the Shaoxing ODR platform. During this period, 46% of the disputes were resolved before litigation, and the resolution rate increased by 16%, compared with the rate prior to the establishment of the Pre-Litigation Mediation Mechanism for Handling Typified Disputes.

2. The Mechanism for Impartially Evaluating Civil and Commercial Disputes

The courts in Shaoxing Municipality first categorized and analyzed adjudication documents that had come into effect, and thereafter developed an intelligent evaluation algorithm for different types of cases, including medical and health, real estate, construction engineering, intellectual property, environmental protection, and finance. As a result, the Mechanism for Impartially Evaluating Civil and Commercial Disputes was established in 2018.

With this mechanism, parties to a civil or commercial dispute can enter relevant information on the Shaoxing ODR platform and immediately obtain an evaluation report that predicts the outcome of the adjudication. Based on the report, the parties can resolve their dispute on their own. Since the mechanism began its operation, parties to disputes have applied for 10,380 evaluation reports on the platform and only 5.3% of the cases were brought to court, effectively reducing civil and commercial litigation cases.

3. The Mechanism for Recording Undisputed Facts

Under China's existing litigation services system, at the end of a mediation process, the mediator generally records in writing the opinions exchanged by the parties during the mediation process concerning undisputed facts and evidence, and the record will then be signed by the parties for confirmation. In this way, if the mediation fails in the end and litigation begins, there is no need to repeat the process of adducing and cross-examining evidence. This makes it convenient for the court that handles the case registration to begin organizing mediation work after the case is registered.

The above procedures have been improved by the Mechanism for Recording Undisputed Facts of the courts in Shaoxing Municipality. Instead of recording all the agreed facts after the mediation process is completed, the mechanism records a fact on the ODR platform once the parties reach a consensus on the fact during the pre-litigation dispute resolution stage and then imports these facts for litigation, if necessary. This shortens the time used by judges to verify the facts of the case, and reduces the number of trial days. Since the courts in Shaoxing Municipality launched the Mechanism for Recording Undisputed Facts in June 2018, the average trial time of 2,130 disputes that have the assistance of the mechanism is 64.3% less than that of other similar cases without such assistance; and the appeal rate was 83% lower than that of the same type of cases.

4. The Autonomous Negotiation Mechanism for Major Commercial Disputes

The *Opinions of the Supreme People's Court on Another Step Taken by People's Courts to Deepen the Reform of the Diversified Dispute Resolution Mechanism*, which was issued in June 2016, proposes:[11]

> 26. **Encourage parties to negotiate a settlement first**. Encourage parties to negotiate first to resolve their disputes and reach a settlement agreement. Where both parties are represented by lawyers, the lawyers are encouraged to guide the parties to settle first. Specially invited mediators, relevant experts, or other personnel participate in the negotiation based on the application or entrustment of the parties, and may provide auxiliary coordination and assistance for dispute resolution. (emphasis added)

The prerequisite for the operation of this negotiation and settlement system is that the negotiation process can be recorded and stored, and the negotiation results can be recognized by the judiciary.

In view of these prerequisites, the ODR of the courts in Shaoxing Municipality has successfully connected the pre-litigation process with litigation, so that the evidence and the list of undisputed facts submitted by both parties during the negotiation process can be stored and recorded on the platform. At the same time, specially invited mediators, relevant experts, or judges may, based on the application or entrustment of the parties, also participate to provide guidance. As a result, the scope of the pre-litigation dispute resolution has been extended from simple cases to major civil and commercial disputes, and an autonomous negotiation mechanism for these disputes has been formally developed.

Since the Autonomous Negotiation Mechanism for Major Commercial Disputes began to operate in August 2020, the Intermediate People's Court of Shaoxing Municipality has organized judges, specially invited mediators, and lawyers to conduct pre-litigation negotiations on the ODR platform. Two financial contract disputes with more than RMB 200 million at issue have been resolved, and these have been the largest amounts mediated by the ODR platform so far. This mechanism has, therefore, enabled parties and their lawyers to receive gentle guidance while the parties' willingness to resolve disputes is respected. With China's ODR digital capacity, major disputes can now be resolved before litigation.

The Effectiveness of the Construction of the Shaoxing Model

Through the four mechanisms discussed above, Shaoxing Municipality has established and improved a litigation services system that is suitable for local characteristics——the "One Body, Two Wings, and Three Dimensions" one-stop system for dispute resolution and litigation services. As a result, the connection between litigation and mediation in the courts in Shaoxing Municipality has progressed satisfactorily.

1. The "One Body, Two Wings, and Three Dimensions" System

The Shaoxing Municipality has taken a few steps to establish a judicial ODR system that has "one body" only (i.e., that is

integrated). First, it aggregates various online and offline cases on the "Conflict Mediation Center Platform" to form a database of cases. Then, it forms a pool of mediators who are affiliated with specially invited mediation organizations, professional mediation organizations, or lawyer mediation organizations. By matching the cases in the database of cases with mediators in the pool of mediators, cases are diverted to each mediator for mediation. Finally, the "Conflict Mediation Center Platform" is connected to the courts' "micro court" system (i.e., "Zhejiang Micro Court Mini Program", which is a "handheld court" built by the High People's Court of Zhejiang Province; the program covers all local courts in Zhejiang Province and parties can, therefore, submit their cases to "the court" conveniently and can go through multiple legal procedures in just one visit to the system). For each case that cannot be successfully mediated by a mediator, the mediator prepares in the system electronic litigation documents, including a record of the parties' undisputed facts, a statement of complaints of the civil dispute, and a single list of evidence. All of these documents are then sent to the micro court for case registration. As a result, a litigation services system that integrates online (micro court, ODR platform), offline (litigation services), and cross–time zone 24-hour litigation services is in place.

The term "Two Wings" refers to "judicial safeguards of litigation services" and "non-litigation dispute resolution". The term "Three Dimensions" refers to "governance of sources of litigation", "governance of sources of visits", and "governance of sources of enforcement", with the goal of the three types of governance being to "resolve conflicts before [letters and] visits, stop disputes before [litigation], [and] protect rights and interests before [enforcement]".[12] Through the coordinated efforts on the above three dimensions, the new litigation services system—whose main body is the Conflict Mediation Center Platform and whose two wings are "judicial safeguards of litigation services" and "non-litigation dispute resolution"—has allowed the connection between mediation and litigation in Shaoxing courts to develop well (see below).

2. Pre-Litigation Mediation in the Courts of Shaoxing Municipality

Since the exploration and practice of non-litigation dispute resolution procedures began in 2012, the six basic-level courts in Shaoxing Municipality have diverted a total of 162,216 civil and commercial cases, with a divergence rate of 30.39%, and successfully mediated 80,306 cases. The number of diversions, the diversion rate, and the number of successful mediations have been increasing every year (see **Figure**). Since the exploration of the ODR mechanism began in 2017, the numbers of pre-litigation diversions and successful mediations have increased significantly.

In addition, in Shaoxing Municipality, from 2018 to 2020, a total of 2,406 mediators were registered online, 408 professional mediation organizations were trained and developed, and 64,102 disputes were handled. All of these efforts provided further support for the connection between litigation and mediation.

Reasons for the Success of the Shaoxing Model

There are two major reasons for the success of the judicial ODR model in Shaoxing Municipality. One reason is that the municipality has formed a work pattern of coordinated advancement led by the judiciary and administrative departments, and the other is that the "Fengqiao Experience" accumulated locally has provided the people's mediation mechanism with a good foundation for resolving disputes.

1. A Work Pattern of Coordinated Advancement Led by the Judiciary and Administrative Departments

The purpose of the pre-litigation mediation mechanism in the litigation services system led by courts is consistent with that of the public legal services system led by the judicial administrative departments. However, each of these two branches often promotes the construction of its system with itself as the center, and, as a result, the judicial, administrative, and social resources for diversified dispute resolution cannot join forces.

In response to the above problems, Shaoxing Municipality experimented with some special arrangements in Zhuji Municipality: when building ODR, the People's Mediation Committee Platform was set up in the municipal court, while full-time people's mediators were hired by the Judicial Bureau. The Mediation Work Guidance Center of the Municipal Judicial Bureau was specifically responsible for the daily work of accepting, registering, and sorting conflicts and disputes, assigning them to mediators, and providing feedback on the results.[13] This work pattern of coordinated advancement led by the judiciary, administrative departments, and society is conducive to enhancing the effectiveness of mediators. In fact, since Zhuji Municipality began to introduce the special arrangements in 2012, pre-litigation dispute resolutions have accounted for 60% of all such resolutions in the entire Shaoxing Municipality, and the pre-litigation resolution rate has remained more than 24% for eight consecutive years. The successful experience of Zhuji Muncipality has motivated other regions of Shaoxing Municipality to make similar arrangements.

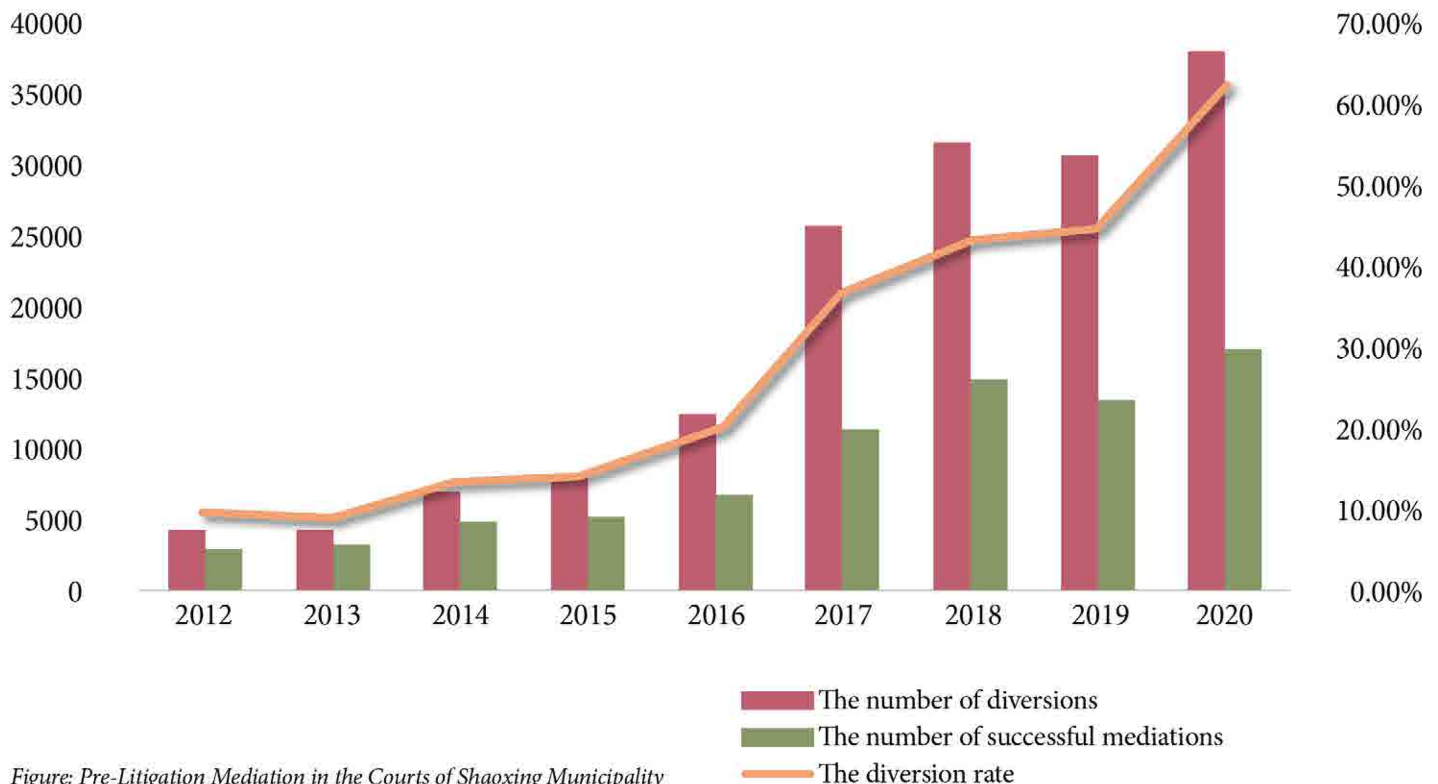

Figure: Pre-Litigation Mediation in the Courts of Shaoxing Municipality

2. The "Fengqiao Experience" Has Provided the People's Mediation Mechanism with a Good Foundation for Resolving Disputes

The people's mediation mechanism in Shaoxing Municipality is relatively complete; this is due to the existence of the grassroots dispute resolution mechanism and the strength of people's mediation developed as a result of the "Fengqiao Experience". Take Zhuji Municipality as an example. Since 2012, there have been more than 50 mediation rooms established by the government or the people.[14] The people's mediation mechanism and other dispute resolution mechanisms have been connected and this helps quickly integrate resources and facilitates and effectively promotes different types of dispute resolution work.

Concluding Remarks

In 2019, at the Central Political and Legal Work Conference, General Secretary XI Jinping of China proposed to "persist in putting the non-litigation dispute resolution mechanism in the forefront".[15] This is a major theoretical innovation for China, aimed at allowing the country to adapt to the main changes in conflicts and disputes in the new era, accurately grasp the trends in the development of conflicts, and implement new development concepts.

The exploration of the ODR model makes it possible to extend the litigation services system to the non-litigation stage. Therefore, bearing in mind the concept of "governance of sources of litigation", focusing on solving the problem of having many cases but inadequate staff, and identifying substantive resolution of disputes as the goal, China, through the practice of local courts, has moved from online ADR to judicial ODR.

Among the practices of many local courts, the practice of the courts in Shaoxing Municipality is particularly prominent. These courts took the construction of online channels that connect litigation with people's mediation as a breakthrough point for reform and innovated the Pre-Litigation Mediation Mechanism for Handling Typified Disputes, the Mechanism for Impartially Evaluating Civil and Commercial Disputes, the Mechanism for Recording Undisputed Facts, and the Autonomous Negotiation Mechanism for Major Commercial Disputes, gradually forming the "One Body, Two Wings, and Three Dimensions" system. This provides a successful paradigm for China's one-stop diversified dispute resolution and litigation services system. ■

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[1] 《最高人民法院关于印发〈关于人民法院推行立案登记制改革的意见〉的通知》 (*Notice of the Supreme People's Court on Printing and Distributing the "Opinions Concerning the Implementation of the Reform of the Case Registration System by People's Courts"*), issued on Apr. 15, 2015, effective as of May 1, 2015, http://www.court.gov.cn/fabu-xiangqing-14152.html.

[2] 2014年最高人民法院工作报告（全文实录） (*2014 Work Report of the Supreme People's Court (Full-Text Record)*), 《人民网》 (WWW.PEOPLE.CN), Mar. 10, 2014, http://lianghui.people.com.cn/2014npc/n/2014/0310/c382480-24592263.html; 2015年最高人民法院工作报告（全文实录） (*2015 Work Report of the Supreme People's Court (Full-Text Record)*), 《人民网》 (WWW.PEOPLE.CN), Mar. 12, 2015, http://lianghui.people.com.cn/2015npc/n/2015/0312/c394473-26681821.html.

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[4] 最高人民法院关于民事诉讼程序繁简分流改革试点情况的中期报告 (*The Mid-Term Report of the Supreme People's Court on the Pilot Reform of the Separation of Complex and Simple Civil Procedures*), 《中国法院网》 (WWW.CHINACOURT.ORG), Feb. 28, 2021, https://www.chinacourt.org/index.php/article/detail/2021/02/id/5825342.shtml.

[5] 最高人民法院关于深化人民法院司法体制综合配套改革的意见——人民法院第五个五年改革纲要（2019—2023） (*Opinions of the Supreme People's Court on Deepening the Comprehensive and Supporting Reforms of the Judicial System of People's Courts—The Fifth Five-Year Reform Outline of People's Courts (2019–2023)*), 《最高人民法院网》 (WWW.COURT.GOV.CN), Feb. 27, 2019, http://www.court.gov.cn/zixun-xiangqing-144202.html.

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绍兴线上纠纷解决模式：完善中国诉讼服务体系的新方案*

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摘要

当代中国诉讼服务体系的发展趋势体现为在线化、一体化。这发展趋势源自法院案多人少的客观困境、人民对美好生活的向往。最高人民法院的"诉源治理"理念开始了新一轮的改革，并基于智慧司法平台的实践，使司法大数据得以获取、多元纠纷解决资源得以汇聚、诉讼调解衔接得以畅通。以上各方面的发展使得中国线上纠纷解决（online dispute resolution；"ODR"）模式突破了"ODR只是线上的ADR（alternative dispute resolution；替代性纠纷解决）"的传统认知，实现了从线上ADR走向司法ODR。

绍兴市法院以"互联网+"诉讼与调解衔接机制为起点，探索出了"类型化纠纷诉前调解处理机制"、"民商事纠纷中立评估机制"、"无争议事实记载机制"、"大标的商事纠纷的自主协商机制"等创新机制，形成了中国司法ODR的绍兴模式，为中国法院诉讼服务体系的完善提供了新方案。本文作者为该市法官、学者，根据其相关司法经验和研究，他们在本文对绍兴模式作出介绍，并说明其成效和成功原因。

引言

自《关于人民法院推行立案登记制改革的意见》于2015年5月1日开始施行后，[1] 符合形式要件的诉讼申请即可立案。这是基于该意见其中一项"立案登记制改革的指导思想"，即：

> 坚持有案必立、有诉必理。对符合法律规定条件的案件，法院必须依法受理，任何单位和个人不得以任何借口阻挠法院受理案件。

自此，进入司法程序的案件量激增，中国法院处于案多人少的困境。例如，最高人民法院2014年受理案件共11210件，较2013年的11016件，增长了1.8%；[2] 但在立案登记制改革施行元年，即2015年，该法院受理案件达15985件，较2014年的数量增长了42.6%。[3] 这一增长趋势持续，在2020年，中国法院受理案件超过3000万件，每位法官在该年平均办案数量为225件。[4] 鉴于此诉讼增长趋势，中国诉讼服务体系的效率和质量必须得到提高。因此，最高人民法院于《最高人民法院关于深化人民法院司法体制综合配套改革的意见——人民法院第五个五年改革纲要（2019—2023）》首次提出"诉源治理"作为中国诉讼服务体系改革的核心理念。具体而言，最高人民法院提出：[5]

> 13. 深化多元化纠纷解决机制改革。创新发展新时代**"枫桥经验"**，[6] 完善**"诉源治理"**机制，坚持把非诉讼纠纷解决机制挺在前面，**推动从源头上减少诉讼增量**[...]。（强调后加）

"枫桥经验"是指1960年代初，浙江省绍兴市诸暨县（现浙江省下辖县级市，由绍兴市代管）枫桥镇干部群众创造了"发动和依靠群众，坚持矛盾不上交，就地解决，实现捕人少，治安好"的方法，用基层力量解决基层矛盾。至于"诉源治理"一词，上述改革纲要没有对其作出说明。根据笔者的司法经验和研究，认为该词体现于三方面：[7]

- 纠纷的预防：通过司法大数据的分析研判和公共法律服务体系的完善，从源头预防纠纷，及时排除调查纠纷隐患；
- 诉讼前纠纷的化解：在诉讼前，引导纠纷当事人选择和解、人民调解、仲裁等非诉形式，将纠纷有效地在诉讼前化解；
- 诉讼对纠纷作出实质的化解：对进入诉讼的案件，运用诉前阶段积累的材料在司法在线平台上完成裁审，成功化解纠纷。

要达到以上三方面的"诉源治理"成果，必须整合社会公共法律服务和诉前调解服务的资源，建设一站式多元纠纷解决机制和一体化的诉讼服务体系。当中困难可想而知。

过去几年，浙江省绍兴市两级法院发挥其作为"枫桥经验"发源地的优势，排除万难，以"互联网+"诉讼与调解衔接机制为起点，探索出四个创新机制，即"类型化纠纷诉前调解处理机制"、"民商事纠纷中立评估机制"、"无争议事实记载机制"、"大标的商事纠纷的自主协商机制"。该市法院以这四个创新机制作为基础，逐步建设"一体两翼三维

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自2016年开始，葛继光法官负责绍兴市法院多元化纠纷解决机制的具体工作，并致力于通过司法实务来促进诉讼和非诉讼机制的相衔接。同年，葛法官组织选聘绍兴市法院第一批特邀调解组织和调解员。自2017年开始，他积极参与线上纠纷解决平台在绍兴的运行和推广。葛法官撰写的相关文章包括《融合运用区块链理念与"互联网+"技术的多元解纷实践与法律风险防范》和《绍兴两级法院打造"一体两翼三维度"的诉服新型机制》。

度"纠纷解决和诉讼服务体系。由于这线上纠纷解决（online dispute resolution；"ODR"）的绍兴模式为中国法院诉讼服务体系的完善提供了新方案，笔者在本文对该模式作出介绍，并说明其成效和成功原因。

绍兴模式的四个创新机制：立足于"替代性纠纷解决"线上化的发展和智慧法院的建设

在中国，传统替代性纠纷解决（alternative dispute resolution；"ADR"）的发展由司法行政部门作主导部门，以人民调解、司法调解和行政调解为主干，综合利用各种资源化解社会矛盾。[8] 随着互联网技术的更新，ADR向线上转移，形成了在线的协商、调解和仲裁。

与此同时，在智慧法院建设下，诉讼服务也向线上迁移。通过司法平台的建设，形成电子档案和司法大数据，简化传统诉讼流程和提高诉讼效率。例如，互联网法院在杭州、北京和广州的设立，[9] 全面在网络上实现了诉讼的每一个环节，包括起诉、诉前调解、立案、证明、庭审和裁判、送达与执行等。[10]

绍兴市法院结合以上两项发展，将线上ADR系统和资源对接入法院，形成了法院主导的司法ODR模式，重构了该市诉讼服务体系。而该ODR的模式是以下文讨论的四个创新机制作为基础，逐步建成和完善。

1. 类型化纠纷诉前调解处理机制

绍兴市法院的类型化纠纷诉前调解处理机制主要分为组建专业性、行业性调解机构和选聘特邀调解员两方面的工作。关于前者，自2012年，绍兴市法院一直积极引导具备条件的商会、行业协会、调解协会、商事仲裁机构等设立商事调解组织、行业调解组织，并根据各地多发、易发纠纷类型组建专业性、行业性调解机构。

关于选聘特邀调解员，2020年9月开始，绍兴市法院积极选聘退休法官、检察官等作为特邀调解员组成天平调解组织参与ODR。退休法官和退休检察官担任特邀调解员，能够充分发挥其作为司法人员的专业优势，而结合他们的专业才能和ODR智能化平台的功能，促使纠纷在诉讼前解决。2020年9月至同年年底，以退休法官和退休检察官组成的特邀调解组织在绍兴ODR平台调解纠纷6014件。在此期间，46%的纠纷在诉前化解，化解率较该机制开始前提升了16个百分点。

2. 民商事纠纷中立评估机制

绍兴市法院对生效的裁判文书分类分析后，形成了医疗卫生、不动产、建筑工程、知识产权、环境保护、金融纠纷等多类案件的智能评估算法，并于2018年建成了民商事纠纷中立评估机制。当事人若有民商事

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纠纷，可在绍兴ODR平台输入相关信息，便立即得到预测司法判决结果的评估报告，并根据该报告自主解决纠纷。自机制运行以来，当事人自主在平台申请评估报告10380份，上述纠纷成讼率仅为5.3%，有效减少民商事诉讼纠纷。

3. 无争议事实记载机制

在中国现有诉讼服务体系下，一般而言，调解员会在调解程序完结时，用书面形式记载调解过程中双方对没有争议的事实和证据所交换的意见，并由当事人签字确认。如此，若调解最终不成进入诉讼后也无需重复举证和质证，便于法院在立案登记时组织立案后的调解工作。

绍兴市法院的无争议事实记载机制对以上程序作出完善。该机制将双方当事人在诉前解纷阶段对某项事实一达成共识后，即记录于ODR平台并导入到诉讼阶段，而非等到调解程序完结时才记录所有已达共识的事实。这缩短了法官查证案件事实的时间，审理天数大幅减少。自2018年6月绍兴市法院首推无争议事实记载以来，有无争议事实记载的2130件纠纷平均审理时间比其他没有该类记载的同类案件减少64.3%；上诉率相比同类型案件减少83%。

4. 大标的商事纠纷的自主协商机制

2016年6月出台的《最高人民法院关于人民法院进一步深化多元化纠纷解决机制改革的意见》提出：[11]

> 26. **鼓励当事人先行协商和解**。鼓励当事人就纠纷解决先行协商，达成和解协议。当事人双方均有律师代理的，鼓励律师引导当事人先行和解。特邀调解员、相关专家或者其他人员根据当事人的申请或委托参与协商，可以为纠纷解决提供辅助性的协调和帮助。（强调后加）

这一协商和解制度得以运行的前提是协商的过程能够被记录、存储，且协商结果能够被司法机关认可。

针对以上的前提要求，绍兴市法院ODR打通了诉前和诉讼两端，让双方当事人在协商过程中提交的证据和无争议事项清单均能够在平台存储、记录。同时，特邀调解员、相关专家或者法官亦可根据当事人的申请或委托参与指导，为适用诉前解纷的案件范围由简易案件扩展至大标的民商事纠纷，正式发展出此类纠纷的自主协商机制。

自2020年8月开始运用大标的商事纠纷自主协商机制，绍兴市中级人民法院组织法官、特邀调解员和代理律师在ODR平台上进行诉前协商，共化解两起标的额2亿元以上的金融合同纠纷，这是目前ODR平台调解处理的最大标的案件。当事人及代理律师通过大标的商事纠纷自主协商机制实现柔性引导和双方解纷意愿的理性匹配，借助中国ODR数字化赋能使大标的纠纷在诉前和解得以实现。

绍兴模式的建设成效

绍兴市通过以上四个机制，建立和完善了适合本地特色的诉讼服务体系——“一体两翼三维度”的一站式纠纷解决和诉讼服务体系。绍兴市法院诉讼调解对接工作因而发展理想。

1. “一体两翼三维度”体系

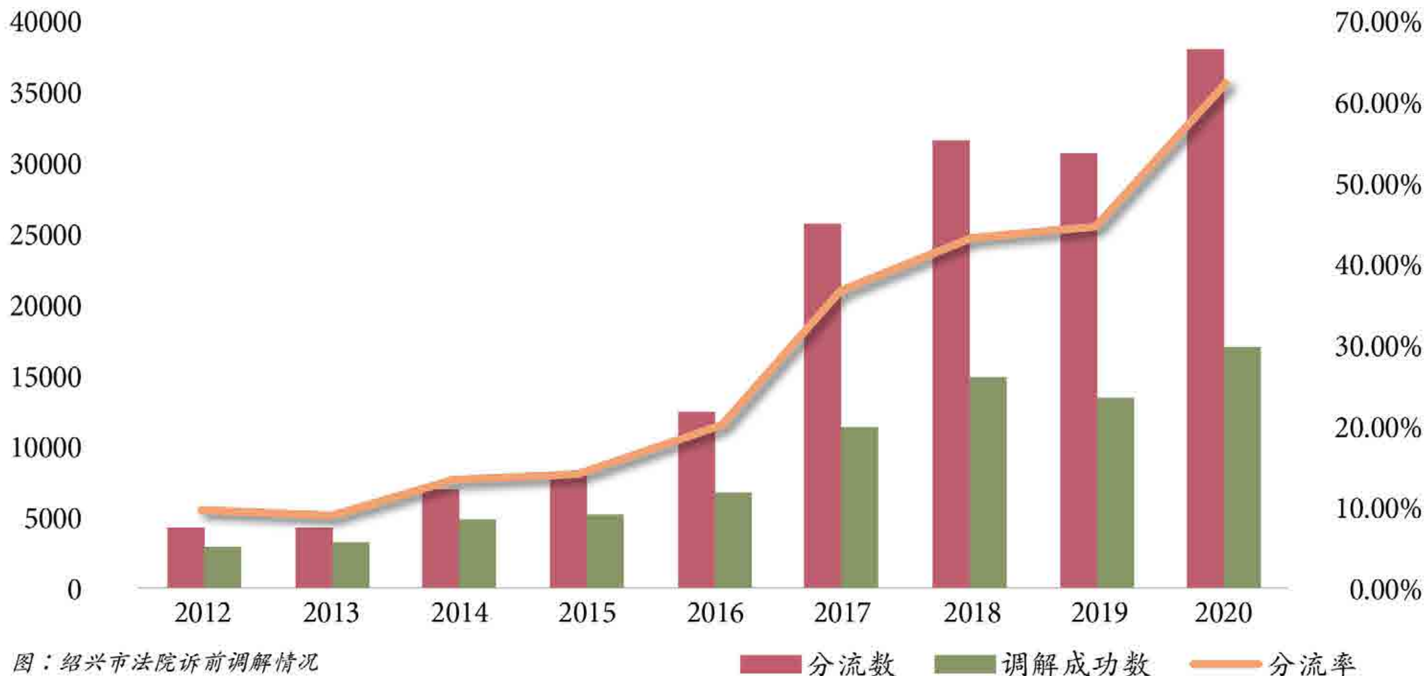
为了形成“一体”化的司法ODR，绍兴市首先将各类线上、线下案件汇集到“矛盾调解中心平台”，形成案件库。其次形成特邀调解组织、专业调解组织或律师调解组织等调解员库。通过对两个库内的案件和调解员作出配对，将案件分流至各调解员处进行调解。最后，“矛盾调解中心平台”对接到法院的“微法庭”系统（即：“浙江微法院小程序”；该程序是由浙江省高级人民法院打造的掌上法院，其汇聚了浙江省各地方法院，让当事人无需多跑就能将自己的案件呈上到法院，只需一次就能走过各项法律流程）。针对调解不成的案件，调解员在系统中做好当事人无争议事项记载、生成民事诉状和单一证据清单等电子诉讼文档，转移至微法院登记立案。由此构建出线上（微法院、ODR平台）、线下（诉讼服务）、跨时域24小时连锁式诉讼服务一体运行的诉讼服务体系。

“两翼”是指“诉讼服务司法保障”和“非诉纠纷解决”。而“三维度”是指“诉源治理”、“访源治理”、“执源治理”，其目标是“化矛盾于[信]访前、止纠纷于诉[讼]前、保障权益于执[行]前”。[12] 通过上述三个维度的协同发力，以“矛盾调解中心平台”为一体、以“诉讼服务司法保障”和“非诉纠纷解决”为两翼的新型诉讼服务体系让绍兴市法院诉讼调解对接工作发展理想（见下文）。

2. 绍兴市法院诉前调解情况

自2012年开始探索实践非诉讼纠纷解决程序以来，绍兴全市六家基层法院共分流民商事案件162216件，分流率30.39%，调解成功80306件。分流数、分流率和调解成功数呈逐年上升趋势（见图）。2017年开始探索ODR机制，诉前分流和调解成功数均大幅上升。

此外，2018年至2020年，绍兴全市共有2406名调解员在线注册，培育专业调解组织408家，处理纠纷64102件，为诉讼调解对接工作提供进一步的支撑。



图：绍兴市法院诉前调解情况

绍兴模式的成功原因

绍兴市司法ODR模式的成功有两大原因，一是该市形成了司法与行政协同推进的工作格局，二是本土积累的“枫桥经验”为人民调解机制提供很好的解纷基础。

1. 司法与行政协同推进的工作格局

由法院主导的诉讼服务体系中诉前调解机制，和司法行政部门主导的公共法律服务体系存在目的一致性。但两个部门往往以本部门为中心推进两个体系建设，多元纠纷解决的司法资源、行政资源和社会资源无法形成合力。

针对以上问题，绍兴市以诸暨市为试点，作出特别安排：在建设ODR时将人民调解委员会平台设立在市级法院，专职人民调解员则由司法局聘请，市司法局所属调解工作指导中心具体承担矛盾纠纷的受理登记、梳理甄别、指派承办、结果反馈等日常工作。[13] 这种司法与行政、社会协同推进的工作格局有利于提升调解员的效能。事实上，诸暨市从2012年开展该特别安排以来，诉前化解的纠纷占到绍兴市各地的60%，诉前化解率连续八年维持在24%以上。诸暨市的成功经验，已经推动了绍兴市其他地区作出同样安排。

2.“枫桥经验”为人民调解机制提供很好的解纷基础

绍兴市人民调解机制较为完善，这是得益于“枫桥经验”所积累而成的基层纠纷解决机制和人民调解力量。以诸暨市为例，自2012年至今，官方成立以及民间自发成立的调解室多达50多个。[14] 人民调解机制与其他纠纷解决机制已经形成衔接，由此可以迅速整合资源，方便和有效地推动各项纠纷解决工作。

结语

2019年，在中央政法工作会议上，中国习近平总书记提出，要“坚持把非诉讼纠纷解决机制挺在前面”。[15] 这是中国为适应新时代主要矛盾纠纷变化，准确把握矛盾发展的趋势，践行新发展理念而作出的重大理论创新。

ODR模式的探索为诉讼服务体系向非诉阶段延伸提供了可能。因此，中国在“诉源治理”理念下，以解决案多人少为问题导向，以争议实质解决为目标，通过地方法院的实践，从线上ADR走向了司法ODR。

在众多地方法院的实践中，绍兴市法院的实践尤为突出。该市法院以诉讼和人民调解衔接机制的线上场景建设为改革突破点，创新出“类型化纠纷诉前调解处理机制”、“民商事纠纷中立评估机制”、“无争议事实记载机制”、“大标的商事纠纷的自主协商机制”，逐步形成了“一体两翼三维度”体系，为中国一站式多元解纷和诉讼服务体系提供了一种成功范式。■

* 此专家*连接*™的引用是：葛继光法官、姚瑶博士，绍兴线上纠纷解决模式：完善中国诉讼服务体系的新方案，《中国法律连接》，第13期，第28页（2021年6月），亦见于斯坦福法学院中国指导性案例项目，专家*连接*™，2021年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-13-202106-connect-14-ge-yao。中文原文由熊美英博士编辑。载于本专家*连接*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目或其它机构的工作或意见。

[1]《最高人民法院关于印发〈关于人民法院推行立案登记制改革的意见〉的通知》，2015年4月15日公布，2015年5月1日起施行，http://www.court.gov.cn/fabu-xiangqing-14152.html。

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[4] 最高人民法院关于民事诉讼程序繁简分流改革试点情况的中期报告，《中国法院网》，2021年2月28日，https://www.chinacourt.org/index.php/article/detail/2021/02/id/5825342.shtml。

[5] 最高人民法院关于深化人民法院司法体制综合配套改革的意见——人民法院第五个五年改革纲要（2019—2023），《最高人民法院网》，2019年2月27日，http://www.court.gov.cn/zixun-xiangqing-144202.html。

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Exploring the Reasons that Guiding Case No. 20 Lost Its Guiding Effect*

Jacob Zhang & Matthew Ma

Abstract

In December 2020, the Supreme People's Court of China decided, for the first time since the establishment of the Case Guidance System in 2010, that two Guiding Cases "will no longer be for reference and imitation". Guiding Case No. 20 was one of them. This Guiding Case was a representative intellectual property case in which the Supreme People's Court stated: "with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee does not have the right to prohibit others from using, offering to sell, or selling [the product] after [the period]". The view taken by the Supreme People's Court had been controversial for many years among academics and legal practitioners. Primarily focusing on how Guiding Case No. 20 is "in conflict with a new law, administrative regulation, or judicial interpretation", this article analyzes and explores the main reasons why this Guiding Case lost its guiding effect and comments on its other shortcomings.

Introduction

On November 8, 2013, the Supreme People's Court of China (the "SPC") released the fifth batch of Guiding Cases[1] for people's courts at all levels to "reference and imitate" when adjudicating similar cases. The batch included Guiding Case No. 20 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*),[2] whose "Reasons for the Adjudication" section covers, *inter alia*, the following:

> [It is clear that] the *Patent Law* provides that a [patent] applicant may request that an entity or individual exploiting his[3] invention after the invention patent application is published but before the patent rights are granted (i.e., during **the provisional protection period of the patent**) pay an appropriate fee; that is, [the applicant] has the right to request the payment of a usage fee covering the provisional protection period of the invention patent. However, with respect to acts exploiting his invention during the provisional protection period of the patent, the applicant does not have the right to request that the exploitation cease.
>
> Therefore, exploiting an invention during the provisional protection period of the invention patent is not a type of act prohibited by the *Patent Law*. In light of the fact that the *Patent Law* does not prohibit [a person from] making, selling, or importing an allegedly patent-infringing product during the provisional protection period of the patent, acts of using, offering to sell, and selling the product after [the period] should also be allowed, even without permission from the patentee. In other words, **with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee does not have the right to prohibit others from using, offering to sell, or selling [the product] after [the period]**. Certainly, this does not negate the patentee's **right**—that he can exercise in accordance with Article 13 of the *Patent Law*—to request that anyone exploiting his invention **pay an appropriate fee**. With respect to an allegedly patent-infringing product that is made, sold, or imported during the provisional protection period of the patent, the seller or user should not be liable for paying an appropriate fee as long as the seller or user provides legal origins [for the product].[4]
>
> (emphasis added)

On December 29, 2020, the SPC released the *Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*, stating:[5]

> In order to ensure the uniform and correct application of national laws, and in accordance with the *Civil Code of the People's Republic of China* and other relevant legal provisions as well as adjudication practices, the Adjudication

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Since March 2007, Mr. Zhang has represented multiple Fortune 500 companies in over 1,000 patent cases of various types and has led a team to handle thousands of patent applications for Chinese companies in overseas countries. Cases that he has handled or participated in handling include the No. 1 case of the annual Top 10 cases selected by the Patent Reexamination Board of the China National Intellectual Property Administration as well as one of the annual Top 10 intellectual property cases of Chinese courts compiled by the Supreme People's Court. Mr. Zhang currently serves as the Beijing Intellectual Property Expert of the Beijing Intellectual Property Office and the vice chair of the China Intellectual Property (IP) Issues Committee of the American Bar Association.

> Committee of the Supreme People's Court discussed and decided that **Guiding Case Nos**. 9 and **20 will no longer be for reference and imitation**. However, the judgments and rulings of these Guiding Cases as well as the judgments and rulings rendered by referencing and imitating these Guiding Cases are still valid. (emphasis added)

The notice came into effect on January 1, 2021. However, the SPC did not explain why the two Guiding Cases mentioned above will no longer be for reference and imitation.

Article 1 of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*[6] provides: "Guiding Cases, which **have guiding effect** on adjudication and

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enforcement work in courts throughout the country, shall be determined and uniformly released by the Supreme People's Court" (emphasis added). Article 7 states: "People's courts at all levels **should reference and imitate** the Guiding Cases released by the Supreme People's Court when adjudicating similar cases" (emphasis added). Based on these two provisions, once a Guiding Case does not have guiding effect, it is no longer to be for reference and imitation.

In addition, with respect to the circumstances under which a Guiding Case "no longer has guiding effect", Article 12 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* provides:[7]

> A Guiding Case no longer has guiding effect under any of the following circumstances:
>
> (1) [the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation;
>
> (2) [the Guiding Case] is replaced with a new Guiding Case.

Since the SPC did not announce any new Guiding Case to replace Guiding Case No. 20, the first circumstance in Article 12, i.e., "[the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation", may be considered the main reason why Guiding Case No. 20 will no longer be for reference and imitation. This article will mainly analyze this reason and highlight the conflicts between the case and a new judicial interpretation as well as the conflicts between the case and a new provision of the *Patent Law of the People's Republic of China*[8] (the "*Patent Law*").

In addition, Article 2 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* provides:

> Guiding Cases should be cases whose rulings or judgments have come into legal effect, [in which] **facts are clearly determined, law is correctly applied, and reasoning for the adjudication is sufficient, and which [provide] good legal and social outcomes and have universal guiding significance for the adjudication of similar cases**. (emphasis added)

Therefore, the fact that Guiding Case No. 20 will no longer be for reference and imitation may also be due to its failure to meet the above requirements. In light of these requirements, this article also attempts to analyze the theoretical and practical limitations of Guiding Case No. 20.

Guiding Case No. 20 Is in Conflict with a New Judicial Interpretation

The *Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights*[9] (the "*Patent Judicial Interpretation (II)*") became effective on April 1, 2016, and is, therefore, a new judicial interpretation with respect to Guiding Case No. 20. The judicial interpretation was amended on December 23, 2020. However, Article 18 remains the same, which provides:

> Where an [invention patent] right-holder brings a lawsuit to request, in accordance with **Article 13 of the *Patent Law***, the payment of an appropriate fee from the entity or individual who exploited the invention **during the period from the date when the invention patent application was published to the date when [the patent] was granted and published**, a people's court may make a reasonable determination with reference to license fees of the relevant patent.
>
> Where the scope of protection sought by the applicant at the time when the invention patent application was published is inconsistent with the scope of protection of the patent rights at the time when the invention patent was granted and published, if an allegedly [patent-infringing] technical solution falls within both of the above two scopes, a people's court should determine that the defendant exploited the invention during the period mentioned in the preceding paragraph; if the allegedly [patent-infringing] technical solution falls within only one [of the two scopes], a people's court should determine that the defendant did not exploit the invention during the period mentioned in the preceding paragraph.
>
> Where, **after the invention patent was granted and published**, [a person], without permission from the patentee and for production and business purposes, uses, offers to sell, or sells a product made, sold, or imported by another person **during the period mentioned in the first paragraph of this article**, and that other person **has paid or promised in writing to pay an appropriate fee** as stated in Article 13 of the *Patent Law*, a people's court shall not support the [invention patent] right-

> holder's claim that the aforementioned act of using, offering to sell, or selling [the product] infringes on the patent rights.
>
> (emphasis added)

There exists a view that the Main Points of the Adjudication of Guiding Case No. 20 do not conform to Article 18 Paragraph 1 of the *Patent Judicial Interpretation (II)*.[10] This is one of the explanations of why Guiding Case No. 20 "is in conflict with a new law, administrative regulation, or judicial interpretation". The Main Points of the Adjudication section of Guiding Case No. 20 states:

> In light of the fact that the *Patent Law* does not prohibit [a person from] making, selling, or importing an allegedly patent-infringing product during the provisional protection period [of the patent], which begins after the invention patent application is published and ends when the patent rights are granted, [acts of] using, offering to sell, and selling [the product] after [the period] **shall not be regarded as infringements of the patent rights**, even [if these acts are done] without permission from the patentee. However, the patentee may, in accordance with law, request that an entity or individual who exploits the invention during the provisional protection period **pay an appropriate fee**. (emphasis added)

Article 13 of the *Patent Law* provides:[11]

> After an invention patent application is published, the applicant may request that the entity or individual exploiting his invention pay **an appropriate fee**. (emphasis added)

According to the view mentioned above, the premise of Article 13 of the *Patent Law* is that "the entity or individual exploiting [the patentee's] invention" has actually infringed on the rights of the patentee, and the original intent of Article 18 Paragraph 1 of the *Patent Judicial Interpretation (II)* "is consistent with the legislative spirit of Article 13 of the *Patent Law*".[12] However, the phrase "shall not be regarded as infringements of the patent rights" in the Main Points of the Adjudication of Guiding Case No. 20 actually reflects the use of the "right to claim ill-gotten gains" theory, rather than the infringement theory, to explain the "pay[ment of] an appropriate fee". This explanation does not conform to the original legislative intent of Article 13 of the *Patent Law*, nor does it conform to the original intent of Article 18 Paragraph 1 of the *Patent Judicial Interpretation (II)*. Therefore, this Guiding Case is no longer for reference and imitation.

The above view has its merits. In the following subsections, the authors analyze more closely how Guiding Case No. 20 is in conflict with Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)*, which, as explained below, is based on good reasoning.

1. *Conflict with Article 18 Paragraph 3 of the* Patent Judicial Interpretation (II)

The meaning of Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)* can be explained by discussing an example involving "Party A" and "Party B". In order to make it easy for readers to understand, the authors added the expressions "Party A" and "Party B" to this paragraph:

> Where, after the invention patent was granted and published, **[Party B]**, without permission from the patentee and for production and business purposes, uses, offers to sell, or sells a product made, sold, or imported by **another person [i.e., Party A]** during the period mentioned in the first paragraph of this article **[i.e., during the period from the date when the invention patent application was published to the date when the patent was granted and published]**, and **that other person [i.e., Party A]** has paid or promised in writing to pay an appropriate fee as stated in Article 13 of the *Patent Law*, a people's court shall not support the [invention patent] right-holder's claim that **[Party B's]** aforementioned act of using, offering to sell, or selling [the product] infringes on the patent rights. (emphasis added)

In this example, "during the period from the date when the invention patent application was published to the date when the patent was granted and published" (i.e., during "the provisional protection period of the patent"), Party A made, sold, or imported a product that falls within the protected scope of claims disclosed in the invention patent application. After examination, the invention patent application was allowed and patent rights were granted (and the product still falls within the protected scope of claims of the granted patent, see Article 18 Paragraph 2). Due to the provision of Article 13 of the *Patent Law* on "pay[ment of] an appropriate fee" (see above), Party A should pay the patentee or promise in writing to pay him the appropriate fee stated in the provision. Whether Party A does so will have the following effects on Party B:

- If Party A **has** paid the patentee or promised in writing to pay him an appropriate fee, Party B, who purchased the product from Party A during the provisional protection period of the patent, **can**, regarding his act of using, offering to sell, or selling the product after the patent rights are granted, **be free from** liability for such infringements of patent rights.

- If Party A **has neither** paid the patentee nor promised in writing to pay him an appropriate fee, Party B **cannot**, regarding his act of using, offering to sell, or selling the product after the patent rights are granted, **be free from** liability for such infringements of patent rights.

The following is an analysis of the facts of Guiding Case No. 20 in accordance with Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)*. Shenzhen Kangtailan Water Treatment Equipment Co., Ltd. ("Kangtailan Company") (similar to Party A of the aforementioned example) **neither** paid patentee Shenzhen Siruiman Fine Chemicals Co., Ltd. ("Siruiman Company") nor promised in writing to pay it an appropriate fee. Therefore, based on Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)*, Shenzhen Kengzi Tap Water Co., Ltd. ("Kengzi Tap Water Company") (similar to Party B of the aforementioned example) **cannot**, regarding its act of using, after the patent rights were granted, a product made and sold by Kangtailan Company (again, similar to Party A of the aforementioned example) during the provisional protection period of the patent, **be free from** liability for such infringements of patent rights. On this basis, the "Reasons for the Adjudication" section of Guiding Case No. 20—which states that "[where neither an appropriate fee has been paid to a patentee nor has a promise to pay such a fee been made in writing,] with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee **does not have the right** to prohibit others from using, offering to sell, or selling [the product] after [the period]" (emphasis added) —is clearly in conflict with Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)*.

2. Article 18 Paragraph 3 of the Patent Judicial Interpretation (II) *Is Reasonable*

The above example involving Party A and Party B shows that Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)* exemplifies very well the legal purpose of Article 13 of the *Patent Law*, i.e., it provides the applicant with certain protection after his invention patent application is published. Otherwise, allowing a third party to freely exploit a published invention before invention patent rights are granted would obviously harm the interests of the patent applicant.

It is worth noting that the use of the term "another person" in Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)* clearly indicates that two parties (i.e., Party A and Party B in the example) are involved. In other words, this paragraph does not exempt **Party A**, who made, sold, or imported a product during the provisional protection period of the patent, from liability for infringements of patent rights regarding **Party A's own** act of using, offering to sell, or selling the product after the patent rights are granted, even if Party A has paid the patentee or promised in writing to pay the patentee an appropriate fee. This reflects a principle in the determination of liability for patent infringement: the liability of **the party** who makes, sells (the first time), or imports a product **(i.e., Party A)** is greater than that of **the other party** who buys the product from Party A as well as uses, offers to sell, or sells (the second time) the product **(i.e., Party B)**.

It is conceivable that if, under the circumstance that Party A has paid the patentee or promised in writing to pay the patentee an appropriate fee, Party A is then allowed to use, offer to sell, or sell, after the patent rights are granted, a product made, sold, or imported by Party A during the provisional protection period of the patent, Party A is likely to make or import a large quantity of the products during the provisional protection period and then use or sell these products for a long time after the patent rights are granted, resulting in a significant loss of the interests of the patentee.

Therefore, the content of Article 18 Paragraph 3 of the *Patent Judicial Interpretation (II)* is reasonable. This further reveals the inadequate arguments and considerations in Guiding Case No. 20, which is contrary to Article 18 Paragraph 3, as reflected in two main points discussed below.

(1) Guiding Case No. 20 Fails to Balance the Interests of All Relevant Parties

In Guiding Case No. 20, manufacturer and seller Kangtailan Company had neither paid patentee Siruiman Company nor promised in writing to pay it an appropriate fee (even though Siruiman Company did not claim an appropriate fee in the case), and yet it was determined that "with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee does not have the right to prohibit others from using, offering to sell, or selling [the product] after [the period]". This is clearly harmful to the rights and interests of the patentee and does not provide any protection to the patentee during the provisional protection period of the patent. This makes the costs of illegally exploiting an invention during the provisional protection period of the patent very low and fails to balance the interests of all relevant parties.

The facts of Guiding Case No. 20 reflect very well the low costs of illegally exploiting an invention. In that case, the patent at issue was an invention patent named "Equipment for Preparing High-Purity Chlorine Dioxide". Each of the various parts of the equipment is common. The novelty of the patent at issue lies in the connection between these parts and their mutual influences. Therefore, a person who refers to the patent specification and purchases these common parts can immediately exploit the invention. The investment costs are very low, far lower than the costs invested by the patentee in the research and development of the invention.

(2) Guiding Case No. 20 Does Not Help Encourage the Use of Inventions and Creations

With respect to the guiding significance of Guiding Case No. 20, the Third Civil Division of the SPC and the Office for the Work on Case Guidance of the SPC commented:[13]

> The Main Points of the Adjudication of that Guiding Case aim to make this point clear: with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee **does not have the right** to prohibit others from using, offering to sell, or selling [the product] after [the period]. The Main Points of the Adjudication address controversies in judicial practice and have guiding significance for the adjudication of similar cases. **Not only [are these Main Points of the Adjudication] in line with the legislative spirit of the *Patent Law* regarding "[granting] protection in return for disclosure", they are also conducive to encouraging the use of inventions and creations, and promoting scientific and technological progress and economic and social development**. (emphasis added)

However, the authors believe that the term "protection" used in the phrase "[granting] protection in return for disclosure" not only includes protection after patent rights are granted, but should also include protection during the provisional protection period of the patent, which is clearly stated in the *Patent Law*. Otherwise, the desire and motivation of innovative entities to apply for patents and disclose their inventions and creations will plummet, and this will be detrimental to "encouraging the use of inventions and creations, and promoting scientific and technological progress and economic and social development".

In particular, it should be noted that, unlike countries such as the United States and Japan, which adopt the model of having the process of patent application publication run in parallel with the process of patent substantive examination, China uses the model of "early disclosure, delayed examination" (such that, in China, the time between the publication of an invention patent application and the grant of patent rights is longer than that in countries such as the United States and Japan). As a result of the Chinese model and the fact that a large number of invention patent applications request "early disclosure", the time between the publication of an invention patent application and the grant of patent rights is generally one to two years. During this relatively long provisional protection period of the patent, the person who exploits an invention can seize a large market share and obtain corresponding benefits. For example, in Guiding Case No. 20, the allegedly patent-infringing products were chlorine dioxide generators, which are a type of large-scale industrial equipment with low market demand and, in general, long service life. Allowing the defendant to continue to use, offer to sell, and sell, after the patent rights were granted, the allegedly patent-infringing products made and sold during the provisional protection period of the patent directly caused the patentee significant loss of market share.

Guiding Case No. 20 Is in Conflict with a New Provision of the *Patent Law*

Article 42 of the *Patent Law* provides:

> The term of invention patent rights is 20 years, the term of utility model patent rights is 10 years, and the term of design patent rights is 15 years. All [of the terms] are calculated from the date of application.
>
> Where invention patent rights are granted four or more years after the date of the invention patent application and three or more years after the date of request for substantive examination, the patent administration department of the State Council shall, at the request of the patentee, compensate for [lost time in the] term of the patent rights in response to **unreasonable delay** in the granting of invention patent rights, except for unreasonable delay caused by the applicant.
>
> […]
>
> (emphasis added)

Article 42 Paragraph 2 of the *Patent Law* was added in 2020 when the law was amended. The original legislative intent of the provision is to compensate for the shortening

of the protection period of an invention patent caused by the unreasonable delay in the process for granting the patent (because "[t]he term of invention patent rights is 20 years [and the term is] calculated from the patent application date", the actual protection period is 20 years minus the period between the patent application date and the date when the grant of the patent is published), thereby providing a more reasonable protection period for the patentee.

It is worth noting that an unreasonable delay in the process for granting the patent also means a corresponding extension of the provisional protection period of the patent. Since the legislative purpose of Article 42 Paragraph 2 of the *Patent Law* is to provide patentees with more reasonable protection, how to allow patentees to obtain appropriate protection during the extended provisional protection period of the patent should also be considered. If, in accordance with the "Reasons for the Adjudication" of Guiding Case No. 20, the acts of using, offering to sell, or selling, after the patent rights are granted, products made during the provisional protection period of the patent shall not be regarded as infringements of the patent rights, this means that the person who exploits the invention can, during the extended provisional protection period of the patent, seize a greater market share and obtain more benefits, causing more harm to the patentee. In this way, even though the patentee is, in accordance with Article 42 Paragraph 2 of the *Patent Law*, compensated for the lost time in the protection period, the loss caused to the patentee by the aforementioned acts of the person who exploits the invention will still be irreparable. Therefore, in order to fully achieve the legislative purpose of Article 42 Paragraph 2 of the *Patent Law* (i.e., to provide patentees with more reasonable protection), Guiding Case No. 20 should no longer have guiding effect. In this sense, there is also conflict between Guiding Case No. 20 and Article 42 Paragraph 2 of the *Patent Law*.

Theoretical and Practical Limitations of Guiding Case No. 20

1. *Guiding Case No. 20 Actually Created New Acts that Do Not Constitute or Are Not Regarded as Infringements of Patent Rights or Acts that Are Exempted from Liability for Infringements of Patent Rights*

In the *Patent Law*, the acts that do not constitute or are not regarded as infringements of patent rights include only those acts specified in Article 67[14] and Article 75[15] (see **Sidebar 1**). In addition, Articles 18 and 25 of the *Patent Judicial Interpretation (II)*, which came into effect after the release of Guiding Case No. 20, provide for acts that are exempted from liability for infringements of patent rights (see **Sidebar 2**).

Sidebar 1:

Patent Law of the People's Republic of China **(amended in 2020)**

Article 67

In a patent infringement dispute, where the alleged infringer has evidence to prove that the technology or design exploited by him is a type of existing technology or an existing design, [his exploitation] **shall not constitute an infringement of patent rights**.

Article 75

None of the following circumstances **shall be regarded as an infringement of patent rights**:

(1) using, offering to sell, selling, or importing a patented product or a product obtained directly by the patented process after the said product is sold by the patentee or by his licensed entity or individual;

(2) having made the same product or having used the same process before the filing date of the patent application, or having made necessary preparations for making such a product or using such a process before the said filing date and continuing to make such a product or using such a process only within the original scope;

(3) for a foreign transportation vehicle temporarily passing through China's territorial land, territorial waters, or territorial airspace, using, in accordance with an agreement signed between its country of origin and China or an international treaty to which both countries have acceded, or in accordance with the principle of reciprocity, relevant patents in the devices and equipment of the vehicle for its own needs;

(4) using relevant patents specially for scientific research and experiments;

(5) making, using, or importing patented drugs or patented medical instruments for the purpose of providing the information as required for administrative examination and approval; or making or importing patented drugs or patented medical devices specifically for [the party performing the act(s) mentioned in the preceding clause].

(emphasis added)

The "Reasons for the Adjudication" of Guiding Case No. 20—regarding the decision that acts of using, offering to sell, or selling, after patent rights are granted, an allegedly patent-infringing product made and sold during the provisional protection period are not prohibited—actually went beyond the aforementioned provisions of the *Patent Law* and the *Patent Judicial Interpretation (II)* to create new acts that do not constitute or are not regarded as infringements of patent rights, or new acts that are exempted from liability for infringements of patent rights.

2. *The View in the "Reasons for the Adjudication" of Guiding Case No. 20, Providing That If Subsequent Exploitations Are Determined to be Infringements This Essentially Provides Protection to Technical Solutions That Are Not Yet Disclosed or Patented, Is Inappropriate*

Sidebar 2:

Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights

Article 25

Where, for production and business purposes, [a person] uses, offers to sell, or sells a patent-infringing product that is not known to have been made and sold without permission from the patentee, and evidence has been adduced to prove the legal origin of the product, a people's court should support a right-holder's request that the aforementioned act of using, offering to sell, or selling cease, **except that the user of the allegedly [patent-] infringing product has adduced evidence to prove that he has paid a reasonable price for the product**.

The term "not known" mentioned in the first paragraph of this article refers to the fact that [a person] actually does not know and should not know.

The term "legal origin" mentioned in the first paragraph of this article refers to the acquisition of a product through normal commercial means such as legal sales channels and usual sales contracts. With respect to the legal origin, the person who uses, offers to sell, or sells [the product] should provide relevant evidence that conforms to the customary practices of the type of transaction [involved].

(emphasis added)

The "Reasons for the Adjudication" section of Guiding Case No. 20 states:

> [...] the patent system is designed to "[grant] protection in return for public disclosure" and the protection [of the invention] can only be requested after [the patent] rights are granted. In terms of an invention patent application, the exploitation of the related invention before the disclosure date does not constitute infringement. After the disclosure date, the acts of exploiting products that were obtained before this date by exploiting the invention should also be allowed. From the disclosure date to the date when the [patent] rights are granted, the invention patent application is given provisional protection. The exploitation of the related invention during this period is not prohibited by the *Patent Law*. Similarly, after [this provisional protection] period, the acts of exploiting products obtained [earlier] by exploiting the invention should also be allowed; but, after obtaining the patent rights, the applicant has the right to request that anyone who exploited his invention during the provisional protection period pay an appropriate fee. Because the *Patent Law* does not prohibit acts of exploitation taking place before the invention patent rights are granted, **subsequent exploitation of products made before the patent rights are granted also does not constitute infringement. Otherwise, it would violate the original legislative intent of the *Patent Law* by providing protection to technical solutions that are not yet disclosed or patented**. (emphasis added)

With respect to the person who exploits an invention (not including any party who purchases a product from the person who initially exploits the invention and uses, offers to sell, or sells the product after the purchase), his exploitation during the provisional protection period of the patent has already resulted in benefits. It is, therefore, reasonable for him to pay the patentee an appropriate fee, the payment of which, however, should not have exhausted the patentee's other patent rights. If, after patent rights are granted, this person is allowed to continue to use, offer to sell, or sell the products made, sold, or imported during the provisional protection period of the patent, this will cause the patentee to lose his exclusive rights brought by the patent. Therefore, prohibiting the exploitation of an invention after patent rights are granted is not to provide protection to technical solutions that are not yet publicly disclosed or patented, but is to protect the patentee's actual interests after the patent rights are granted.

3. The Use of "Prior Use Rights" As an Analogy in the "Reasons for the Adjudication" of Guiding Case No. 20 Is Inappropriate

The "Reasons for the Adjudication" section of Guiding Case No. 20 also states:

> [...] the *Patent Law* provides for **prior use rights**. [The law] only states that a prior user's continued making of the same product or use of the same process within the original scope is not regarded as an infringement; [it] does not state whether, with respect to the same product that has been made [before the patent application date] or a product that has been made[, before the patent application date,] by using the same process, a subsequent act of exploiting [the product] constitutes infringement. But the aforementioned subsequent act of exploitation cannot be determined to constitute infringement merely because the *Patent Law* does not have clear provisions. Otherwise, the prior use rights provided for by the *Patent Law* would be meaningless. (emphasis added)

A prior-use right holder's act of exploiting a patented technology occurred before the filing date of a patent application and this covers a time range that is different from the provisional protection period of the patent, which covers the time range that is after the invention patent application is published but before the patent rights are granted. The solution exploited by a prior-use right holder that happens to be identical with the patented technology is, for the most part, independently developed and designed and should be protected by law. However, the acts of a person who exploits an invention during the provisional protection period of the patent are mostly based on the disclosures in the patent application and it is difficult to prove the related solution is independently developed and designed. Therefore, the legislative purposes of provisions regarding holders of prior-use rights and those who exploit an invention during the provisional protection period of the patent are not comparable and should not have been compared in Guiding Case No. 20.

4. Guiding Case No. 20 Is Inconsistent with the Patent Examination Guidelines

The *Patent Examination Guidelines*, which was formulated by the China National Intellectual Property Administration, was revised in 2019 to, for the first time, include a provision that allows patent applicants to apply for delayed examination.[16] Part V Chapter Seven Section 8.3 of the *Guidelines* provides the following regarding "delayed examination":

> **An applicant may submit a request for delayed examination of an application for an invention patent or a design patent.** The request for delayed examination of [the application for] an invention patent should be submitted by the applicant at the same time as the request for substantive examination, but the request for delayed examination of the application for an invention patent shall take effect on the date when the request for substantive examination becomes effective [...]. The period of delay is one year, two years, or three years from the effective date of the delayed examination request. After the expiration of the delay period, the application will be examined in order [of receipt]. When necessary, the Patent Office may initiate the examination procedures on its own and notify the applicant that the delayed examination period requested by the applicant is thereby terminated.
> (emphasis added)

An applicant may take the initiative to request that the substantive examination of an invention patent application be delayed for one to three years. Then, the applicant can, based on his own technological development and iteration and that of his competitors, consider more comprehensively the focus of the scope of his patent protection. The applicant can also reserve, for a longer period of time, the possibility of filing a new divisional application.

If the "Reasons for the Adjudication" in Guiding Case No. 20 are followed, the patent applicant is likely to be reluctant to adopt the strategy of delaying examination. This is because it will extend the provisional protection period of the patent and a patentee will not be willing to increase his risk of "not hav[ing] the right to prohibit others from using, offering to sell, or selling" after the provisional protection period "an allegedly patent-infringing product made, sold, or imported during the provisional protection period". This violates the original intent of the above-mentioned revision of the *Patent Examination Guidelines* and will lead to the failure of China's "early disclosure, delayed examination" system.

Concluding Remarks

Guiding Case No. 20 not only conflicts with a new judicial interpretation and a new provision of the *Patent Law* but also has theoretical and practical limitations. Therefore, it no longer has guiding effect. The SPC's decision that Guiding Case No. 20 "will no longer be for reference and imitation" is reasonable and helps the gradual improvement of the Case Guidance System. In the future, if decisions are issued to

announce that some other Guiding Cases "will no longer be for reference and imitation", the authors hope that the SPC will provide reasons accordingly, so as to provide better guidance and reference for the people's courts at all levels in the adjudication of related cases as well as for participants of related cases.

* The citation of this Experts *Connect*™ is: Jacob Zhang & Matthew Ma, *Exploring the Reasons that Guiding Case No. 20 Lost Its Guiding Effect*, 13 China Law Connect 33 (June 2021), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, June 2021, http://cgc.law.stanford.edu/commentaries/clc-13-202106-connect-15-zhang-ma. The original, Chinese version of this Experts *Connect*™ piece was edited by Dr. Mei Gechlik. The English version was prepared by Jennifer Baccanello, Shanahly Wan, and David Wei Zhao, and was finalized by Jennifer Ingram, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project or other institutions.

1 《最高人民法院关于发布第五批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Fifth Batch of Guiding Cases*), issued on and effective as of Nov. 8, 2013, http://www.chinacourt.org/law/detail/2013/11/id/147238.shtml.

2 《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*), 12 China Law Connect 79 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC20), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-20.

For the final judgment upon which Guiding Case No. 20 is based, see (2011) 民提字第259号民事判决 ((2011) Min Ti Zi No. 259 Civil Judgment), rendered by the Supreme People's Court on Dec. 20, 2011, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2011-min-ti-zi-259-civil-judgment.

The aforementioned bilingual version of Guiding Case No. 20 also shows the China Guiding Cases Project's comparison of this Guiding Case with the reasoning section of (2011) Min Ti Zi No. 259 Civil Judgment.

3 The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

4 For more discussion of the concept "legal origins", see *infra* part titled "Theoretical and Practical Limitations of Guiding Case No. 20".

5 《最高人民法院关于部分指导性案例不再参照的通知》 (*Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*), issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282441.html. For a discussion of why the term "reference and imitate" is used for "参照", see Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance.

6 Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, *supra* note 5. For the original, Chinese version of the Provisions, see 《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

7 Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance. For the original, Chinese version of the Detailed Implementing Rules, see 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

8 《中华人民共和国专利法》 (*Patent Law of the People's Republic of China*), passed and issued on Mar. 12, 1984, effective as of Apr. 1, 1985, amended four times, most recently on Oct. 17, 2020, effective as of June 1, 2021, http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html.

9 《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释(二)》 (*Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights*), passed by the Adjudication Committee of the Supreme People's Court on Jan. 25, 2016, issued on Mar. 21, 2016, effective as of Apr. 1, 2016, amended on Dec. 23, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282641.html.

10 Judge GUO Feng, *Results from the "Cleanup" of Judicial Interpretations and Guiding Cases and Trends in Their Development in the Era of China's* Civil Code, 12 China Law Connect 1 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, Mar. 2021, http://cgc.law.stanford.edu/commentaries/clc-12-202103-34-guo-feng.

11 *Patent Law of the People's Republic of China*, *supra* note 8, Article 13. The article remains unchanged after the 2020 amendment to the *Patent Law*.

12 Judge GUO Feng, *supra* note 10, at 4.

13 最高人民法院民三庭、最高人民法院案例指导工作办公室 (The Third Civil Division of the Supreme People's Court and The Office for the Work on Case Guidance of the Supreme People's Court), 指导案例20号《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》的理解与参照 (*Understanding, Referencing, and Imitating Guiding Case No. 20, Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*), 《人民司法·案例》 (The People's Judicature · Cases), Issue No. 6, at 98 (2014).

14 *Patent Law of the People's Republic of China*, *supra* note 8, Article 67. The article remains unchanged after the 2020 amendment to the *Patent Law*.

15 *Id.* Article 75. The article remains unchanged after the 2020 amendment to the *Patent Law*.

16 《国家知识产权局关于修改〈专利审查指南〉的决定》 (*Decision of the China National Intellectual Property Administration on Revising the "Patent Examination Guidelines"*), issued on Sept. 23, 2019, effective as of Nov. 1, 2019, http://www.gov.cn/xinwen/2019-09/26/content_5433360.htm.

探讨指导案例20号失去指导作用的原因*

张思悦、马越

摘要

2020年12月，中国最高人民法院在2010年建立案例指导制度以来首次决定"不再参照"两件指导性案例。指导案例20号是其中之一。该案例是知识产权领域的代表性案例，其中确立的"专利权人无权禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售"的裁判观点多年来一直在学界和实务界争议颇大。本文以指导案例20号"与新的法律、行政法规或者司法解释相冲突"为主要视角，分析和探讨该案例失去指导作用的主要原因，并辅以对该案例其它不当之处的评述和观点。

引言

2013年11月8日，最高人民法院（"最高法"）发布第五批指导性案例，[1] 其中包括指导案例20号《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》，[2] 供各级人民法院在审判类似案件时参照。该案例的"裁判理由"主要包括：

> 专利法虽然规定了申请人可以要求在发明专利申请公布后至专利权授予之前（即**专利临时保护期**内）实施其发明的单位或者个人支付适当的费用，即享有请求给付发明专利临时保护期使用费的权利，但对于专利临时保护期内实施其发明的行为并不享有请求停止实施的权利。因此，在发明专利临时保护期内实施相关发明的，不属于专利法禁止的行为。在专利临时保护期内制造、销售、进口被诉专利侵权产品不为专利法禁止的情况下，其后续的使用、许诺销售、销售该产品的行为，即使未经专利权人许可，也应当得到允许。也就是说，**专利权人无权禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售。**当然，这并不否定专利权人根据专利法第十三条规定行使要求实施其发明者**支付适当费用的权利**。对于在专利临时保护期内制造、销售、进口的被诉专利侵权产品，在销售者、使用者提供了合法来源的情况下，销售者、使用者不应承担支付适当费用的责任。（强调后加）

2020年12月29日，最高法发布了《最高人民法院关于部分指导性案例不再参照的通知》，指出：[3]

> 为保证国家法律统一正确适用，根据《中华人民共和国民法典》等有关法律规定和审判实际，经最高人民法院审判委员会讨论决定，9号、**20号指导性案例不再参照**。但该指导性案例的裁判以及参照该指导性案例作出的裁判仍然有效。（强调后加）

该通知自2021年1月1日起施行。然而，最高法并未提供上述两件指导性案例不再参照的理由。

《最高人民法院关于案例指导工作的规定》[4]第一条规定："对全国法院审判、执行工作**具有指导作用**的指导性案例，由最高人民法院确定并统一发布。"（强调后加）。第七条规定："最高人民法院发布的指导性案例，各级人民法院审判类似案例时**应当参照**。"（强调后加）。根据上述两条，指导性案例一旦不再具有指导作用，将不再参照。

此外，《〈最高人民法院关于案例指导工作的规定〉实施细则》[5]第十二条对于"不再具有指导作用"的情形作出了规定：

> 指导性案例有下列情形之一的，不再具有指导作用：
> （一）与新的法律、行政法规或者司法解释相冲突的；
> （二）为新的指导性案例所取代的。

由于最高法并未公布新的指导性案例来取代指导案例20号，因此，"与新的法律、行政法规或者司法解释相冲突"应当是指导案例20号不再参照的主要理由，本文将主要从这个角度进行分析，并指出该案例与新的司法解释以及《中华人民共和国专利法》[6]（"《专利法》"）新的条款相冲突之处。

《〈最高人民法院关于案例指导工作的规定〉实施细则》第二条还规定了：

张思悦
隆天知识产权代理有限公司副总经理、合伙人及专利代理师

张思悦是隆天知识产权代理有限公司的副总经理、合伙人及专利代理师。他擅长专利申请、专利无效、专利行政和民事诉讼、企业专利战略制定和专利布局、专利尽职调查和自由实施调查、知识产权维权打假等业务。自2007年3月起，张先生曾代理过多家世界500强企业各种类型的专利案件千余件，并带领团队处理了中国企业在海外各国的数千件专利申请。他主办和参与办理的案件曾被评为国家知识产权局专利复审委员会年度十大案件之首和最高人民法院中国法院年度十大知识产权案件。张先生目前担任北京市知识产权局的北京市知识产权专家库专家，以及美国律师协会中国知识产权事务委员会副主席。

> 指导性案例应当是裁判已经发生法律效力，**认定事实清楚，适用法律正确，裁判说理充分，法律效果和社会效果良好，对审理类似案件具有普遍指导意义**的案例。（强调后加）

因此，指导案例20号也有可能是由于不符合上述条件而不再参照，本文亦尝试通过这些条件来理解和分析指导案例20号在理论和实践方面所存在的局限性。

指导案例20号与新的司法解释相冲突

《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》[7]（“《专利司法解释（二）》”）自2016年4月1日起开始施行，对于指导案例20号而言，属于新的司法解释。其中，第十八条在该司法解释于2020年12月23日修正时维持不变。第十八条规定：

> 权利人依据**专利法第十三条**诉请在**发明专利申请公布日至授权公告日期间**实施该发明的单位或者个人支付适当费用的，人民法院可以参照有关专利许可使用费合理确定。
>
> 发明专利申请公布时申请人请求保护的范围与发明专利公告授权时的专利权保护范围不一致，被诉技术方案均落入上述两种范围的，人民法院应当认定被告在前款所称期间内实施了该发明；被诉技术方案仅落入其中一种范围的，人民法院应当认定被告在前款所称期间内未实施该发明。
>
> **发明专利公告授权后**，未经专利权人许可，为生产经营目的使用、许诺销售、销售**在本条第一款所称期间内**已由他人制造、销售、进口的产品，且该他人**已支付或者书面承诺支付**专利法第十三条规定的**适当费用的**，对于权利人关于上述使用、许诺销售、销售行为侵犯专利权的主张，人民法院不予支持。
>
> （强调后加）

马越
美国Wolf Greenfield律师事务所专利律师

马越博士现任美国Wolf Greenfield律师事务所专利律师，具有近30年技术开发、知识产权管理、创新、技术转移，及商品化交易的经验。他擅长知识产权咨询服务、专利申请、商标注册、并购、许可、诉讼的知识产权尽职调查，以及提供非侵权法律意见等。

马博士所著的*Fundamentals of Patenting and Licensing for Scientists and Engineers*一书2015再版，并全球发行。该书被美国伯克利大学、清华大学等多所高校作为专利和创新相关的本科及研究生课程的教材。他主编的《知识产权管理实务大全》一书近100万字，由当时在任的中国知识产权局田力普局长亲笔作序，并被中国企业联合会企业管理岗位培训认证《注册知识产权管理师》列为指定培训教材。2011–2013年，马博士在清华大学经管学院主讲《专利战略与创新》课程。

马博士出生于北京，获取多个学位，包括清华大学电子学系工学学士、美国纽约州立大学布法罗分校计算机和电机系硕士、美国东北大学电机系博士及美国Seton Hall大学法学院法学博士。他是美国电子电气工程协会（IEEE）高级会员，并具有美国华盛顿州、新泽西州、宾夕法尼亚州及美国专利和商标局的律师执业资格。

有观点认为，指导案例20号“裁判要点”不符合《专利司法解释（二）》第十八条第一款。[8]这也是对于指导案例20号“与新的法律、行政法规或者司法解释相冲突”的一种解释。指导案例20号的“裁判要点”是：

> 在发明专利申请公布后至专利权授予前的临时保护期内制造、销售、进口的被诉专利侵权产品不为专利法禁止的情况下，其后续的使用、许诺销售、销售，即使未经专利权人许可，也**不视为侵害专利权**，但专利权人可以依法要求临时保护期内实施其发明的单位或者个人**支付适当的费用**。（强调后加）

而《专利法》第十三条规定：[9]

> 发明专利申请公布后，申请人可以要求实施其发明的单位或者个人支付**适当的费用**。（强调后加）

该观点指出，《专利法》第十三条前提是“实施其发明的单位或者个人”实际上侵害了专利权人的权利，而《专利司法解释（二）》第十八条第一款的原意“与《专利法》第十三条立法精神是一致的”。[10]但是，指导案例20号裁判要点中认为“不视为侵害专利权”，实际上是用“不当得利请求权”理论而非侵权理论来解释“支付适当的费用”。这解释不符合《专利法》第十三条的立法原意和《专利司法解释（二）》第十八条第一款的原意。所以，该指导性案例不再参照。

以上观点有其可取之处。在接下来的小节中，笔者集中分析指导案例20号如何与《专利司法解释（二）》第十八条第三款相冲突以及该款规定合理的理由。

1. 与《专利司法解释（二）》第十八条第三款相冲突

《专利司法解释（二）》第十八条第三款的含义，可以通过讨论涉及“甲方”和“乙方”的例子作出说明。为了让读者容易明白，笔者为该款添加了“甲方”和“乙方”等表述：

> 发明专利公告授权后，未经专利权人许可，[**乙方**]为生产经营目的使用、许诺销售、销售在本条第一款所称期间内[**即：发明专利申请公布日至授权公告日期间**]已由**他人**[**即：甲方**]制造、销售、进口的产品，且**该他人**[**即：甲方**]已支付或者书面承诺支付专利法第十三条规定的适当费用的，对于权利人关于[**乙方**]上述使用、许诺销售、销售行为侵犯专利权的主张，人民法院不予支持。（强调后加）

在例子中，于“发明专利申请公布日至授权公告日期间”（“专利临时保护期内”），甲方制造、销售或进口了落入发明专利申请公开的权利要求的保护范围的产品，该发明专利申请经过审查被授予专利权（且该产品也落入授权权利要求的保护范围，见第十八条第二款）。由于《专利法》第十三条关于“支付适当的费用”的规定（见上文），所以甲方应当向专利权人支付或者书面承诺支付该条规定的适当的费用。甲方是否这样做会对乙方有以下影响：

- 如果甲方**已向**专利权人支付或者书面承诺向其支付适当的费用，在专利临时保护期内从甲方购买了该产品的乙方在专利授权后使用、许诺销售或销售该产品的行为**可以免于**侵犯专利权的责任。

- 如果甲方**未向**专利权人支付、**也未**书面承诺向其支付适当的费用，则乙方在专利授权后使用、许诺销售或销售该产品的行为**不能免于**侵犯专利权的责任。

下面根据《专利司法解释（二）》第十八条第三款的规定来分析指导案例20号的案情。深圳市康泰蓝水处理设备有限公司（“康泰蓝公司”）（类似上述例子的甲方）并未支付、也未书面承诺支付给专利权人深圳市斯瑞曼精细化工有限公司（“斯瑞曼公司”）适当的费用。因此，根据《专利司法解释（二）》第十八条第三款的规定，深圳市坑梓自来水有限公司（“坑梓自来水公司”）（类似上述例子的乙方）在专利授权后使用在专利临时保护期由康泰蓝公司制造和销售的产品的行为**不能免于**侵犯专利权的责任。据此，指导案例20号中的裁判理由“[在未支付、也未书面承诺支付给专利权人适当费用的情况下]专利权人**无权**禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售”（强调后加），显然与《专利司法解释（二）》第十八条第三款的规定相冲突。

2.《专利司法解释（二）》第十八条第三款的规定合理

以上涉及甲、乙方的例子反映出《专利司法解释（二）》第十八条第三款的规定很好地体现了《专利法》第十三条的立法目的，即，在公布发明专利申请之后为申请人提供一种保护。如若不然，允许第三人在授予发明专利权之前任意实施已经公布的发明，就明显会损害专利申请人的利益。

值得一提的是，《专利司法解释（二）》第十八条第三款内使用“他人”一词清楚表明涉及甲、乙两方。换言之，该条款并未免除在专利临时保护期内制造、销售或进口该产品的**甲方**在专利授权后针对该产品的使用、许诺销售或销售行为的侵犯专利权的责任，即使甲方已经向专利权人支付或书面承诺向专利权人支付适当的费用。这体现了专利侵权认定中制造、销售（首次）或进口产品的**一方（即：甲方）**的责任

要高于从其购买并使用、许诺销售或销售（二次）该产品的**另一方（即：乙方）**的责任的原则。可以想见，倘若在甲方向专利权人支付或书面承诺向专利权人支付适当的费用的情况下，就允许甲方在专利授权后使用、许诺销售或销售其在专利临时保护期内制造、销售或进口的产品，就可能会出现甲方在临时保护期内大量制造或进口产品、然后在专利授权后一直长期使用或销售该批产品的现象，从而导致专利权人的利益收到极大的损失。

因此，《专利司法解释（二）》第十八条第三款的规定合理。这更显现出与之相悖的指导案例20号的论点和考虑的不足，其中至少涉及下文讨论的两点。

（1）指导案例20号没有平衡好相关各方的利益

指导案例20号在制造和销售者康泰蓝公司未向专利权人斯瑞曼公司支付、也未书面承诺向其支付适当费用的前提下（尽管斯瑞曼公司在案件中并未主张适当的费用），就认定"专利权人无权禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售"，显然不利于专利权人的权益，没有体现出专利临时保护期对于专利权人的保护，使得在专利临时保护期内实施人的违法成本很低，没有平衡好相关各方的利益。

指导案例20号的案情很能反映出实施人的违法成本之低。在该案中，涉案专利为"制备高纯度二氧化氯的设备"的发明专利，该设备中的各种部件均属于常见部件，涉案专利的发明点在于这些部件的连接关系和相互作用。所以，实施人参照专利说明书采购这些常见部件即可以实施专利方案，投入成本非常之低，远低于专利权人研发和设计专利方案投入的成本。

（2）指导案例20号不利于推动发明创造的应用

关于指导案例20号的指导意义，最高法民三庭、最高法案例指导工作办公室评述道：[11]

> 该指导案例裁判要点旨在明确专利权人**无权**禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售。这一裁判要点解决了司法实践中的争议，对审判类似案件具有指导意义，**不仅符合专利法"以公开换保护"的立法精神，而且有利于推动发明创造的应用，促进科学技术进步和经济社会发展**。（强调后加）

然而，笔者认为："以公开换保护"中的"保护"不仅包括专利授权后的保护，也理应包括《专利法》明确规定的专利临时保护期的保护，否则将打击创新主体申请专利和公开发明创造的愿望和动力，反而不利于"推动发明创造的应用，促进科学技术进步和经济社会发展"。

尤其需要注意的是，不同于美国、日本等国家和地区采取的专利申请公开程序与实质审查程序并行的模式，在中国"早期公开、延迟审查"的模式下（发明专利申请公开与授权之间的时间相较于美国、日本等国家和地区较长），且在目前有大量发明专利申请请求提前公开的情况下，发明专利申请从公开到授权的期间普遍长达1至2年。在这相对较长的专利临时保护期内，实施人可以大量抢占市场份额，获得相应的利益。例如，指导案例20号中的被诉专利侵权产品为二氧化氯发生器，属于市场需求量不高的大型工业设备，且使用寿命一般较长。允许被告在专利授权后继续使用、许诺销售、销售在专利临时保护期制造和销售的被诉专利侵权产品，直接给专利权人造成市场份额方面的很大损失。

指导案例20号与《专利法》新的条款存在冲突

《专利法》第四十二条规定：

> 发明专利权的期限为二十年，实用新型专利权的期限为十年，外观设计专利权的期限为十五年，均自申请日起计算。
>
> 自发明专利申请日起满四年，且自实质审查请求之日起满三年后授予发明专利权的，国务院专利行政部门应专利权人的请求，就发明专利在授权过程中的**不合理延迟**给予专利权期限补偿，但由申请人引起的不合理延迟除外。
>
> [...]
>
> （强调后加）

第四十二条第二款是《专利法》2020年修正时新增加的内容，其立法本意是为了补偿发明专利在授权过程中的不合理延迟造成的专利权保护期限的缩短（由于"发明专利权的期限为二十年，[并]自申请日起计算"，所以实际保护期限为二十年减去专利申请日至专利授权公告日之间的期间），从而为专利权人提供更合理的保护期限。

值得注意的是，授权过程中存在不合理延迟，也等于专利临时保护期存在相应的延长。既然第四十二条第二款的立法目的是为专利权人提供更合理的保护，如何让专利权人在延长了的专利临时保护期得到适当的保护也应在考虑之列。如果按照指导案例20号的裁判理由，专利临时保护期内制造的产品在专利授权后的使用、许诺销售或销售均不视为侵害专利权，则意味着发明专利的实施人可以在延长了的专利临时保护期

内抢占专利权人更多的市场份额、获得更多的利益，对专利权人更加不利。这样一来，即使根据第四十二条第二款为专利权人补偿了保护期限，实施人的上述行为对于专利权人造成的损失仍然无法弥补。因此，要全面达到第四十二条第二款的立法目的（即：为专利权人提供更合理的保护），指导案例20号不应再具有指导作用。在这个意义上，指导案例20号与《专利法》第四十二条第二款亦存在一定的冲突。

指导案例20号存在理论和实践方面的局限性

1. 指导案例20号实际上创立了新的不构成或不视为侵犯专利权或免于侵犯专利权责任的行为

《专利法》中规定的不构成或不视为侵犯专利权的行为仅包括该法第六十七条[12]和第七十五条[13]规定的行为（见**侧边栏1**），而指导案例20号发布之后实施的《专利司法解释（二）》第十八条以及第二十五条则规定了免于侵犯专利权责任的行为（见**侧边栏2**）。

指导案例20号中关于临时保护期内制造、销售的被诉专利侵权产品在专利授权后的使用、许诺销售、销售的行为不被禁止的裁判理由实际上是在上述《专利法》和《专利司法解释（二）》的明确规定之外创立了新的不构成或不视为侵犯专利权或免于侵犯专利权责任的行为。

2. 指导案例20号"裁判理由"中若认定后续实施侵权，则即是为未公开或者授权的技术方案提供保护的观点不恰当

指导案例20号"裁判理由"部分有这样的表述：

> 专利制度的设计初衷是"以公开换保护"，且是在授权之后才能请求予以保护。对于发明专利申请来说，在公开日之前实施相关发明，不构成侵权，在公开日后也应当允许此前实施发明得到的产品的后续实施行为；在公开日到授权日之间，为发明专利申请提供的是临时保护，在此期间实施相关发明，不为专利法所禁止，同样也应当允许实施发明得到的产品在此期间之后的后续实施行为，但申请人在获得专利权后有权要求在临时保护期内实施其发明者支付适当费用。由于专利法没有禁止发明专利授权前的实施行为，则**专利授权前制造出来的产品的后续实施也不构成侵权。否则就违背了专利法的立法初衷，为尚未公开或者授权的技术方案提供了保护。**（强调后加）

发明的实施人（不包括从该实施人处购买产品并进行使用、许诺销售或销售的一方）在专利临时保护期内的实施行为已经为其获得了利益，理应要向专利权人支付适当的使用费，但该适当的使用费不应造成专利权的权利用尽。如果专利授权后允许实施人对其在专利临时保护期内制造、销售或进口的产品继续实施使用、许诺销售或销售的行为，则会使专利权人丧失专利带来的排他权。禁止专利授权后的实施行为并不是为未公开或者授权的技术方案提供保护，而是为了保障专利权人在专利授权后的切实利益。

3. 指导案例20号"裁判理由"中引用先用权进行类比不恰当

指导案例20号"裁判理由"部分亦有这样的表述：

> 专利法规定了**先用权**，虽然仅规定了先用权人在原有范围内继续制造相同产品、使用相

侧边栏1：

《中华人民共和国专利法》（2020修正）

第六十七条

在专利侵权纠纷中，被控侵权人有证据证明其实施的技术或者设计属于现有技术或者现有设计的，**不构成侵犯专利权**。

第七十五条

有下列情形之一的，**不视为侵犯专利权**：

（一）专利产品或者依照专利方法直接获得的产品，由专利权人或者经其许可的单位、个人售出后，使用、许诺销售、销售、进口该产品的；

（二）在专利申请日前已经制造相同产品、使用相同方法或者已经作好制造、使用的必要准备，并且仅在原有范围内继续制造、使用的；

（三）临时通过中国领陆、领水、领空的外国运输工具，依照其所属国同中国签订的协议或者共同参加的国际条约，或者依照互惠原则，为运输工具自身需要而在其装置和设备中使用有关专利的；

（四）专为科学研究和实验而使用有关专利的；

（五）为提供行政审批所需要的信息，制造、使用、进口专利药品或者专利医疗器械的，以及专门为其制造、进口专利药品或者专利医疗器械的。

（强调后加）

侧边栏2：

《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》

第二十五条

为生产经营目的使用、许诺销售或者销售不知道是未经专利权人许可而制造并售出的专利侵权产品，且举证证明该产品合法来源的，对于权利人请求停止上述使用、许诺销售、销售行为的主张，人民法院应予支持，但**被诉侵权产品的使用者举证证明其已支付该产品的合理对价的除外**。

本条第一款所称不知道，是指实际不知道且不应当知道。

本条第一款所称合法来源，是指通过合法的销售渠道、通常的买卖合同等正常商业方式取得产品。对于合法来源，使用者、许诺销售者或者销售者应当提供符合交易习惯的相关证据。

（强调后加）

> 同方法不视为侵权，没有规定制造的相同产品或者使用相同方法制造的产品的后续实施行为是否构成侵权，但是不能因为专利法没有明确规定就认定上述后续实施行为构成侵权，否则，专利法规定的先用权没有任何意义。（强调后加）

先用权人开始实施专利技术的行为发生在专利申请日之前，与发明专利申请公开之后至授权之前的专利临时保护期属于不同的时间范围。先用权人实施的与专利技术相同的方案多为其自主研发和设计的方案，应当被法律保护；而专利临时保护期内的实施行为多为实施人参照公开的专利申请的方案而实施的，至少难以证明是其自主研发和设计的。两者的立法宗旨无可比性，指导案例20号不应对两者进行类比。

4. 指导案例20号与《专利审查指南》不协调

国家知识产权局所制定的《专利审查指南》于2019年作出修改，并首次作出了专利申请人可以申请延迟审查的规定。[14] 该指南的第五部分第七章第8.3节对“延迟审查”规定如下：

> **申请人可以对发明和外观设计专利申请提出延迟审查请求。**发明专利延迟审查请求，应当由申请人在提出实质审查请求的同时提出，但发明专利申请延迟审查请求自实质审查请求生效之日起生效；[...]。延迟期限为自提出延迟审查请求生效之日起1年、2年或3年。延迟期限届满后，该申请将按顺序待审。必要时，专利局可以自行启动审查程序并通知申请人，申请人请求的延迟审查期限终止。（强调后加）

申请人可以主动请求延迟1至3年来进行发明专利申请的实质审查，从而使申请人可以根据自身和竞争对手在技术上的发展和迭代更全面地考虑专利保护范围的侧重点，也能够在更长的时间范围内保留提出新的分案申请的可能性。

如果依照指导案例20号的裁判理由，专利申请人很可能不愿意采用延迟审查的策略。这是因为这会延长专利临时保护期，专利权人不会愿意增加自己“无权禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售”的风险。这有违《专利审查指南》上述修改的原意，且会导致“早期公开、延迟审查”沦为一种失败的制度。

结语

指导案例20号存在与新的司法解释和《专利法》新的条款相冲突的情况，并且存在理论和实践方面的局限性，不再具有指导作用。最高法关于指导案例20号不再参照的决定具有合理性，有利于逐步完善和健全案例指导制度。如果后续针对其它指导性案例发布不再参照的决定时，希望最高法能够提供相应的理由，以为各级人民法院在审理相关案件和相关主体参与相关案件提供更好的指引和参考。

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* 此专家*连接*™的引用是：张思悦、马越，探讨指导案例20号失去指导作用的原因，《中国法律连接》，第13期，第43页（2021年6月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2021年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-13-202106-connect-15-zhang-ma。中文原文由熊美英博士编辑。载于本专家*连接*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目或其它机构的工作或意见。

[1]《最高人民法院关于发布第五批指导性案例的通知》，2013年11月8日公布，同日起施行，http://www.chinacourt.org/law/detail/2013/11/id/147238.shtml。

[2]《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》，《中国法律连接》，第12期，第79页（2021年3月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC20），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-20。

关于指导案例12号所依据的最终判决，见（2011）民提字第259号民事判决，2011年12月20日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/spc-2011-min-ti-zi-259-civil-judgment。前述的指导案例12号的双语版本亦展示了中国指导性案例项目对该指导性案例和（2011）民提字第259号民事判决的说理部分所作出的比较。

[3]《最高人民法院关于部分指导性案例不再参照的通知》，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282441.html。

[4] 中华人民共和国《最高人民法院关于案例指导工作的规定》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-provisions-case-guidance。关于该规定的原文，见《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

[5] 中华人民共和国《〈最高人民法院关于案例指导工作的规定〉实施细则》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance。关于该实施细则的原文，见《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

[6]《中华人民共和国专利法》，1984年3月12日通过和公布，1985年4月1日起施行，经四次修正，最新修正于2020年10月17日，2021年6月1日起施行，http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html。

[7]《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》，2016年1月25日由最高人民法院审判委员会通过，2016年3月21日公布，2016年4月1日起施行，并于2020年12月23日修正，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282641.html。

[8] 郭锋法官，中国《民法典》时代司法解释和指导性案例的清理成果与发展趋势，《中国法律连接》，第12期，第14页（2021年3月），*亦见于*斯坦福法学院中国指导性案例项目，2021年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-12-202103-34-guo-feng。

[9]《中华人民共和国专利法》，注释 6，第十三条。该条在《专利法》2020年修正时维持不变。

[10] 郭锋法官，注释8，第16页。

[11] 最高人民法院民三庭、最高人民法院案例指导工作办公室，指导案例20号《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》的理解与参照，《人民司法·案例》，第6期，第98页（2014）。

[12]《中华人民共和国专利法》，注释 6，第六十七条。该条内容在《专利法》2020年修正时维持不变。

[13] *同上*，第七十五条。该条内容在《专利法》2020年修正时维持不变。

[14]《国家知识产权局关于修改〈专利审查指南〉的决定》，2019年9月23日公布，2019年11月1日起施行，http://www.gov.cn/xinwen/2019-09/26/content_5433360.htm。

中国指导性案例项目成立于2011年2月，并通过其双语网站（https://cgc.law.stanford.edu/zh-hans）共享了项目的知识库。该网站已使居住在世界不同洲的20多万用户受益。

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How Guiding Case No. 24 and Its Hundreds of Subsequent Cases Have Shaped the Chinese Version of the Eggshell-Skull Rule*

Ziwen Tan & Xin Shen

Abstract

The eggshell-skull rule, which is a rule of tort law under the common law system, is very similar to the Main Points of the Adjudication of Guiding Case No. 24. The Office for the Work on Case Guidance of the Supreme People's Court clearly stated that the conclusion of Guiding Case No. 24 represents "the specific application of [the eggshell-skull rule] in disputes over liability for traffic accidents".

Guiding Case No. 24 has been one of the most cited Guiding Cases. Through an analysis of 23 select subsequent judgments or rulings, this article discusses in depth how courts in China have referenced[1] Guiding Case No. 24. While these subsequent judgments or rulings have enriched the content of the Chinese version of the eggshell-skull rule, they have also revealed the different views held by Chinese courts on Guiding Case No. 24 and the resulting challenges to referencing this Guiding Case. Nevertheless, the Chinese judiciary's consideration of well-established foreign rules and use of Guiding Cases in its reasoning process are welcome. The next step should focus on how to ensure that "similar cases are adjudicated alike" when Guiding Cases are referenced.

Introduction

The eggshell-skull rule is a well-known legal principle in the common law system. *Black's Law Dictionary* defines the principle as follows:[2]

> [A] defendant is liable for a plaintiff's unforeseeable and uncommon reactions to the defendant's negligent or intentional act.

The dictionary provides an example: if a person negligently scrapes another person who turns out to be a hemophiliac, the negligent person is still liable for the full extent of the injuries suffered by the hemophiliac, even though the harm to another victim would have been minor.[3]

The Main Points of the Adjudication section of Guiding Case No. 24 (*RONG Baoying v. WANG Yang and the Jiangyin Branch of Alltrust Insurance Co., Ltd., A Dispute over Liability for a Motor Vehicle Traffic Accident*),[4] which was released by the Supreme People's Court of China (the "SPC") in January 2014, is very similar to the eggshell-skull rule. The section reads: "[If] a victim of a traffic accident is not at fault, the effect of his[5] [pre-existing] physical condition on the consequences of the harm[6] [he suffered] is not a type of statutory circumstance that can reduce an infringer's liability". However, the specific scope of application of this rule in the Main Points of the Adjudication and the criteria for its application has not been studied closely. Therefore, through an analysis of Guiding Case No. 24 and its subsequent judgments or rulings (the "SJ/Rs"), this article explores how courts in China have shaped the Chinese version of the eggshell-skull rule.

This article first explains the origin of Guiding Case No. 24 and how the Office for the Work on Case Guidance of the SPC commented on the Guiding Case from the perspective of the eggshell-skull rule. Then, through an in-depth analysis of 23 SJ/Rs that were selected from more than 500 SJ/Rs based on specific criteria (see below), the authors discuss the different understandings of Guiding Case No. 24 used by courts across China. Finally, in the Concluding Remarks, the authors share their overall observations about their findings and related suggestions.

The Origin of Guiding Case No. 24

Guiding Case No. 24 is a dispute over liability for a motor vehicle traffic accident involving WANG Yang and RONG Baoying. WANG Yang, who was driving a sedan, hit and injured pedestrian RONG Baoying when the sedan reached the crosswalk lines at the intersection of two roads. The traffic police issued the *Written Determination of the Road Traffic Accident* declaring that WANG Yang was fully responsible for the accident and that RONG Baoying was not at all.

The Binhu District People's Court of Wuxi Municipality, Jiangsu Province, rendered the first-instance judgment.

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Based on the content of a judicial appraisal (i.e., "The degree of the injuries' contribution [to the total harm suffered by RONG Baoying] is assessed to be 75%, [and RONG Baoying's] physical [condition] is a factor that [contributed] 25%"), the court determined that the disability damages of RMB 27,658.05 should be reduced by 25% to yield RMB 20,743.54.[7]

The Intermediate People's Court of Wuxi Municipality rendered the second-instance judgment, stating that the traffic accident in this case was brought about by the failure of WANG Yang to fulfill his duty of care to drive safely and thus, his motor vehicle grazed pedestrian RONG Baoying when he drove into the pedestrian crossing. According to the police's determination of responsibility for the accident, RONG Baoying was not responsible for this accident, meaning that he was not at fault for the accident itself or for the consequences of the harm that resulted from the accident. Although RONG Baoying was of advanced age, his osteoporosis from old age was an objective factor contributing only to the consequences of the accident, rather than, according to law, a cause of the accident. The personal physical condition of RONG Baoying had a specific effect on the consequences of the harm that occurred, but this did not constitute fault within the meaning of the term used in the *Tort Liability Law* or other laws. As a result, the Intermediate People's Court determined that RONG Baoying should not, due to the fact that his personal physical condition had a certain effect on his injuries and disabilities caused by the traffic accident, bear corresponding liability. It further decided that the first-instance court's decision to make corresponding reductions when calculating disability damages on the grounds that the disability grade appraisal concluded that "[t]he degree of the injuries' contribution [to the total harm suffered by RONG Baoying] is assessed to be 75%" was an erroneous application of law, and should be corrected.[8]

Subsequently, the Office for the Work on Case Guidance of the SPC commented that when the Civil No. 1 Tribunal of the SPC reviewed this case, it found that "[the second-instance judgment] is well-reasoned and the conclusion is correct; it is conducive to clarifying improper understandings in practice and has certain exemplary significance".[9] The case was, therefore, finally selected as Guiding Case No. 24 for release. When explaining the importance of the case, the Office for the Work on Case Guidance of the SPC mentioned the eggshell-skull rule:[10]

> The conclusion of this case is also **the specific application of the eggshell-skull theory in disputes over liability for traffic accidents; it has**

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> **jurisprudential basis and a certain universality**. The so-called eggshell-skull theory is a well-known rule in British and American tort law concerning liability for personal injuries. According to the rule, [when] a person is at fault for another person's [injuries], the personal characteristics of the victim should not be taken into account, even though such personal characteristics of the victim increase his possibility of suffering from the harm and the degree of the harm. For a request for compensation brought about by the fracture of a victim's skull, the fact that the victim's skull is abnormally prone to fracture cannot be a reason for defense. That is, an [alleged] infringer cannot use this as a reason to reduce the amount of compensation that should be borne. The application of the eggshell-skull theory is fully reflected in the legal protection of the rights and interests of vulnerable groups. **In a traffic accident, regardless of the physical condition of the victim and no matter whether [such condition] can be foreseen by the motor vehicle driver, [the driver] should act with the same high degree of care and bear legal liability for all of the harm directly caused by his acts**. (emphasis added)

The above explanation suggests that the SPC itself did consider the eggshell-skull rule when selecting this case as a Guiding Case. Whether or not it did so, the above explanation only mentions that the eggshell-skull rule can be used for reference in traffic accidents. In Chinese judicial practice, can the eggshell-skull rule also be referenced if the harm is not caused by a traffic accident? In addition, how have Chinese courts used Guiding Case No. 24 to develop the eggshell-skull rule in a way that is still consistent with Chinese law? To answer these questions, the authors, as shown below, present their in-depth analysis of 23 select SJ/Rs of Guiding Case No. 24 and discuss how local courts understood the Guiding Case and how they referenced it.

23 Select Subsequent Judgments or Rulings and How Their Courts Understood the Scope for Referencing Guiding Case No. 24

Among the more than 150 Guiding Cases that have been released by the SPC, Guiding Case No. 24 has consistently had one of the highest numbers of SJ/Rs citing it. For the research covered in this article, the authors set the search period to capture SJ/Rs whose dates of adjudication are on or before December 31, 2020 and the search criteria as:

> (1) any SPC judgment or ruling in which Guiding Case No. 24 is mentioned in any part of the judgment or ruling; and
>
> (2) any judgment or ruling rendered by a court other than the SPC where Guiding Case No. 24 is mentioned in the reasoning section titled "This Court opines" of the judgment or ruling.

More than 500 judgments or rulings meet these search requirements. After careful review, the authors selected 23 of them for in-depth analysis. Among them, one judgment was rendered by the SPC and three by high people's courts of three provinces (namely, Hunan Province, Jiangsu Province, and Jilin Province), and 19 by intermediate people's courts or basic people's courts (see **Appendix 1**).

Given the content of the Main Points of the Adjudication of Guiding Case No. 24 (i.e., "[If] a victim of a traffic accident is not at fault, the effect of his [pre-existing] physical condition on the consequences of the harm [he suffered] is not a type of statutory circumstance that can reduce an infringer's liability"), the authors now turn to the question of whether Guiding Case No. 24 can only be referenced in cases involving "traffic accidents". The following two sections focus on how courts handling these select SJ/Rs understood the prerequisite for referencing Guiding Case No. 24 (i.e., "[the] victim of a traffic accident is not at fault") and the essence of the case (i.e., "the effect of [the victim's pre-existing] physical condition on the consequences of the harm [he suffered] is not a type of statutory circumstance that can reduce an infringer's liability").

1. The SPC Did Not Comment on Whether Guiding Case No. 24 Can Only Be Referenced in Cases Involving "Traffic Accidents"

Guiding Case No. 24 is a dispute over liability for the infringement of rights arising from a traffic accident, but the case does not specify whether it can be referenced in disputes over liability for the infringement of rights in other situations. In the (2015) Min Shen Zi No. 1195 Civil Ruling (see **Appendix 1: No. 2**)—a dispute over liability for the infringement of rights arising from a fire—the victim argued that Guiding Case No. 24 should be referenced, but the SPC, which adjudicated this case, did not address this issue in the reasoning section of the civil ruling titled "This Court opines". It is worth considering whether this suggests that the SPC intentionally avoided addressing the issue. However, Article 11 Paragraph 2 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* provides:[11]

> Where a public prosecution organ, a party to a case or his defender, or a litigation agent quotes a Guiding Case as a ground [for the] prosecution (litigation) or defense, the personnel handling the case **should**, in the reasons for the adjudication, **respond** as to whether [they] referenced and imitated the Guiding Case [in the adjudication of the case] and explain their reasons. (emphasis added)

Regardless of the SPC's reasons for not addressing whether Guiding Case No. 24 could be referenced in this case, its lack of response should be noted.

2. Local Courts' Comments on Whether Guiding Case No. 24 Can Only Be Referenced in Cases Involving "Traffic Accidents"

Although most of the remaining 22 SJ/Rs mentioning Guiding Case No. 24 analyzed by the authors are disputes over liability for infringement of rights in traffic accidents, some cover other types of infringement cases. Some local courts believed that Guiding Case No. 24 could only be referenced in infringement disputes arising from traffic accidents. In the (2017) Chuan 05 Min Zhong No. 233 Civil Judgment (see **Appendix 1: No. 3**), the Intermediate People's Court of Luzhou Municipality, Sichuan Province, decided not to reference Guiding Case No. 24 because the Guiding Case is a traffic accident case, while the pending case concerned harm caused by medical treatment. For the same reason, the Intermediate People's Court of Wuhan Municipality, Hubei Province, also decided not to reference Guiding Case No. 24 in two cases: one in a dispute over liability for the infringement of physical rights and health rights ((2017) E 01 Min Zhong No. 2606 Civil Judgment (see **Appendix 1: No. 4**)), and the other in a dispute over liability for the infringement of rights related to harm caused by a domesticated animal ((2018) E 01 Min Zhong No. 5089 Civil Judgment (see **Appendix 1: No. 10**)).

Unlike the aforementioned courts, some local courts decided that the scope of Guiding Case No. 24 is not limited to traffic accidents. For example, in the (2017) Wan 01 Min Zhong No. 4293 Civil Judgment (see **Appendix 1: No. 6**), although this case, like the (2017) E 01 Min Zhong No. 2606 Civil Judgment (see **Appendix 1: No. 4**) discussed above, is a dispute over liability for the infringement of physical rights and health rights, the Intermediate People's Court of Hefei Municipality, Anhui Province, did reference Guiding Case No. 24. Therefore, even for the same type of case, the courts can hold very different opinions. In addition, in a dispute over liability for the infringement of rights related to harm suffered by a laborer, the Intermediate People's Court of Harbin Municipality, Heilongjiang Province, decided that Guiding Case No. 24 was of referential value ((2019) Hei 01 Min Zhong No. 9329 Civil Judgment (see **Appendix 1: No. 15**)).

Table 1 summarizes the above analysis. It should be noted that no matter whether these courts decided that Guiding Case No. 24 could also be referenced in other types of cases,

References Guiding Case No. 24? (Yes/No)	Subsequent Judgment/ Ruling No.	Adjudicating Court	Type of Dispute	Appendix 1: No.
No response	(2015) Min Shen Zi No. 1195	Supreme People's Court	Dispute over Liability for the Infringement of Rights Arising from a Fire	2
No	(2017) Chuan 05 Min Zhong No. 233	Intermediate People's Court of Luzhou Municipality, Sichuan Province	Dispute over Liability for the Infringement of Rights Related to Harm Caused by Medical Treatment	3
No	(2017) E 01 Min Zhong No. 2606	Intermediate People's Court of Wuhan Municipality, Hubei Province	Dispute over Liability for the Infringement of Physical Rights and Health Rights	4
No	(2018) E 01 Min Zhong No. 5089	Intermediate People's Court of Wuhan Municipality, Hubei Province	Dispute over Liability for the Infringement of Rights Related to Harm Caused by a Domesticated Animal	10
Yes	(2017) Wan 01 Min Zhong No. 4293	Intermediate People's Court of Hefei Municipality, Anhui Province	Dispute over Liability for the Infringement of Physical Rights and Health Rights	6
Yes	(2019) Hei 01 Min Zhong No. 9329	Intermediate People's Court of Harbin Municipality, Heilongjiang Province	Dispute over Liability for the Infringement of Rights Related to Harm Suffered by a Laborer	15

Table 1: Whether Guiding Case No. 24 Can Only Be Referenced in Cases Involving "Traffic Accidents"—Responses of Different Courts

they did not specify the reasoning behind their decision. Those courts that decided that Guiding Case No. 24 should not be referenced in other types of cases merely cited "this case is different from the Guiding Case" or "this case is not a traffic accident dispute" as the reason. Most of those courts that decided that Guiding Case No. 24 could be referenced in other types of cases directly referenced the Guiding Case without giving specific reasons. Such inadequate explanations offered by the courts might be the cause for having different reference outcomes and judgment opinions for the same type of case; this is not conducive to maintaining the impartiality and authority of the judiciary.

How Courts Handling the Select Subsequent Judgments or Rulings Understood the Prerequisite for Referencing Guiding Case No. 24—"[The] Victim of a Traffic Accident Is Not at Fault"

The prerequisite for referencing Guiding Case No. 24 is that "[the] victim of a traffic accident is not at fault". Courts handling the 23 SJ/Rs of Guiding Case No. 24 analyzed by the authors fully grasped this requirement. For example, in the (2020) Ji Min Shen No. 2524 Civil Ruling (see **Appendix 1: No. 23**), the High People's Court of Jilin Province decided that the victim of the traffic accident in that case was not at fault and thus the victim was not liable for the traffic accident; as a result, the effect of the victim's pre-existing physical condition on the consequences of the harm the victim suffered was not a type of statutory circumstance that could reduce the infringer's liability. On the contrary, in cases where the victim was at fault, the courts decided not to reference Guiding Case No. 24. For example, in the (2018) Xiang Min Zai No. 33 Civil Judgment (see **Appendix 1: No. 9**), the High People's Court of Hunan Province decided that both the victim and the infringer were at fault and they both contributed to the consequences of the injuries; thus, Guiding Case No. 24 was not referenced.

As for how to determine whether a victim is at fault, the courts' opinions are not consistent. Most courts did not clearly explain their evaluation process, but directly gave a conclusion. The court in the (2020) Ji Min Shen No. 2524 Civil Ruling (see **Appendix 1: No. 23**), as discussed in the preceding paragraph, is one such example.

Some courts used written determinations of the parties' responsibilities in the traffic accident issued by the traffic police as the basis for determining whether the victim was at fault. The (2015) Lai Zhong Min Yi Zhong Zi No. 50 Civil Judgment (see **Appendix 1: No. 1**) is one such example. However, the Intermediate People's Court of Laiwu Municipality, Shandong Province, which handled the case, did not explain its reasoning for this approach. In fact, these written determinations of responsibilities for traffic accidents are the main evidence relied upon by public security organs when they make administrative decisions in the traffic accidents they handle. Although these written determinations can be used as evidence in civil lawsuits, their conclusions are based on corresponding administrative regulations, which are different from the legal basis for the determination of infringing acts and the principle of liability in civil lawsuits. Whether the infringer is at fault, as well as what the magnitude of the fault is, should be determined based on the actual facts of the case and the determination of responsibility for the traffic accident, and should be comprehensively determined in accordance with principles of civil liability for the infringement of rights of the person.

In summary, the courts must do more to strengthen their reasoning on how to determine whether a victim is at fault. The authors hope that future SJ/Rs of Guiding Case No. 24 can provide detailed explanations.

How Courts Handling the Select Subsequent Judgments or Rulings Understood the Essence of Guiding Case No. 24—"The Effect of [the Victim's Pre-Existing] Physical Condition on the Consequences of the Harm [He Suffered] Is Not a Type of Statutory Circumstance that Can Reduce an Infringer's Liability"

1. Definition of "Physical Condition"

The Main Points of the Adjudication of Guiding Case No. 24 clearly state that "the effect of [the victim's pre-existing] physical condition on the consequences of the harm [he suffered] is not a type of statutory circumstance that can reduce an infringer's liability". However, Guiding Case No. 24 does not explain how to define the term "physical condition".

In the select SJ/Rs, there was disagreement surrounding whether a "personal illness" is a "physical condition". In the (2015) Lai Zhong Min Yi Zhong Zi No. 50 Civil Judgment (see **Appendix 1: No. 1**), the Intermediate People's Court of Laiwu Municipality, Shandong Province, considered a "personal illness" to be a "physical condition":

> This Court opines that a person's physical [condition] is formed by **congenital inheritance** and **acquisition after birth**. It is **a relatively stable** objective characteristic of **human bodily function and form**. [The victim] suffers from brain atrophy, high blood pressure, and other diseases, all of which fall within the category of physical condition. (emphasis added)

However, some courts held the opposite opinion and their reasons include:

- In the (2018) Xiang 01 Min Zhong No. 1409 Civil Judgment (see **Appendix 1: No. 11**), the Intermediate People's Court of Changsha Municipality, Hunan Province, decided that it would have been difficult to cause the death [in the case] had the victim not had his own pre-existing illness. Therefore, the court considered a "personal illness" to not be a "physical condition" as required in Guiding Case No. 24.

- In the (2019) Gui 03 Min Zhong No. 3675 Civil Judgment (see **Appendix 1: No. 16**), the Intermediate People's Court of Guilin Municipality, Guangxi Zhuang Autonomous Region, determined whether a "personal illness" is a "physical condition" by looking at the functions of the organs in a body. The court stated that the victim in Guiding Case No. 24 had "osteoporosis from old age, which is a personal physical factor, and the structure [of his body] was still complete and did not affect normal functions". However, in the pending case, "appellee Li's right eye problem […] seriously affects the function of the right eye and this is distinctly different from the Supreme People's Court's Guiding Case No. 24".

- In the (2019) Gui 1122 Min Chu No. 628 Civil Judgment (see **Appendix 1: No. 17**), the Zhongshan County People's Court of Hezhou Municipality, Guangxi Zhuang Autonomous Region, explained, based on the principle of fairness, that a "personal illness" is not a "physical condition":

  > However, the situation in this case is more extreme and special. Before the accident occurred, the victim [...] has, for a long period of time, suffered from heart disease, lung disease, high blood pressure, anemia, and other serious diseases. During his hospitalization, his own underlying diseases gradually deteriorated and, eventually, he died of "multiple organ failure". **It would be unfair to the defendant to completely exclude** the role of the **victim's** long-term heart disease, lung disease, high blood pressure, anemia, and other **serious diseases** in his death. (emphasis added)

- In the (2020) Hu 0115 Min Chu No. 47246 Civil Judgment (see **Appendix 1: No. 22**), the People's Court of Pudong New Area, Shanghai Municipality, stated that the term "physical condition" should be interpreted as the normal aging process of a human body, excluding the specific diseases suffered by an individual person. The court noted that in Guiding Case No. 24, the plaintiff's senile osteoporosis involved gradual physiological changes at an old age, while, in the pending case, the plaintiff suffered from ankylosing spondylitis, which was a specific disease suffered by the plaintiff. Therefore, Guiding Case No. 24 should not be referenced.

In conclusion, local courts have disagreed a lot over how to understand the term "physical condition" in Guiding Case No. 24, especially whether the condition includes a "personal illness".

2. "Consequences of the Harm": Their Relationship with the Infringer's Act and the Victim's "Physical Condition"

The Main Points of the Adjudication section of Guiding Case No. 24 does not explicitly mention the relationship between the "consequences of the harm" and an infringer's act or the relationship between the "consequences of the harm" and the victim's "physical condition". It seems that the Office for the Work on Case Guidance of the SPC noticed this ambiguity and formulated an explanation accordingly:[12]

> In [Guiding Case No. 24], the consequences of the harm resulting from the traffic accident involved in the case were caused by the fact that victim RONG Baoying fell to the ground and sustained a fracture after colliding with a motor vehicle. Although RONG Baoying was old and had osteoporosis, he was, according to the determination of responsibility for the accident, not responsible for the accident. In terms of the subjective [requirement], he was not at fault for the occurrence of the accident or for the consequences of the harm. **His senile osteoporosis** was only an **objective intervening factor in the consequences** of the accident, **rather than a legal cause of the accident.** In the traffic accident, the relationship between the infringer's act and the consequences of the harm met the standard for determining the existence of a considerable causal relationship, i.e., "if this act does not happen, the harm will not occur; if this act happens, this harm usually occurs". In other words, **the infringer's act is the direct cause of the consequences of the harm**; there is a considerable causal relationship between the two and this is also one of the important constituent elements of liability for the harm. **The physical characteristics of the victim himself**, according to jurisprudence, **did not have a considerable causal relationship with the occurrence of the consequences of the harm**. (emphasis added)

The Office for the Work on Case Guidance of the SPC highlighted two elements: first, there is a causal relationship between the infringer's act and the "consequences of the harm"; second, there is no causal relationship between the victim's "physical condition" and the "consequences of the harm". Some courts that handled the select SJ/Rs analyzed by the authors also explained these two elements.

(1) There Is a Causal Relationship Between the Infringer's Act and the "Consequences of the Harm"

Courts handling the select SJ/Rs basically had no objection to the fact that referencing Guiding Case No. 24 requires that there be a causal relationship between the infringer's act and the "consequences of the harm". For example, in the (2018) Chuan 11 Min Zhong No. 63 Civil Judgment (see **Appendix 1: No. 8**), the Intermediate People's Court of Leshan Municipality, Sichuan Province, stated:

> The **premise** of bearing liability for the infringement of rights should be that **there is a causal relationship between [the infringer's act and the "consequences of the harm"]**. On the basis of the existence of such causal relationship, [the court] then considers whether the infringee is at fault and whether the infringer's liability should be reduced [...]. (emphasis added)

Similarly, in the (2019) Su Min Shen No. 3295 Civil Ruling (see **Appendix 1: No. 19**), the High People's Court of Jiangsu Province also pointed out:

> The **causal relationship** [between the infringer's act and the consequences of the harm] is the **basic element** for the existence of liability for the infringement of rights. Only after this objective element (i.e., the causal relationship) has been satisfied can the subjective elements of general liability for the infringements of rights be analyzed. (emphasis added)

However, when the infringer's act is not the **direct** cause of the consequences of the harm, it is not easy to determine the causal relationship between the two. Local courts that handled the select SJ/Rs mainly provided two lines of thought.

The first line of thought is that if the infringer's act is not the direct cause of the consequences of the harm, the infringer's liability can be reduced, or the infringer can even be found to be not liable at all. For example, in the (2019) Xiang 0223 Min Chu No. 10998 Civil Judgment (see **Appendix 1: No. 14**), the You County People's Court of Zhuzhou Municipality, Hunan Province, decided to reduce the infringer's liability:

> In this case, [victim] LIU Guoyun sustained an injury to the ankle. **There is no direct causal relationship** between the cause of the traffic accident and the cerebral infarction that occurred during hospitalization. This situation is not the same as one involving the [pre-existing] physical condition of an individual. Therefore, the facts of the Supreme People's Court's Guiding Case No. 24 are different from this case. **Cerebral infarction is the main cause of LIU Guoyun's death** [...]. This Court determines that **the degree of the traffic accident's contribution [to the total harm] is 40%**, and the degree of contribution of LIU Guoyun's personal illness is 60%. (emphasis added)

In the (2019) Su 06 Min Zhong No. 61 Civil Judgment (see **Appendix 1: No. 12**), when the Intermediate People's Court of Nantong Municipality, Jiangsu Province, considered that the traffic accident only aggravated the victim's original illness, the court directly concluded that the infringer's act had nothing to do with the consequences of the harm, and the infringer "has no obligation to pay compensation for the consequences of the harm that are not related to him". Similar opinions of the court also appeared in the (2019) Jin 03 Min Zhong No. 489 Civil Judgment (see **Appendix 1: No. 13**). In that case, the Intermediate People's Court of Yangquan Municipality, Shanxi Province, stated:

> In this case, [victim] HAN Junping himself had an illness. The road traffic accident may have aggravated HAN Junping's illness, but it **is not the direct cause** of his cervical spondylosis. In [Guiding Case No. 24,] RONG Baoying had osteoporosis, and the traffic accident was the direct cause of RONG Baoying's disability. **Therefore, this Court does not support the appellant's claim.** (emphasis added)

Another line of thought is that while the court must affirm that the infringer's act and the consequences of the harm have a causal relationship, it shall also consider legal policies and determine legal values so as to balance the protection of the rights and interests of the infringer and the victim. For example, in the (2019) Su Min Shen No. 3295 Civil Ruling (see **Appendix 1: No. 19**), the High People's Court of Jiangsu Province stated:

> The determination of a legal causal relationship is not a purely objective judgment, but a judgment with obvious **consideration of legal policies and judgment of legal values**. The various determinations of legal causal relationships in different cases are

> all aimed at seeking maximum compliance with fairness and justice, legal purposes, or social needs at the time. **As far as victims are concerned**, the rights to life, body, health, and other **personality rights** are, of course, of the highest value, and they should enjoy stronger protection [of these rights]. **For the infringers on the other hand, freedom of conduct** is also a basic right granted by law and should also be protected. When determining the legal causal relationship, it is necessary to find, to the extent possible, a balance between the protections of these rights. (emphasis added)

In the (2020) Yu 0115 Min Chu No. 388 Civil Judgment (see **Appendix 1: No. 21**), the Changshou District People's Court of Chongqing Municipality also decided that "whether [Guiding] Case No. 24 can be referenced in the adjudication of complicated cases must be [considered] by returning to jurisprudence, so as to explore the original intent of the law. Only by seeking a general balance between the interests of the infringer and the victim can we ultimately maintain social fairness and justice".

It is worth noting that the above two courts misunderstood Guiding Case No. 24. Guiding Case No. 24 focuses on the understanding of "fault-based liability" in the law regarding infringement of rights, and protection should lean toward the infringees. However, the above-mentioned courts were not completely faithful to the principle of liability specified in Guiding Case No. 24 and, instead, they prioritized balancing the interests of all parties. The authors believe that the extended interpretation of Guiding Case No. 24 by these two courts is to achieve the "social effect" of discouraging disputes. Although this, to a certain extent, led to misunderstanding of Guiding Case No. 24, this also provides additional perspective on why some courts chose to reference this Guiding Case.

(2) There Is No Causal Relationship Between the Victim's "Physical Condition" and the "Consequences of the Harm"

Courts handling the select SJ/Rs generally identified the necessity for the requirement that there cannot be a causal relationship between the victim's "physical condition" and the "consequences of the harm". For example, in the (2017) Hu 0115 Min Chu No. 23817 Civil Judgment (see **Appendix 1: No. 5**), the People's Court of Pudong New Area, Shanghai Municipality, stated that "[the victim] is old, but the basis for his pre-existing degeneration of the right knee is only **an objective factor** in the consequences of the accident**, rather than a legal cause of the accident**" (emphasis added). In the (2017) Liao 04 Min Zhong No. 1780 Civil Judgment (see **Appendix 1: No. 7**), the Intermediate People's Court of Fushun Municipality, Liaoning Province, stated:

> In this case, although [victim] SUN Guiqin's **physical condition** has a certain effect on the occurrence of the consequences of the harm, **this is not a fault as prescribed by the *Tort Liability Law* or other laws**. SUN Guiqin's physical condition is only **an objective factor** for the occurrence of the consequences of the harm, and **there is no legal causal relationship between her physical condition and the occurrence of the consequences of the harm**. Therefore, victim SUN Guiqin is not at fault for the occurrence or expansion of the harm, and there is no statutory circumstance permitting reduction of the infringer's liability for compensation or exempting the infringer from such liability. (emphasis added)

In the (2020) Xiang 0922 Min Chu No. 1095 Civil Judgment (see **Appendix 1: No. 20**), the Taojiang County People's Court of Yiyang Municipality, Hunan Province, further pointed out:

> The victim [...] certainly has **his own physical peculiarities, but these are results he did not desire**; they do not constitute a fault in the sense of law regarding infringement of rights, nor do they have any legal causal relationship with the occurrence of the traffic accident in this case. (emphasis added)

Although many courts recognized that there cannot be a causal relationship between the victim's "physical condition" and the "consequences of the harm", most of them merely stated in a few words that "there is no legal causal relationship", and few courts went into an in-depth interpretation of this issue.

However, in a select few complicated traffic accident cases, the court decided that there was only an indirect or secondary causal relationship between the traffic accident (the infringing act) and the consequences of the harm, and that if it had not been for the victim's personal illness, the final disability or death would not have occurred. The court then decided that it would be unfair to require the infringer to bear all of the liability, and that the infringer needed to bear the relevant liability corresponding to the scope of his infringing acts. For example, in the (2019) Xiang 0112 Min Chu No. 5451 Civil Judgment (see **Appendix 1: No. 18**), the Wangcheng District People's Court of Changsha Municipality, Hunan Province, stated:

> From the above judicial appraisal opinions and medical death certificate, it can be determined that although the injuries resulting from the traffic accident were **one of the causes** of the victim's death, such injuries could have **hardly led to the consequence of death** under normal circumstances, had the victim's own pre-existing **multiple diseases not existed**. In addition, the injuries resulting from the traffic accident in this case only play **a secondary or auxiliary role** in the consequence of death. This is different from the situation in Guiding Case No. 24, which was released by the Supreme People's Court. In that case, the infringee was not at fault for the occurrence of the accident and the accident **directly caused** him to become disabled. Thus, the case is not of referential value. (emphasis added)

In the above case, the court decided that the victim's physical condition was one of the causes of the consequences of the harm and should be taken into account in determining liability for the infringement of rights of the person. Thus, the court misunderstood the issue regarding the causal relationship as stated in Guiding Case No. 24.

Concluding Remarks

The development of the Chinese version of the eggshell-skull rule through Guiding Case No. 24 and its several hundred SJ/Rs shows that the Chinese judiciary is gradually accepting the method of citing Guiding Cases for reasoning in cases and allowing Guiding Cases to play an important role in Chinese judicial practices. In fact, some Chinese courts even directly referred to the eggshell-skull rule in the reasoning sections of judgments or rulings without mentioning Guiding Case No. 24 (see **Appendix 2**). This clearly reflects the interest of Chinese courts in common law theories and the tendency of different legal systems to learn from each other.

Although the Chinese judiciary has referred to the eggshell-skull rule of the common law system, the reference must be prudent and gradual because of the fundamental differences between the Chinese legal system and the common law system. Therefore, in practice, Chinese courts have not reached a unified view on Guiding Case No. 24 and the related eggshell-skull rule, and, regarding certain issues, they have even formed completely opposite views (e.g., whether Guiding Case No. 24 can be referenced in cases other than those related to traffic accidents).

The lack of a unified view among courts may also be due to the fact that courts at higher levels, particularly the SPC, have not rendered judgments in which they provide clear opinions on Guiding Case No. 24 and the related eggshell-skull rule. In China, given its two-instance final adjudication system,[13] the first-instance courts and second-instance courts for handling infringement cases similar to Guiding Case No. 24 are mostly basic people's courts and intermediate people's courts, respectively. Such infringement cases are rarely adjudicated by high people's courts, let alone the SPC. Therefore, the basic and intermediate people's courts do not have many opportunities to see how high people's courts and the SPC have referenced and understood Guiding Case No. 24. As a result, it is difficult for courts across China to reach a relatively uniform view in their judgments.

Despite the above problems, there is no need to have a pessimistic attitude. On the contrary, the authors believe that the active analysis of Guiding Case No. 24 by different courts is a good beginning for the development of the Guiding Cases System. The authors hope that the SPC will soon have an opportunity to adjudicate a case similar to Guiding Case No. 24 and clarify its opinions on this case and the related eggshell-skull rule. At the same time, the Chinese judiciary should contribute more efforts to promote the communication and mutual learning between Chinese and Western legal systems. This way we will be able to see more promising achievements in the convergence and integration of different legal systems around the world. ■

Appendix 1: 23 Subsequent Judgments/Rulings of Guiding Case No. 24 Selected for In-Depth Analysis (identified through December 31, 2020)

No.	Date of Adjudication	Subsequent Judgment/ Ruling No.	Adjudicating Court	Link
1	2015/6/4	(2015) Lai Zhong Min Yi Zhong Zi No. 50	Intermediate People's Court of Laiwu Municipality, Shandong Province	http://cgc.law.stanford.edu/judgments/shandong-2015-lai-zhong-min-yi-zhong-zi-50-civil-judgment
2	2015/6/26	(2015) Min Shen Zi No. 1195	Supreme People's Court	http://cgc.law.stanford.edu/judgments/spc-2015-min-shen-zi-1195-civil-ruling
3	2017/5/15	(2017) Chuan 05 Min Zhong No. 233	Intermediate People's Court of Luzhou Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2017-chuan-05-min-zhong-233-civil-judgment
4	2017/7/3	(2017) E 01 Min Zhong No. 2606	Intermediate People's Court of Wuhan Municipality, Hubei Province	http://cgc.law.stanford.edu/judgments/hubei-2017-e-01-min-zhong-2606-civil-judgment
5	2017/8/17	(2017) Hu 0115 Min Chu No. 23817	People's Court of Pudong New Area, Shanghai Municipality	http://cgc.law.stanford.edu/judgments/shanghai-2017-hu-0115-min-chu-23817-civil-judgment
6	2017/8/21	(2017) Wan 01 Min Zhong No. 4293	Intermediate People's Court of Hefei Municipality, Anhui Province	http://cgc.law.stanford.edu/judgments/anhui-2017-wan-01-min-zhong-4293-civil-judgment
7	2017/11/23	(2017) Liao 04 Min Zhong No. 1780	Intermediate People's Court of Fushun Municipality, Liaoning Province	http://cgc.law.stanford.edu/judgments/liaoning-2017-liao-04-min-zhong-1780-civil-judgment
8	2018/1/24	(2018) Chuan 11 Min Zhong No. 63	Intermediate People's Court of Leshan Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-11-min-zhong-63-civil-judgment
9	2018/3/21	(2018) Xiang Min Zai No. 33	High People's Court of Hunan Province	http://cgc.law.stanford.edu/judgments/hunan-2018-xiang-min-zai-33-civil-judgment
10	2018/8/14	(2018) E 01 Min Zhong No. 5089	Intermediate People's Court of Wuhan Municipality, Hubei Province	http://cgc.law.stanford.edu/judgments/hubei-2018-e-01-min-zhong-5089-civil-judgment
11	2019/3/7	(2018) Xiang 01 Min Zhong No. 1409	Intermediate People's Court of Changsha Municipality, Hunan Province	http://cgc.law.stanford.edu/judgments/hunan-2018-xiang-01-min-zhong-1409-civil-judgment
12	2019/3/15	(2019) Su 06 Min Zhong No. 61	Intermediate People's Court of Nantong Municipality, Jiangsu Province	http://cgc.law.stanford.edu/judgments/jiangsu-2019-su-06-min-zhong-61-civil-judgment
13	2019/7/22	(2019) Jin 03 Min Zhong No. 489	Intermediate People's Court of Yangquan Municipality, Shanxi Province	http://cgc.law.stanford.edu/judgments/shanxi-2019-jin-03-min-zhong-489-civil-judgment
14	2019/11/5	(2019) Xiang 0223 Min Chu No. 10998	You County People's Court of Zhuzhou Municipality, Hunan Province	http://cgc.law.stanford.edu/judgments/hunan-2019-xiang-0223-min-chu-10998-civil-judgment
15	2019/11/25	(2019) Hei 01 Min Zhong No. 9329	Intermediate People's Court of Harbin Municipality, Heilongjiang Province	http://cgc.law.stanford.edu/judgments/heilongjiang-2019-hei-01-min-zhong-9329-civil-judgment
16	2020/1/16	(2019) Gui 03 Min Zhong No. 3675	Intermediate People's Court of Guilin Municipality, Guangxi Zhuang Autonomous Region	http://cgc.law.stanford.edu/judgments/guangxi-2019-gui-03-min-zhong-3675-civil-judgment

No.	Date of Adjudication	Subsequent Judgment/ Ruling No.	Adjudicating Court	Link
17	2020/3/23	(2019) Gui 1122 Min Chu No. 628	Zhongshan County People's Court of Hezhou Municipality, Guangxi Zhuang Autonomous Region	http://cgc.law.stanford.edu/judgments/guangxi-2019-gui-1122-min-chu-628-civil-judgment
18	2020/6/22	(2019) Xiang 0112 Min Chu No. 5451	Wangcheng District People's Court of Changsha Municipality, Hunan Province	http://cgc.law.stanford.edu/judgments/hunan-2019-xiang-0112-min-chu-5451-civil-judgment
19	2020/7/2	(2019) Su Min Shen No. 3295	High People's Court of Jiangsu Province	http://cgc.law.stanford.edu/judgments/jiangsu-2019-su-min-shen-3295-civil-ruling
20	2020/9/21	(2020) Xiang 0922 Min Chu No. 1095	Taojiang County People's Court of Yiyang Municipality, Hunan Province	http://cgc.law.stanford.edu/judgments/hunan-2020-xiang-0922-min-chu-1095-civil-judgment
21	2020/9/27	(2020) Yu 0115 Min Chu No. 388	Changshou District People's Court of Chongqing Municipality	http://cgc.law.stanford.edu/judgments/chongqing-2020-yu-0115-min-chu-388-civil-judgment
22	2020/9/27	(2020) Hu 0115 Min Chu No. 47246	People's Court of Pudong New Area, Shanghai Municipality	http://cgc.law.stanford.edu/judgments/shanghai-2020-hu-0115-min-chu-47246-civil-judgment
23	2020/10/19	(2020) Ji Min Shen No. 2524	High People's Court of Jilin Province	http://cgc.law.stanford.edu/judgments/jilin-2020-ji-min-shen-2524-civil-ruling

Appendix 2: Seven Judgments/Rulings Explicitly Mentioning the Eggshell Skull Rule (identified through December 31, 2020)

No.	Date of Adjudication	Judgment/ Ruling No.	Adjudicating Court	Link
1	2016/10/28	(2016) Liao 0113 Min Chu No. 5490	Shenbei New District People's Court of Shenyang Municipality, Liaoning Province	http://cgc.law.stanford.edu/judgments/liaoning-2016-liao-0113-min-chu-5490-civil-judgment
2	2017/2/6	(2016) Chuan 16 Min Zhong No. 1174	Intermediate People's Court of Guang'an Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2016-chuan-16-min-zhong-1174-civil-judgment
3	2017/3/17	(2017) Chuan 16 Min Zhong No. 75	Intermediate People's Court of Guang'an Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2017-chuan-16-min-zhong-75-civil-judgment
4	2019/3/4	(2018) Chuan 1602 Min Chu No. 3548	Guang'an District People's Court of Guang'an Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-1602-min-chu-3548-civil-judgment
5	2019/3/28	(2018) Chuan 1724 Min Chu No. 3421	Dazhu County People's Court of Dazhou Municipality, Sichuan Province	http://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-1724-min-chu-3421-civil-judgment
6	2020/5/15	(2020) Su 0581 Min Chu No. 1161	People's Court of Changshu Municipality, Jiangsu Province	http://cgc.law.stanford.edu/judgments/jiangsu-2020-su-0581-min-chu-1161-civil-judgment
7	2020/5/25	(2020) Jin 06 Min Zhong No. 261	Intermediate People's Court of Shuozhou Municipality, Shanxi Province	http://cgc.law.stanford.edu/judgments/shanxi-2020-jin-06-min-zhong-261-civil-ruling

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[1] The text reads "参照" and should be translated as "reference and imitate", but for simplicity, "reference" is used herein unless in quoted statements where the term "reference and imitate" is used. For a discussion of why the term "reference and imitate" is used for "参照", see Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance.

[2] *Eggshell-Skull Rule*, Black's Law Dictionary (11th ed. 2019).

[3] *Id.*

[4] 《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》 (*RONG Baoying v. WANG Yang and the Jiangyin Branch of Alltrust Insurance Co., Ltd., A Dispute over Liability for a Motor Vehicle Traffic Accident*), 13 China Law Connect 73 (June 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC24), June 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-24.

[5] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[6] The text reads "损害后果" and is translated herein as the "consequences of the harm". For more discussion of this topic, see 于世平 (YU Shiping), 侵权损害后果的类型划分及其实践意义 (*The Classification of the Consequences of the Harm [Caused by] the Infringement of Rights and Its Practical Significance*), 《人民司法》 (The People's Judicature), Issue No. 10, at 22 (2005), http://pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=23168b8a8af6c79b085e545e147828d8bdfb (indicating that the term "consequences of the harm" generally refers to the objective situations emerging from the harm caused to the injured party and can be classified as, for example, tangible vis-à-vis intangible consequences, or direct vis-à-vis indirect consequences).

[7] *Id.* On February 8, 2013, the Binhu District People's Court of Wuxi Municipality, Jiangsu Province, rendered the (2012) Xi Bin Min Chu Zi No. 1138 Civil Judgment. This judgment has not been found and may have been excluded from publication.

[8] *Id.* On June 21, 2013, the Intermediate People's Court of Wuxi Municipality, Jiangsu Province, rendered the (2013) Xi Min Zhong Zi No. 497 Civil Judgment. This judgment has not been found and may have been excluded from publication.

[9] 最高人民法院案例指导工作办公室 (The Office for the Work on Case Guidance of the Supreme People's Court), 指导案例24号《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》的理解与参照 (*Understanding and Referring to Guiding Case No. 24, RONG Baoying v. WANG Yang and the Jiangyin Branch of Alltrust Insurance Co., Ltd., A Dispute over Liability for a Motor Vehicle Traffic Accident*), 《人民司法・案例》 (The People's Judicature・Cases), Issue No. 12, at 9 (2015).

[10] *Id.* at 11.

[11] Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance. For the original, Chinese version of the Detailed Implementing Rules, see 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

[12] The Office for the Work on Case Guidance of the Supreme People's Court, *supra* note 9, at 10.

[13] Under China's two-instance final adjudication system, a case shall, in principle, end after two instances of adjudication, unless the procedures for adjudication supervision are initiated. However, the initiation of such procedures is not decided by the parties to a case, but by the court or the procuratorate. Article 10 of the *Civil Procedure Law of the People's Republic of China* provides:

> In the adjudication of civil cases, people's courts shall implement, in accordance with law, [...] the two-instance final adjudication system.

See 《中华人民共和国民事诉讼法》(*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

指导案例24号及其数百个后续裁判如何塑造中国版的“蛋壳脑袋规则”*

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摘要

“蛋壳脑袋规则”(Eggshell-Skull Rule) 是普通法系下的一项侵权法规则，该规则与指导案例24号的裁判要点非常相似。最高人民法院案例指导工作办公室也明确指出，指导案例24号所作结论是“蛋壳脑袋规则”“在交通事故责任纠纷案件中的具体适用”。

一直以来，指导案例24号是被援引次数最多的指导性案例之一。本文以精选的23个后续裁判为基础，深入探讨中国法院对指导案例24号的参照情况。这些后续裁判丰富了中国版的“蛋壳脑袋规则”的内涵，但同时也揭示了中国法院对指导案例24号所持的不同观点，并给参照该指导性案例的工作带来了挑战。但无论如何，中国司法界对外国经得起考验的规则的借鉴及以指导性案例进行说理的方式都值得欢迎，下一步应更关注如何在参照指导性案例时确保“类案类判 ”。

引言

“蛋壳脑袋规则” (Eggshell-Skull Rule) 是普通法体系中的一项广为人知的法律原则。 根据*Black's Law Dictionary*（《布莱克法律词典》），该原则是指：[1]

> 原告对被告的过失或故意行为作出不可预见和不寻常的反应的，被告仍需对这些反应负责。

该词典举例说明：如果某人过失刮伤了一位血友病患者，即使刮伤所导致的损害对其他人而言是轻微的，该人依然要对血友病患者所遭受的全部损害负责。[2]

中国最高人民法院（“最高法”）于2014年1月发布的指导案例24号（《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》）[3]的裁判要点——“交通事故的受害人没有过错，其体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形”——与“蛋壳脑袋规则”非常相似，但其具体应用范围和标准未被深入研究。因此，本文通过指导案例24号及其后续裁判来探讨中国法院如何塑造中国版的“蛋壳脑袋规则”。

本文首先说明了指导案例24号的由来，以及最高法案例指导工作办公室如何从“蛋壳脑袋规则”的角度评价该指导性案例。其次，通过对从五百多个后续裁判精选出来的23个裁判作出的深入分析（见下文），笔者探讨了中国各地法院对指导案例24号的不同理解。最后，在结语部分，笔者分享了其对此次研究的整体观察与相关建议。

指导案例24号的由来

指导案例24号是涉及王阳和荣宝英的一起机动车交通事故责任纠纷案。王阳驾驶轿车通过路口人行横道线时，碰擦行人荣宝英致其受伤。交警作出《道路交通事故认定书》，认定王阳负事故的全部责任，荣宝英无责。江苏省无锡市滨湖区人民法院作出一审判决时，根据相关司法鉴定内容（即：荣宝英“损伤参与度评定为75%，其个人体质的因素占25%”），确认残疾赔偿金27658.05元扣减25%为20743.54元。[4]

江苏省无锡市中级人民法院作出二审判决，认为本起交通事故的引发系王阳驾驶机动车穿越人行横道线时，未尽到安全注意义务碰擦行人荣宝英所致。事故责任认定荣宝英对本起事故不负责任，其对事故的发生及损害后果的造成均无过错。虽然荣宝英年事已高，但其年老骨质疏松仅是事故造成后果的客观因素，并无法律上的因果关系。尽管荣宝英的个人体质状况对损害后果的发生具有一定的影响，但这不是侵权责任法等法律规定的过错，荣宝英不应因个人体质状况对交通事故导致的伤残存在一定影响而自负相应责任，一审判决以伤残等级鉴定结论中将荣宝英个人体质状况“损伤参与度评定为75%”为由，在计算残疾赔偿金时作相应扣减属适用法律错误，应予纠正。[5]

根据最高法案例指导工作办公室对此案的评论，最高法民一庭在审查该案时，认为“[该二审判决]说理清晰，结论正确，有利于澄清实践中的不当认识，具有一定示范意义”，[6]因此，该案最终被作为指导案例24

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号公布。在说明该案的重要性时，最高法案例指导工作办公室明确提到"蛋壳脑袋规则"：[7]

> 本案例所作结论也是**"蛋壳脑袋理论"在交通事故责任纠纷案件中的具体适用，具有法理基础，有一定普遍性**。所谓"蛋壳脑袋理论"是英美侵权法中关于人身损害赔偿责任的一项著名规则。该规则指出，一个对他人犯有过失的人，不应计较受害人的个人特质，尽管受害人的这种个人特质增加了他遭受损害的可能性和程度；对于一个因受害人的头骨破裂而引起的损害赔偿请求，受害人的头骨异常易于破裂不能成为抗辩的理由，即侵权人不能以此作为减少应承担的损害赔偿金的理由。"蛋壳脑袋理论"的适用充分体现在法律对加强弱势群体权益的保护上。**在交通事故中，无论受害人体质状况如何，机动车驾驶人是否能够预见，都应当具有同样的高度注意义务，对其行为直接引起的全部损害承担法律责任。**（强调后加）

上述的说明很可能意味着最高法本身在遴选该案作为指导性案例时，确实考虑到"蛋壳脑袋规则"。无论是否如此，以上的说明仅提及"蛋壳脑袋规则"在交通事故领域中可被借鉴。在中国司法实践中，如果损害不是由交通事故造成的，是否也能借鉴"蛋壳脑袋规则"？此外，中国法院如何通过指导案例24号让"蛋壳脑袋规则"以仍然符合中国法律的方式发展？为回答这些问题，笔者在下文对23个指导案例24号的精选后续裁判作出深入分析，从而展示各地法院如何理解和参照指导案例24号。

23个精选后续裁判及其法院如何理解指导案例24号的参照范围

在最高法已发布的150多个指导性案例中，引用指导案例24号的后续裁判数目一直名列前茅。针对本文的研究，笔者设定检索时间为截至2020年12月31日，以覆盖所有在该日或之前审判的后续案件。此外，检索标准是：（1）最高法裁判文书的任何部分提及指导案例24号的案件；（2）其他法院作出的裁判文书，在其"本院认为"的说理部分提及指导案例24号的案件。符合这些检索条件的案件共五百多个。经仔细查阅，笔者从中精选了23个裁判作深入分析，而其中有1个裁判来自最高法、3个来自省高级人民法院（分别是湖南省、江苏省和吉林省的高级人民法院），以及19个来自中级人民法院或基层人民法院（见**附录1**）。

针对指导案例24号的裁判要点（即"交通事故的受害人没有过错，其体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形"），笔者于此节深入讨论指导案例24号的参照是否仅限于"交通事故"。下面两节分析精选后续裁判的法院如何理解指导案例24号的参照前提（即："受害人没有过错"）和要义（即受害人"体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形"）。

1. 最高法对指导案例24号的参照是否仅限于"交通事故"没有回应

指导案例24号是一起因交通事故而引起的侵权责任纠纷案，但该案例没有明确其是否可以参照于其他类型

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的侵权责任纠纷。在（2015）民申字第1195号民事裁定（见**附录1：序号2**）——一起因火灾引起的侵权责任纠纷中，受害人一方主张参照指导案例24号，但处理该案的最高法并未在裁定的"法院认为"说理部分对是否可以参照该指导案例予以说明。这是否意味着最高法故意回避对指导案例24号的参照范围的说明，值得注意。但依照《〈最高人民法院关于案例指导工作的规定〉实施细则》第十一条第二款的规定：[8]

> 公诉机关、案件当事人及其辩护人、诉讼代理人引述指导性案例作为控（诉）辩理由的，案件承办人员**应当**在裁判理由中**回应**是否参照了该指导性案例并说明理由。（强调后加）

无论最高法出于何种理由而没有回应是否可以参照指导案例24号，其做法都值得商榷。

2. 地方法院对指导案例24号的参照是否仅限于"交通事故"的回应

提及指导案例24号的其余22个精选后续裁判虽然大都是交通事故侵权责任纠纷案件，但也包括其它类型的侵权案件。有些地方法院认为指导案例24号的参照范围仅限于交通事故引起的侵权纠纷。在（2017）川05民终233号民事判决（见**附录1：序号3**）中，四川省泸州市中级人民法院认为，指导案例24号针对的是交通事故案件，而本案属于医疗损害侵权责任纠纷，因此不参照指导案例24号。基于相同的理由，湖北省武汉市中级人民法院在两个案件中，都认为不应参照指导案例24号：一起是身体权、健康权侵权责任纠纷（（2017）鄂01民终2606号民事判决（见**附录1：序号4**）），而另一起是饲养动物损害侵权责任纠纷（（2018）鄂01民终5089号民事判决（见**附录1：序号10**））。

与上述法院不同，有部分地方法院认为指导案例24号的参照范围并不限于交通事故。例如，在（2017）皖01民终4293号民事判决（见**附录1：序号6**）中，尽管该案与上述提及的（2017）鄂01民终2606号民事判决（见**附录1：序号4**）一样，都是一起身体权、健康权侵权责任纠纷，但是安徽省合肥市中级人民法院却直接参照了指导案例24号。可见，即使针对同一类型的案件，法院的意见也很不同。此外，在一起提供劳务者受害导致的侵权责任纠纷中，黑龙江省哈尔滨市中级人民法院认为指导案例24号同样具有参考价值（（2019）黑01民终9329号民事判决（见**附录1：序号15**））。

表1清楚展示以上的分析。需要注意的是，无论法院是否认为其他类型的案件能参照指导案例24号，它们都没有具体说明其理由。认为不应在其他类型案件中参照指导案例24号的法院，通常只以"本案与指导案例案情不同"、"本案不属于交通事故纠纷"作为理由；而认为可以在其他类型案件中参照指导案例24号的法院，则通常直接参照指导案例24号，并没有说明具体理由。法院的不够充分说理可能导致相同类型的案件出现不同的参照情况和裁判意见，不利于维护司法的公正性和权威性。

精选后续裁判的法院如何理解指导案例24号的参照前提——"受害人没有过错"

指导案例24号的参照前提是受害人没有过错。23个精选后续裁判的法院都基本掌握这一点。如在（2020）吉民申2524号民事裁定（见**附录1：序号23**）中，吉林省高级人民法院认为，本案中的受害人没有过错，对交通事故不承担责任，因此其体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形。相反，在受害人存在过错的情况下，法院决定不参照该指导性案例。例如，在（2018）湘民再33号民事判决（见**附录1：序号9**）中，湖南省高级人民法院认为，受害人和侵权人都有过错，由于双方共同导致受伤这一结果，所以指导案例24号不得到参照。

至于如何认定受害人是否有过错，法院的意见并不一致。大部分法院并未对此明确说明，而是直接给出了结论，如前段提到的（2020）吉民申2524号民事裁定（见**附录1：序号23**）。有法院以交警出具的交通事故责任认定书作为受害人是否有过错的依据，（2015）莱中民一终字第50号民事判决（见**附录1：序号1**）便是一例。但是，处理该案的山东省莱芜市中级人民法院没有对此做法作出论述。事实上，交通事故责任认定书是公安机关处理交通事故，作出行政决定所依据的主要证据。虽然这些认定书可以在民事诉讼中作为证据使用，但由于其认定结论的依据是相应行政法规，与民事诉讼中关于侵权行为认定的法律依据、归责原则有所区别。行为人在侵权行为中有无过错及过错大小，应当结合案件实际情况及交通事故责任划定，根据民事侵权责任的归责原则进行综合认定。

综上，法院对如何认定受害人是否有过错仍需加强说理，笔者期待指导案例24号将来的后续裁判可以针对这方面作出详细的说明。

精选后续裁判的法院如何理解指导案例24号的要义——受害人"体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形"

1. 何谓"体质状况"

在指导案例24号的裁判要点中，明确指出受害人"体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形"。但是，指导案例24号并没有阐述如何界定"体质状况"。

是否参照指导案例24号	后续裁判号	审判法院	纠纷类型	附录1：序号
没有回应	（2015）民申字第1195号	最高人民法院	因火灾引起的侵权责任纠纷	2
未参照	（2017）川05民终233号	四川省泸州市中级人民法院	医疗损害侵权责任纠纷	3
未参照	（2017）鄂01民终2606号	湖北省武汉市中级人民法院	身体权、健康权侵权责任纠纷	4
未参照	（2018）鄂01民终5089号	湖北省武汉市中级人民法院	饲养动物损害侵权责任纠纷	10
参照	（2017）皖01民终4293号	安徽省合肥市中级人民法院	身体权、健康权侵权责任纠纷	6
参照	（2019）黑01民终9329号	黑龙江省哈尔滨市中级人民法院	提供劳务者受害导致的侵权责任纠纷	15

表1：指导案例24号的参照是否仅限于交通事故——不同法院的回应

在23个精选后续裁判中，出现了有关“自身疾病”是否属于“体质状况”的争论。在（2015）莱中民一终字第50号民事判决（见**附录1：序号1**）中，山东省莱芜市中级人民法院认为自身疾病属于“体质状况”：

> 本院认为，个人体质由**先天遗传**和**后天获得**形成，是**人体机能和形态相对稳定**的客观特征。[受害人]患有脑萎缩、高血压等疾病，属于个人体质状况的范畴。（强调后加）

但是，也有法院持相反意见，其中的理由包括：

- 在（2018）湘01民终1409号民事判决（见**附录1：序号11**）中，湖南省长沙市中级人民法院认为，若没有受害人自身原有疾病的参与，难以导致死亡后果的发生，因此自身疾病不属于指导案例24号的“体质状况”。

- 在（2019）桂03民终3675号民事判决（见**附录1：序号16**）中，广西壮族自治区桂林市中级人民法院从器官功能角度来判断自身疾病是否属于“体质状况”。该法院认为，指导案例24号中的受害人“年老骨质疏松属个人体质因素，其结构完整，亦不影响正常功能”，但是“被上诉人李某1原右眼残疾，已严重影响右眼功能，与最高人民法院指导案例24号存在质的区别”。

- 在（2019）桂1122民初628号民事判决（见**附录1：序号17**）中，广西壮族自治区贺州市钟山县人民法院从公平原则角度说明了自身疾病不属于“体质状况”的原因：

> 但本案情形较为极端、特殊，事故发生前受害人[...]长期患有心、肺、高血压、贫血等多种严重内科疾病，住院期间其自身基础性疾病逐步恶化，最终因“多器官功能衰竭”而死亡。**若完全排除受害人**长期患有的心、肺、高血压、贫血等**多种严重内科疾病**在其死亡结果中的作用**对被告有失公平**。（强调后加）

- 在（2020）沪0115民初47246号民事判决（见**附录1：序号22**）中，上海市浦东新区人民法院认为，“体质状况”应解释为人体正常衰老发展过程，不包括自身疾病。该法院指出，由于指导案例24号的原告的老年骨质疏松系老年性渐进生理改变，而该案中的原告所患的强直性脊柱炎系原告的自身疾病，因此不应当参照指导案例24号。

总括而言，各地法院对如何理解指导案例24号中的“体质状况”，尤其该状况是否包括“自身疾病”这个问题上，争议较大。

2.“损害后果”与侵权人行为以及受害人“体质状况”之间的关系

指导案例24号的裁判要点中并没有明确提及“损害后果”与侵权人行为以及受害人“体质状况”之间的关系。最高法案例指导工作办公室似乎注意到这不清晰之处，并作出说明：[9]

> [指导案例24号]中，案涉交通事故造成的损害后果系受害人荣宝英在机动车碰撞后倒地

> 并引发骨折所致，虽然荣宝英年事已高、骨质疏松，但事故责任认定荣宝英对本起事故不负责任，其对事故的发生及损害后果的造成均无主观过错，其**年老骨质疏松**仅是与事故造成**后果**存在**客观上的介入因素，并无法律上的因果关系**。而在交通事故中，加害人的行为与损害后果之间符合“无此行为，必不生此损害；有此行为，通常即生此种损害”的相当因果关系判断标准。也就是说，**加害人的行为是损害后果的直接原因**，二者之间具有相当的因果关系，这也是损害赔偿责任的重要构成要件之一。而**受害人自身的体质因素**，按法理上之通说，**对损害后果的发生并不具有相当的因果关系**。（强调后加）

最高法案例指导工作办公室点出了两个要件：第一，侵权人行为与“损害后果”有因果关系；第二，受害人“体质状况”与“损害后果”没有因果关系。一些法院在精选后续裁判中亦对这两个要件作出了说明。

（1）侵权人行为与“损害后果”有因果关系

关于侵权人行为与“损害后果”有因果关系是参照指导案例24号的前提这一点，23个精选后续案件基本上没有异议。例如，在（2018）川11民终63号民事判决（见**附录1：序号8**）中，四川省乐山市中级人民法院认为：

> 侵权责任的承担应当**以[侵权人行为与损害后果间的]因果关系的存在为前提**，在具有因果关系的基础上再考虑被侵权人是否有过错，是否应减轻侵权人的责任[...]。（强调后加）

同样，江苏省高级人民法院在（2019）苏民申3295号民事裁定（见**附录1：序号19**）中也指出：

> [侵权人行为与损害后果间的]**因果关系**是侵权责任成立的**基础要件**，只有在作为客观要件的因果关系已经满足后才能对一般侵权责任的主观要件进行分析。（强调后加）

但是，当侵权人行为不是造成损害后果的**直接**原因时，两者的因果关系的认定并非易事。各地法院在精选后续裁判中主要提供了两种思路。

第一种思路是，若侵权人行为不是造成损害后果的直接原因，侵权人承担的责任可以减少，甚至不需承担任何责任。例如，在（2019）湘0223民初10998号民事判决（见**附录1：序号14**）中，湖南省株洲市攸县人民法院便决定减少侵权人承担的责任：

> 本案中，[受害人]刘国云受伤的部位为足踝，因交通事故原因与其在住院期间所出现的脑梗塞现象**不具有直接因果关系**，与个人体质原因不属同一情况，因此，最高人民法院第24号指导案例的案情与本案不同。**脑干梗塞是导致刘国云死亡的主要原因**[...]，本院认定本案**交通事故的参与度为40%**，刘国云自身疾病的参与度为60%。（强调后加）

在（2019）苏06民终61号民事判决（见**附录1：序号12**）中，当江苏省南通市中级人民法院认为交通事故仅仅是加重了受害人的原有病症时，该法院直接指出侵权人行为与损害后果无关，其“对与己无关的损害结果，无赔偿的义务”。类似的裁判意见也出现于（2019）晋03民终489号民事判决（见**附录1：序号13**）。在该案中，山西省阳泉市中级人民法院指出：

> 本案中[受害人]韩俊平本身就有疾病，发生道路交通事故后，可能造成韩俊平的病情加重，但并**不是**造成韩俊平颈椎病的**直接原因**，而[指导案例24号]中荣宝英属于骨质疏松，交通事故发生是导致荣宝英伤残的直接原因，**故上诉人的主张，本院不予支持**。（强调后加）

第二种思路是，在肯定侵权人行为和损害后果需要有因果关系的同时，法院作出法律政策之考量和法律价值之判断，务求平衡侵权人和受害者的权益保护。例如，在（2019）苏民申3295号民事裁定（见**附录1：序号19**）中，江苏省高级人民法院指出：

> 法律上因果关系的认定并非纯粹客观的判断，而是带有明显的**法律政策之考量和法律价值之判断**。不同案件中对法律上因果关系作出的不同认定，其目的均是为寻求最大限度符合公平正义、法律目的或当时的社会需求。**对受害者而言**，生命权、身体权、健康权等**人格权益**当然具有最高的价值位阶，应当享有更加有力的保护。但是**对侵权人而言，行为自由**同样是法律赋予的基本权利，亦应当予以保护。在认定法律上的因果关系时，必须尽可能寻找二者之间权益保护的平衡点。（强调后加）

在（2020）渝0115民初388号民事判决（见**附录1：序号21**）中，重庆市长寿区人民法院同样认为，“在纷繁复杂的个案审理中能否参照24号案例，必须回归法理，探求法律的本意，在侵权人与受害人的利益之间寻求大致平衡，才能最终维护社会公平正义。”

值得注意的是，上述两所法院对于指导案例24号的理解存在偏差。指导案例24号是对侵权法上“过错责任”的理解，对被侵权人应当采取倾斜性的保护。

然而上述法院并未完全忠实于指导案例24号所明确的归责原则；相反，平衡各方利益成了法院考虑的优先选项。笔者认为，两所法院对指导案例24号的延伸性解读是出于实现定分止争"社会效果"的目的。这虽然在一定程度上对指导案例24号产生了误读，但也为参照指导性案例提供了新的观察视角。

（2）受害人"体质状况"与"损害后果"没有因果关系

关于受害人"体质状况"与"损害后果"不能有因果关系，23个精选后续案件基本上也指出其必要性。例如，在（2017）沪0115民初23817号民事判决（见**附录1：序号5**）中，上海市浦东新区人民法院指出，"[受害人]年事已高，但其原有右膝退变基础仅是事故造成后果的**客观因素，并无法律上的因果关系**"（强调后加）。辽宁省抚顺市中级人民法院在（2017）辽04民终1780号民事判决（见**附录1：序号7**）中认为：

> 本案中，虽然[受害人]孙桂琴的**个人身体状况**对损害后果的发生具有一定的影响，但**这不是侵权责任法等法律规定的过错**，孙桂琴的身体状况仅是损害后果发生的**客观因素，其身体状况与损害后果的发生并无法律上的因果关系**。因此，受害人孙桂琴对于损害的发生或扩大均没有过错，不存在减轻或者免除加害人赔偿责任的法定情形。（强调后加）

湖南省益阳市桃江县人民法院在（2020）湘0922民初1095号民事判决（见**附录1：序号20**）中进一步指出，

> 受害人[...]固然存在**自身体质方面的特殊性，但此并非其追求的结果**，不构成侵权法意义上的过错，也与本案交通事故的发生不存在任何法律上的因果关系。（强调后加）

尽管不少法院意识到受害人"体质状况"与"损害后果"不能有因果关系，大多数法院仅仅用寥寥数语说明"不成立法律上的因果关系"，鲜有法院对该问题作出深入的解读。

然而，在个别复杂的交通事故案件中，法院认为交通事故（侵权行为）与损害后果间只有间接或次要的因果关系，若没有受害人自身的疾病参与，并不会导致最后的伤残或死亡结果。法院继而认为，要求侵权人承担所有责任是不公平的，侵权人只需要在侵权行为的范围内承担相关责任。例如，在（2019）湘0112民初5451号民事判决（见**附录1：序号18**）中，湖南省长沙市望城区人民法院认为：

> 从上述司法鉴定意见及医学死亡证明可以认定交通事故造成的损伤虽是受害人死亡的**原因力之一**，但**若没有**受害人自身原有**多种疾病的参与**，正常情况下本案交通事故造成的损伤**难以导致死亡后果的发生**，且本案交通事故所致外伤对死亡后果仅起到**次要作用或辅助作用**，这与最高人民法院发布的"24号指导案例"中被侵权人对事故发生无过错并因事故**直接导致**伤残的情形不同，故该案例不具有参照性。（强调后加）

在上述案例中，法院认为受害人体质状况是导致损害后果的原因之一，在确定侵权责任时应当被考虑。这是该法院对指导案例24号因果关系理解上的偏差。

结语

指导案例24号及其数百个后续裁判对中国版"蛋壳脑袋规则"的塑造说明了中国司法界正逐步接受以援引指导性案例进行说理的方式，让这些案例在中国司法实践中发挥着重要作用。甚至，有中国法院在裁判的说理部分直接引用了"蛋壳脑袋规则"而没有提及指导案例24号（见**附录2**）。这突出反映了中国法院对于普通法理论的兴趣，以及不同法律制度间相互借鉴的趋势。

尽管中国法院借鉴了普通法系的"蛋壳脑袋规则"，但是由于中国与普通法系之间存在基本差异，该借鉴必是审慎的、渐进的。所以，在实践中，中国法院并没有达成对指导案例24号和相关的"蛋壳脑袋规则"的统一的看法，甚至在某些问题上形成了完全相反的意见，比如能否在交通事故以外的领域参照指导案例24号。

法院没有统一的看法也可能是因为较高层级的法院，尤其是最高法，尚未作出对指导案例24号及相关的"蛋壳脑袋规则"给出明确意见的判决。在施行两审终审制的中国，[10]一般来说，与指导案例24号类似的侵权案件的一审法院多为基层人民法院，二审法院为中级人民法院；该类侵权案件鲜少能够进入到高级人民法院进行审理，更不用说最高法。因此，基层、中级人民法院没有更多机会看到高级人民法院、最高法对指导案例24号的参照与理解，各地法院因此也难以形成较为一致的裁判意见。

尽管有以上问题，我们无需对此持消极态度。相反，笔者认为，不同法院踊跃地对指导案例24号作出分析是指导性案例制度发展的一个好的开端。笔者寄望最高法尽早有机会审判涉及指导案例24号的类案，并就该案例和相关的"蛋壳脑袋规则"给出明确的意见。同时，中国司法界应付出更多的努力，致力于推进中西法律制度交流互鉴。通过这种方式，我们将能够看到世界各地不同法律体系在交汇融合方面取得更好的成果。■

附录1：23个被深入分析的指导案例24号的后续裁判（截至2020年12月31日）

序号	审判日期	后续裁判号	审判法院	链接
1	2015/6/4	（2015）莱中民一终字第50号	山东省莱芜市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/shandong-2015-lai-zhong-min-yi-zhong-zi-50-civil-judgment
2	2015/6/26	（2015）民申字第1195号	最高人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/spc-2015-min-shen-zi-1195-civil-ruling
3	2017/5/15	（2017）川05民终233号	四川省泸州市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2017-chuan-05-min-zhong-233-civil-judgment
4	2017/7/3	（2017）鄂01民终2606号	湖北省武汉市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hubei-2017-e-01-min-zhong-2606-civil-judgment
5	2017/8/17	（2017）沪0115民初23817号	上海市浦东新区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/shanghai-2017-hu-0115-min-chu-23817-civil-judgment
6	2017/8/21	（2017）皖01民终4293号	安徽省合肥市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/anhui-2017-wan-01-min-zhong-4293-civil-judgment
7	2017/11/23	（2017）辽04民终1780号	辽宁省抚顺市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/liaoning-2017-liao-04-min-zhong-1780-civil-judgment
8	2018/1/24	（2018）川11民终63号	四川省乐山市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-11-min-zhong-63-civil-judgment
9	2018/3/21	（2018）湘民再33号	湖南省高级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2018-xiang-min-zai-33-civil-judgment
10	2018/8/14	（2018）鄂01民终5089号	湖北省武汉市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hubei-2018-e-01-min-zhong-5089-civil-judgment
11	2019/3/7	（2018）湘01民终1409号	湖南省长沙市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2018-xiang-01-min-zhong-1409-civil-judgment
12	2019/3/15	（2019）苏06民终61号	江苏省南通市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2019-su-06-min-zhong-61-civil-judgment
13	2019/7/22	（2019）晋03民终489号	山西省阳泉市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/shanxi-2019-jin-03-min-zhong-489-civil-judgment
14	2019/11/5	（2019）湘0223民初10998号	湖南省株洲市攸县人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2019-xiang-0223-min-chu-10998-civil-judgment
15	2019/11/25	（2019）黑01民终9329号	黑龙江省哈尔滨市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/heilongjiang-2019-hei-01-min-zhong-9329-civil-judgment
16	2020/1/16	（2019）桂03民终3675号	广西壮族自治区桂林市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/guangxi-2019-gui-03-min-zhong-3675-civil-judgment

序号	审判日期	后续裁判号	审判法院	链接
17	2020/3/23	（2019）桂1122民初628号	广西壮族自治区贺州市钟山县人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/guangxi-2019-gui-1122-min-chu-628-civil-judgment
18	2020/6/22	（2019）湘0112民初5451号	湖南省长沙市望城区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2019-xiang-0112-min-chu-5451-civil-judgment
19	2020/7/2	（2019）苏民申3295号	江苏省高级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2019-su-min-shen-3295-civil-ruling
20	2020/9/21	（2020）湘0922民初1095号	湖南省益阳市桃江县人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2020-xiang-0922-min-chu-1095-civil-judgment
21	2020/9/27	（2020）渝0115民初388号	重庆市长寿区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2020-yu-0115-min-chu-388-civil-judgment
22	2020/9/27	（2020）沪0115民初47246号	上海市浦东新区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/shanghai-2020-hu-0115-min-chu-47246-civil-judgment
23	2020/10/19	（2020）吉民申2524号	吉林省高级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/jilin-2020-ji-min-shen-2524-civil-ruling

附录2：7个明确提及“蛋壳脑袋规则”的裁判（截至2020年12月31日）

序号	审判日期	裁判号	审判法院	链接
1	2016/10/28	（2016）辽0113民初5490号	辽宁省沈阳市沈北新区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/liaoning-2016-liao-0113-min-chu-5490-civil-judgment
2	2017/2/6	（2016）川16民终1174号	四川省广安市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2016-chuan-16-min-zhong-1174-civil-judgment
3	2017/3/17	（2017）川16民终75号	四川省广安市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2017-chuan-16-min-zhong-75-civil-judgment
4	2019/3/4	（2018）川1602民初3548号	四川省广安市广安区人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-1602-min-chu-3548-civil-judgment
5	2019/3/28	（2018）川1724民初3421号	四川省达州市大竹县人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-1724-min-chu-3421-civil-judgment
6	2020/5/15	（2020）苏0581民初1161号	江苏省常熟市人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2020-su-0581-min-chu-1161-civil-judgment
7	2020/5/25	（2020）晋06民终261号	山西省朔州市中级人民法院	http://cgc.law.stanford.edu/zh-hans/judgments/shanxi-2020-jin-06-min-zhong-261-civil-ruling

* 此中国案例*见解*™的引用是：谭子文、沈馨，指导案例24号及其数百个后续裁判如何塑造中国版的“蛋壳脑袋规则”，《中国法律连接》，第13期，第63页（2021年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2021年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-13-202106-insights-14-tan-shen。中文原文由赵炜和熊美英博士编辑。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 *Eggshell-Skull Rule*，Black's Law Dictionary（2019年第11版）。原文是：“[A] defendant is liable for a plaintiff's unforeseeable and uncommon reactions to the defendant's negligent or intentional act.”

2 *同上*。

3 《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》，《中国法律连接》，第13期，第73页（2021年6月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC24），2021年6月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-24。

4 *同上*。江苏省无锡市滨湖区人民法院于2013年2月8日作出（2012）锡滨民初字第1138号民事判决。该判决书尚未找到，有可能已被排除在公布之外。

5 *同上*。江苏省无锡市中级人民法院于2013年6月21日作出（2013）锡民终字第497号民事判决。该判决书尚未找到，有可能已被排除在公布之外。

6 最高人民法院案例指导工作办公室，指导案例24号《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》的理解与参照，《人民司法·案例》，第12期，第9页（2015）。

7 *同上*，第11页。

8 中华人民共和国《〈最高人民法院关于案例指导工作的规定〉实施细则》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance。

9 最高人民法院案例指导工作办公室，注释6，第10页。

10 在中国的两审终审制下，原则上，案件经过两次审理即告终结，除非启动审判监督程序。但是审判监督程序的启动并不由当事人决定，而是由法院或检察院决定。《中华人民共和国民事诉讼法》第十条规定：“人民法院审理民事案件，依照法律规定实行[...]两审终审制度”。《中华人民共和国民事诉讼法》，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html。

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荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案

RONG Baoying v. WANG Yang and the Jiangyin Branch of Alltrust Insurance Co., Ltd., A Dispute over Liability for a Motor Vehicle Traffic Accident

指导案例24号
（最高人民法院审判委员会讨论通过
2014年1月26日发布）*

Guiding Case No. 24
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on January 26, 2014)**

关键词

民事
交通事故
过错责任

Keywords

Civil
Traffic Accident
Fault-Based Liability

裁判要点

交通事故的受害人没有过错，其体质状况对损害后果的影响不属于可以减轻侵权人责任的法定情形。

Main Points of the Adjudication

[If] a victim of a traffic accident is not at fault, the effect of his[1] [pre-existing] physical condition on the consequences of the harm[2] [he suffered] is not a type of statutory circumstance that can reduce an infringer's liability.

相关法条

《中华人民共和国侵权责任法》第二十六条[3]

《中华人民共和国道路交通安全法》第七十六条第一款第（二）项[5]

Related Legal Rule(s)

Article 26 of the *Tort Liability Law of the People's Republic of China*[4]

Article 76 Paragraph 1 Item (2) of the *Road Traffic Safety Law of the People's Republic of China*[6]

基本案情

原告荣宝英诉称：被告王阳驾驶轿车与其发生刮擦，致其受伤。该事故经江苏省无锡市公安局交通巡逻警察支队滨湖大队（简称滨湖交警大队）认定：王阳负事故的全部责任，荣宝英无责。原告要求下述两被告赔偿医疗费用30006元、住院伙食补助费414元、营养费1620元、残疾赔偿金27658.05元、护理费6000元、交通费800元、精神损害抚慰金10500元，并承担本案诉讼费用及鉴定费用。

Basic Facts of the Case[7]

Plaintiff RONG Baoying claimed: a sedan driven by defendant WANG Yang grazed him, causing him to suffer injuries. The Traffic Patrol Police Detachment Binhu Brigade of the Public Security Bureau of Wuxi Municipality, Jiangsu Province ([hereinafter] referred to as the "Binhu Traffic Police Brigade"), determined: WANG Yang is fully responsible for the accident; RONG Baoying is not at all. The plaintiff requested that the two defendants mentioned below pay him RMB 30,006 as compensation for [his] medical expenses, RMB 414 as subsidies for [his] hospital meals, RMB 1,620 as compensation for [his] nutrition costs,[8] RMB 27,658.05 as disability damages, RMB 6,000 as compensation for [his] nursing

expenses, RMB 800 as compensation for [his] traveling expenses, and a solatium of RMB 10,500 as compensation for [his] mental harm, and bear the costs of litigation and appraisal in this case.

被告永诚财产保险股份有限公司江阴支公司(简称永诚保险公司)辩称：对于事故经过及责任认定没有异议，其愿意在交强险限额范围内予以赔偿；对于医疗费用30006元、住院伙食补助费414元没有异议；因鉴定意见结论中载明"损伤参与度评定为75%，其个人体质的因素占25%"，故确定残疾赔偿金应当乘以损伤参与度系数0.75，认可20743.54元；对于营养费认可1350元，护理费认可3300元，交通费认可400元，鉴定费用不予承担。

The Jiangyin Branch of Alltrust Insurance Co., Ltd.[9] ([hereinafter] referred to as "Alltrust Insurance Company"), the defendant, asserted in defense: [it] did not dispute the [plaintiff's] account of the accident and the [Binhu Traffic Police Brigade's] determination of responsibility, and was willing to pay an amount of compensation within the limits of the compulsory liability insurance for motor vehicle traffic accidents.[10] [Alltrust Insurance Company] did not dispute the medical expenses of RMB 30,006 or the subsidies for hospital meals of RMB 414. Because the conclusion of an appraisal opinion clearly stated that "[t]he degree of the injuries' contribution [to the total harm[11] suffered by RONG Baoying] is assessed to be 75%, [and RONG Baoying's] physical [condition] is a factor that [contributed] 25%", the confirmed amount of disability damages should be multiplied by 0.75, the coefficient of the degree of contribution of injuries, [to yield] RMB 20,743.54. [Alltrust Insurance Company] agreed [to pay] RMB 1,350 for nutrition costs, RMB 3,300 for nursing expenses, and RMB 400 for traveling expenses, but would not bear the costs of appraisal.

被告王阳辩称：对于事故经过及责任认定没有异议，原告的损失应当由永诚保险公司在交强险限额范围内优先予以赔偿；鉴定费用请求法院依法判决，其余各项费用同意保险公司意见；其已向原告赔偿20000元。

Defendant WANG Yang asserted in defense: [he] did not dispute the [plaintiff's] account of the accident and the [Binhu Traffic Police Brigade's] determination of responsibility. The compensation for the plaintiff's losses should be first paid by Alltrust Insurance Company within the limits of the compulsory liability insurance for motor vehicle traffic accidents. [He] requested that the court determine the costs of appraisal in accordance with law, and agreed with Alltrust Insurance Company's opinion regarding other expenses. He had already paid the plaintiff RMB 20,000 as compensation.

法院经审理查明：2012年2月10日14时45分许，王阳驾驶号牌为苏MT1888的轿车，沿江苏省无锡市滨湖区蠡湖大道由北往南行驶至蠡湖大道大通路口人行横道线时，碰擦行人荣宝英致其受伤。2月11日，滨湖交警大队作出《道路交通事故认定书》，认定王阳负事故的全部责任，荣宝英无责。事故发生当天，荣宝英即被送往医院治疗，发生医疗费用30006元，王阳垫付20000元。荣宝英治疗恢复期间，以每月2200元聘请一名家政服务人员。号牌苏MT1888轿车在永诚保险公司投保了机动车交通事故责任强制保险，保险期间为2011年8月17日0时起至2012年8月16日24时止。原、被告一致确认荣宝英的医疗费用为30006元、住院伙食补助费为414元、精神损害抚慰金为10500元。

The court handled the case and ascertained: at approximately 14:45 on February 10, 2012, WANG Yang, who was driving a sedan bearing license plate Su MT1888[12] southwards on Lihu Avenue of Binhu District, Wuxi Municipality, Jiangsu Province, hit and injured pedestrian RONG Baoying when [WANG's sedan] reached the crosswalk lines at the intersection of Datong Road and Lihu Avenue. On February 11, the Binhu Traffic Police Brigade issued the *Written Determination of the Road Traffic Accident* declaring that WANG Yang was fully responsible for the accident and that RONG Baoying was not at all. On the day of the accident, RONG Baoying was immediately sent to a hospital for treatment, incurring medical expenses of RMB 30,006, RMB 20,000 of which was paid by WANG Yang. During the period of treatment and recovery, RONG Baoying hired a housekeeper for RMB 2,200 per month. The sedan bearing license plate Su MT1888 was insured under compulsory liability insurance for motor vehicle traffic accidents with Alltrust Insurance Company. The insurance period started on August 17, 2011, at 00:00, and ended on August 16, 2012, at 24:00. The plaintiff and the defendants unanimously affirmed that RONG Baoying's medical expenses were RMB 30,006, the subsidies for hospital meals were RMB 414, and the solatium for mental harm was RMB 10,500.

荣宝英申请并经无锡市中西医结合医院司法鉴定所鉴定，结论为：1. 荣宝英左桡骨远端骨折的伤残等级评定为十级；左下肢损伤的伤残等级评定为九级。损伤参与度评定为75%，其个人体质的因素占25%。2. 荣宝英的误工期评定为150日，护理期评定为60日，营养期评定为90日。一审法院据此确认残疾赔偿金27658.05元扣减25%为20743.54元。

RONG Baoying applied for [and received] an appraisal from the Institute of Judicial Appraisal, at the Wuxi Integrated Traditional Chinese and Western Medicine Hospital,[13] whose conclusions were:

1. The disability grade of the fractures of RONG Baoying's left distal radius is assessed to be Grade 10; the disability grade of the injuries of [his] left lower limb is assessed to be Grade 9. The degree of the injuries' contribution [to the total harm suffered by RONG Baoying] is assessed to be 75%, [and RONG Baoying's] physical [condition] is a factor that [contributed] 25%.

2. RONG Baoying's lost working time is assessed to be 150 days, [his] nursing period is assessed to be 60 days, and [his] nourishment period[14] is assessed to be 90 days.

Based on [this appraisal], the first-instance court determined that the disability damages of RMB 27,658.05 [should] be reduced by 25% to yield RMB 20,743.54.

裁判结果

江苏省无锡市滨湖区人民法院于2013年2月8日作出（2012）锡滨民初字第1138号判决：[15] 一、被告永诚保险公司于本判决生效[16]后十日内赔偿荣宝英医疗费用、住院伙食补助费、营养费、残疾赔偿金、护理费、交通费、精神损害抚慰金共计45343.54元。二、被告王阳于本判决生效后十日内赔偿荣宝英医疗费用、住院伙食补助费、营养费、鉴定费共计4040元。三、驳回原告荣宝英的其他诉讼请求。宣判后，荣宝英向江苏省无锡市中级人民法院提出上诉。无锡市中级人民法院经审理于2013年6月21日以原审适用法律错误为由作出（2013）锡民终字第497号民事判决：[17] 一、撤销无锡市滨湖区人民法院（2012）锡滨民初字第1138号民事判决；二、被告永诚保险公司于本判决生效后十日内赔偿荣宝英52258.05元。三、被告王阳于本判决生效后十日内赔偿荣宝英4040元。四、驳回原告荣宝英的其他诉讼请求。

Results of the Adjudication

On February 8, 2013, the Binhu District People's Court of Wuxi Municipality, Jiangsu Province, rendered the (2012) Xi Bin Min Chu Zi No. 1138 [Civil] Judgment:[18]

1. [The court ordered] defendant Alltrust Insurance Company to pay, within ten days of the judgment's coming into effect,[19] RONG Baoying RMB 45,343.54 in total as compensation for medical expenses, subsidies for hospital meals, nutrition costs, disability damages, nursing expenses, traveling expenses, and a solatium for mental harm.

2. [The court ordered] defendant WANG Yang to pay, within ten days of the judgment's coming into effect, RONG Baoying RMB 4,040 in total as compensation for medical expenses, subsidies for hospital meals, nutrition costs, and appraisal costs.

3. [The court] rejected plaintiff RONG Baoying's other litigation requests.

After the judgment was pronounced, RONG Baoying appealed to the Intermediate People's Court of Wuxi Municipality, Jiangsu Province. After handling [the case], on June 21, 2013, the Intermediate People's Court of Wuxi Municipality rendered, on the grounds of erroneous application of law by the original court, the (2013) Xi Min Zhong Zi No. 497 Civil Judgment:[20]

1. [The court] revoked the (2012) Xi Bin Min Chu Zi No. 1138 Civil Judgment of the Binhu District People's Court of Wuxi Municipality.

2. [The court ordered] defendant Alltrust Insurance Company to pay, within ten days of the judgment's coming into effect, RONG Baoying RMB 52,258.05 as compensation.

3. [The court ordered] defendant WANG Yang to pay, within ten days of the judgment's coming into effect, RONG Baoying RMB 4,040 as compensation.

4. [The court] rejected plaintiff RONG Baoying's other litigation requests.

裁判理由

法院生效裁判认为：《中华人民共和国侵权责任法》第二十六条规定：[22]"被侵权人对损害的发生也有过错的，可以减轻侵权人的责任。"《中华人民共和国道路交通安全法》第七十六条第一款第（二）项规定，[23]机动车与非机动车驾驶人、行人之间发生交通事故，非机动车驾驶人、行人没有过错的，由机动车一方承担赔偿责任；有证据证明非机动车驾驶人、行人有过错的，根据过错程度适当减轻机动车一方的赔偿责任。因此，交通事故中在计算残疾赔偿金是否应当扣减时应当根据受害人对损失的发生或扩大是否存在过错进行分析。本案中，虽然原告荣宝英的个人体质状况对损害后果的发生具有一定的影响，但这不是侵权责任法等法律规定的过错，荣宝英不应因个人体质状况对交通事故导致的伤残存在一定影响而自负相应责任，原审判决以伤残等级鉴定结论中将荣宝英个人体质状况"损伤参与度评定为75%"为由，在计算残疾赔偿金时作相应扣减属适用法律错误，应予纠正。

从交通事故受害人发生损伤及造成损害后果的因果关系看，本起交通事故的引发系肇事者王阳驾驶机动车穿越人行横道线时，未尽到安全注意义务碰擦行人荣宝英所致；本起交通事故造成的损害后果系受害人荣宝英被机动车碰撞、跌倒发生骨折所致，事故责任认定荣宝英对本起事故不负责任，其对事故的发生及损害后果的造成均无过错。虽然荣宝

Reasons for the Adjudication[21]

In the effective judgment, the court opined:[24] Article 26 of the *Tort Liability Law of the People's Republic of China* provides:[25]

> Where an infringed person is also at fault for the occurrence of the harm, the liability of the infringer can be reduced.

Article 76 Paragraph 1 Item (2) of the *Road Traffic Safety Law of the People's Republic of China* provides:[26]

> Where a traffic accident occurs between a motor vehicle on the one side and the driver of a non-motor vehicle or a pedestrian on the other, and the driver of the non-motor vehicle or the pedestrian is not at fault, the motor vehicle side shall be liable for compensation. Where there is evidence proving that the driver of the non-motor vehicle or the pedestrian is at fault, the liability of the motor vehicle side shall be appropriately reduced in accordance with [the driver's or the pedestrian's] degree of fault. […].

Therefore, in traffic accidents, when calculating whether disability damages should be reduced, the [court's] analysis should be based on whether the victim is at fault for the occurrence or amplification of the loss. In this case, although the personal physical condition of plaintiff RONG Baoying had a certain effect on the occurrence of the consequences of the harm, this does not constitute fault as prescribed by the *Tort Liability Law* or other laws. RONG Baoying should not, due to [the fact that his] personal physical condition had a certain effect on injuries and disabilities caused by the traffic accident, bear corresponding liability. The first-instance [court's] decision to make corresponding reductions when calculating disability damages on the grounds that the disability grade appraisal concluded that "[t]he degree of the injuries' contribution [to the total harm suffered by RONG Baoying] is assessed to be 75%" was an erroneous application of law, and should be corrected.

Judging from the causal relationship between the occurrence of injury to a victim of a traffic accident and the consequences of the harm [suffered by the victim], the traffic accident [in this case] was brought about by the failure of WANG Yang, the person who caused the accident, to fulfill his duty of care [to drive] safely; [thus, his] motor vehicle grazed pedestrian RONG Baoying when he drove through the pedestrian crossing. The consequences of the harm resulting from this traffic accident were caused by victim RONG Baoying's being hit by the motor vehicle, falling down, and suffering bone fractures. [According to] the determination

英年事已高，但其年老骨质疏松仅是事故造成后果的客观因素，并无法律上的因果关系。因此，受害人荣宝英对于损害的发生或者扩大没有过错，不存在减轻或者免除加害人赔偿责任的法定情形。同时，机动车应当遵守文明行车、礼让行人的一般交通规则和社会公德。本案所涉事故发生在人行横道线上，正常行走的荣宝英对将被机动车碰撞这一事件无法预见，而王阳驾驶机动车在路经人行横道线时未依法减速慢行、避让行人，导致事故发生。因此，依法应当由机动车一方承担事故引发的全部赔偿责任。

of responsibility for the accident, RONG Baoying is not responsible for this accident and he was not at fault for the occurrence of the accident or the causation of the consequences of the harm. Although RONG Baoying is of advanced age, his osteoporosis from old age is only an objective factor contributing to the consequences of the accident, rather than a legal cause [of the accident]. Therefore, victim RONG Baoying was not at fault for the occurrence or amplification of the harm, and there was no statutory circumstance [to enable the court] to reduce the infringer's liability or exempt him from it. At the same time, [drivers of] motor vehicles should obey general traffic rules and social morals on driving civilly and yielding to pedestrians. The accident involved in this case occurred in a pedestrian crossing. RONG Baoying, who was walking normally, could not have foreseen the event of being hit by a motor vehicle. WANG Yang, when driving the motor vehicle into the pedestrian crossing, did not decelerate or avoid pedestrians in accordance with law and thus caused the accident to occur. Therefore, the motor vehicle side should, in accordance with law, bear full liability arising from the accident.

根据我国道路交通安全法的相关规定，机动车发生交通事故造成人身伤亡、财产损失的，由保险公司在机动车第三者责任强制保险责任限额范围内予以赔偿。而我国交强险立法并未规定在确定交强险责任时应依据受害人体质状况对损害后果的影响作相应扣减，保险公司的免责事由也仅限于受害人故意造成交通事故的情形，即便是投保机动车无责，保险公司也应在交强险无责限额内予以赔偿。因此，对于受害人符合法律规定的赔偿项目和标准的损失，均属交强险的赔偿范围，参照“损伤参与度”确定损害赔偿责任和交强险责任均没有法律依据。

The related provision of the *Road Traffic Safety Law* in China[27] states:

> Where the occurrence of a motor vehicle traffic accident causes personal injury or death, or loss of property, compensation shall be paid by an insurance company within the limits of the compulsory third-party liability insurance for motor vehicles. […]

China's legislation on the compulsory liability insurance for motor vehicle traffic accidents does not provide that [a court] should, when determining the liability under the compulsory liability insurance for motor vehicle traffic accidents, make corresponding reductions based on the effect of the victim's [pre-existing] physical condition on the consequences of the harm.[28] An insurance company's exemption from liability is also limited to situations where the victim intentionally caused the traffic accident. Even where [the driver of] the insured motor vehicle is not liable, the insurance company should still pay compensation within the no-liability limit of the compulsory liability insurance for motor vehicle traffic accidents. Therefore, losses of the victim that conform to the compensation items and standards provided by law are within the scope of compensation of the compulsory liability insurance for motor vehicle traffic accidents. There was no legal basis [for the first-instance court] to refer to "the degree of the injuries' contribution [to the total harm suffered]" when determining the liability for paying compensation for the harm and the liability under the compulsory liability insurance for motor vehicle traffic accidents.

CGCP 备注

备注1:

《中华人民共和国侵权责任法》[29]

第二十六条

被侵权人对损害的发生也有过错的，可以减轻侵权人的责任。[31]

备注2:

《中华人民共和国道路交通安全法》[33]

第七十六条

机动车发生交通事故造成人身伤亡、财产损失的，由保险公司在机动车第三者责任强制保险责任限额范围内予以赔偿；不足的部分，按照下列规定承担赔偿责任：

（一）[…]。

（二）机动车与非机动车驾驶人、行人之间发生交通事故，非机动车驾驶人、行人没有过错的，由机动车一方承担赔偿责任；有证据证明非机动车驾驶人、行人有过错的，根据过错程度适当减轻机动车一方的赔偿责任；机动车一方没有过错的，承担不超过百分之十的赔偿责任。

[…] ■

CGCP Notes

Note 1:

Tort Liability Law of the People's Republic of China[30]

Article 26

Where an infringed person is also at fault for the occurrence of the harm, the liability of the infringer can be reduced.[32]

Note 2:

Road Traffic Safety Law of the People's Republic of China[34]

Article 76

Where the occurrence of a motor vehicle traffic accident causes personal injury or death, or loss of property, compensation shall be paid by an insurance company within the limits of the compulsory third-party liability insurance for motor vehicles. For the portion that the [aforementioned] compensation is insufficient [to cover], the liability shall be borne in accordance with the following provisions:

(1) […].

(2) Where a traffic accident occurs between a motor vehicle on the one side and the driver of a non-motor vehicle or a pedestrian on the other, and the driver of the non-motor vehicle or the pedestrian is not at fault, the motor vehicle side shall be liable for compensation. Where there is evidence proving that the driver of the non-motor vehicle or the pedestrian is at fault, the liability of the motor vehicle side shall be appropriately reduced in accordance with [the driver's or the pedestrian's] degree of fault. Where the motor vehicle side is not at fault, its liability for compensation shall not exceed 10%.

[…] ■

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* 此案例的中文引用是：《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》，《中国法律连接》，第13期，第73页（2021年6月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC24），2021年6月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-24。

案例原文载于：《最高人民法院网》，http://www.court.gov.cn/shenpan-xiangqing-13327.html。*亦见*《最高人民法院关于发布第六批指导性案例的通知》，2014年1月26日公布，同日起施行，http://rmfyb.chinacourt.org/paper/images/2014-01/29/03/2014012903_pdf。除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》(*RONG Baoying v. WANG Yang and the Jiangyin Branch of Alltrust Insurance Co., Ltd., A Dispute over Liability for a Motor Vehicle Traffic Accident*), 13 China Law Connect 73 (June 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC24), June 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-24.

The original, Chinese version of this case is available at 《最高人民法院网》 (www.court.gov.cn), http://www.court.gov.cn/shenpan-xiangqing-13327.html. *See also* 《最高人民法院关于发布第六批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Sixth Batch of Guiding Cases*), issued on and effective as of Jan. 26, 2014, http://rmfyb.chinacourt.org/paper/images/2014-01/29/03/2014012903_pdf.

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[1] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[2] The text reads "损害后果" and is translated herein as the "consequences of the harm". For more discussion of this topic, see 于世平 (YU Shiping), 侵权损害后果的类型划分及其实践意义 (*The Classification of the Consequences of the Harm [Caused by] the Infringement of Rights and Its Practical Significance*), 《人民司法》 (The People's Judicature), Issue No. 10, at 22 (2005), http://pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=23168b8a8af6c79b085e545e147828d8bdfb (indicating that the term "consequences of the harm" generally refers to the objective situations emerging from the harm caused to the injured party and can be classified as, for example, tangible vis-à-vis intangible consequences, or direct vis-à-vis indirect consequences).

[3] 《中华人民共和国侵权责任法》，2009年12月26日通过和公布，2010年7月1日起施行，http://www.gov.cn/flfg/2009-12/26/content_1497435.htm（以下简称"《侵权责任法》"）。该法于2021年1月1日中国《民法典》生效时废止。见《中华人民共和国民法典》，第一千二百六十条，2020年5月28日通过，2020年6月1日公布，2021年1月1日起施行，https://www.chinacourt.org/law/detail/2020/06/id/150163.shtml（以下简称"《民法典》"）。

[4] 《中华人民共和国侵权责任法》 (*Tort Liability Law of the People's Republic of China*), passed and issued on Dec. 26, 2009, effective as of July 1, 2010, http://www.gov.cn/flfg/2009-12/26/content_1497435.htm (hereinafter "*Tort Liability Law*"). This law was repealed on January 1, 2021, when China's *Civil Code* came into effect. *See* 《中华人民共和国民法典》 (*Civil Code of the People's Republic of China*), Article 1260, passed on May 28, 2020, issued on June 1, 2020, effective as of Jan. 1, 2021, https://www.chinacourt.org/law/detail/2020/06/id/150163.shtml (hereinafter "*Civil Code*").

[5] 《中华人民共和国道路交通安全法》，2003年10月28日通过和公布，2004年5月1日起施行，经三次修正，最新修正于2021年4月29日，同日起施行，https://www.lawbus.net/articles/1473.html（以下简称"《道路交通安全法》"）。法院作出本指导性案例所基于的判决时，适用的《道路交通安全法》是2011年4月修正的版本。2021年的修正仅修改了该法第二十条第一款，其他规定保持不变。

[6] 《中华人民共和国道路交通安全法》 (*Road Traffic Safety Law of the People's Republic of China*), passed and issued on Oct. 28, 2003, effective as of May 1, 2004, amended three times, most recently on Apr. 29, 2021, effective as of Apr. 29, 2021, https://www.lawbus.net/articles/1473.html (hereinafter "*Road Traffic Safety Law*"). When the underlying judgments of this Guiding Case were rendered, the applicable *Road Traffic Safety Law* was the version amended in April 2011. The 2021 amendment only amended Article 20 Paragraph 1 of the law and other provisions remain the same.

[7] The content in this section is a summary, based on the underlying judgment(s) of this Guiding Case, by the Supreme People's Court. In each Guiding Case, the parties' claim(s) and defense(s) as well as the court's ascertained facts are often copied verbatim from the original judgment(s). In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, and information in them on the date when the final judgment (*see infra* note 20) was rendered.

[8] The term "营养费" ("nutrition costs") refers to the cost of providing a victim additional nourishment so as to ensure his full recovery. *See* 陈旭 (CHEN Xu), 交通事故中的"营养费"怎么算？(*How to Calculate "Nutrition Costs" in Traffic Accidents?*), 《德翔说法》 (Ideas), Mar. 27, 2020, http://www.dexianglaw.com/Ideas/238.html.

[9] The name "永诚财产保险股份有限公司" is translated herein as "Alltrust Insurance Co., Ltd." in accordance with the English name appearing on the website of the company's wholly-owned subsidiary named Alltrust Insurance Asset Management Co., Ltd. (永诚保险资产管理有限公司), at https://www.allasset.com.cn/en/overview/index.aspx.

[10] The term "交强险" as used herein is an abbreviation of the term "机动车交通事故责任强制保险" ("compulsory liability insurance for motor vehicle traffic accidents"). *See, e.g.*, 保监会公布交强险责任限额调整方案 2月1日起实行 (*The China Insurance Regulatory Commission Announced that the Plan to Adjust the Liability Limits for the Compulsory Liability Insurance for Motor Vehicle Traffic Accidents Will Be Implemented From February 1*), 《中央政府门户网站》 (www.gov.cn), Jan. 11, 2008, http://www.gov.cn/gzdt/2008-01/11/content_856023.htm.

[11] For a brief discussion of this topic, see 何颂跃 (HE Songyue), 损伤参与度的评定标准 (*Standards for Assessing the Degree of Contribution of Injuries*), 《法律与医学杂志》 (Journal of Law and Medicine), Issue No. 1 (1998), https://www.cnki.com.cn/Article/CJFDTotal-FLYZ199801022.htm.

[12] The identifier "苏" ("Su") preceding the alphanumeric "MT1888" is the abbreviation of Jiangsu Province, where license plate MT1888 was likely registered.

[13] The name "无锡市中西医结合医院" is translated here literally as the "Wuxi Integrated Traditional Chinese and Western Medicine Hospital". The hospital does not appear to have an official English name.

[14] The term "营养期" ("nourishment period") refers to the period during which the injured person needs to replenish his body with necessary nourishment to facilitate treatment or to speed up recovery. *See, e.g.*, 《人身损害受伤人员休息期、营养期、护理期评定准则》(*Standards for Assessing the Rest Period, Nourishment Period, and Nursing Period of Injured Persons Suffering from Physical Injuries*), issued by the Shanghai Quality and Technical Supervision Bureau on Jan. 30, 2015, effective as of May 1, 2015, http://std.samr.gov.cn/db/search/stdDBDetailedCNF?id=91D99E4D6D3C2E24E05397BE0A0A3A10.

[15] 一审判决书尚未找到，有可能已被排除在公布之外。

[16] 《中华人民共和国民事诉讼法》第一百五十五条规定："最高人民法院的判决、裁定，以及依法不准上诉或者超过上诉期没有上诉的判决、裁定，是发生法律效力的判决、裁定。"见《中华人民共和国民事诉讼法》，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html。

[17] 二审判决书尚未找到，有可能已被排除在公布之外。

[18] The first-instance judgment has not been found and may have been excluded from publication.

[19] The text reads "判决生效" ("the judgment's coming into effect"). According to Article 155 of the *Civil Procedure Law of the People's Republic of China*, judgments and rulings that have come into effect are judgments and rulings of the Supreme People's Court as well as judgments and rulings which, according to law, may not be appealed or which have not been appealed within the prescribed time limit. *See* 《中华人民共和国民事诉讼法》(*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[20] The second-instance judgment has not been found and may have been excluded from publication.

[21] In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, legal principles, and information in them on the date when the final judgment (*see supra* note 20) was rendered.

[22] 《侵权责任法》，注释3。

[23] 《道路交通安全法》，注释5。

[24] The Chinese text does not specify which court opined. Given the context, this should be the Intermediate People's Court of Wuxi Municipality, Jiangsu Province.

[25] *Tort Liability Law*, *supra* note 4.

[26] *Road Traffic Safety Law*, *supra* note 6.

[27] The original text reads "我国" ("my/our country") and is translated herein as "China".

[28] The reference to "China's legislation on the compulsory liability insurance for motor vehicle traffic accidents" is likely to be a reference to 《机动车交通事故责任强制保险条例》 (*Regulation on the Compulsory Liability Insurance for Motor Vehicles Traffic Accidents*), passed by the State Council on Mar. 21, 2006, revised on Mar. 30, 2012 and Dec. 17, 2012, effective as of Mar. 1, 2013, http://www.gov.cn/zwgk/2012-12/27/content_2300554.htm. In 2016 and 2019, the legislation was further revised.

[29] 《侵权责任法》，注释3。

[30] *Tort Liability Law*, *supra* note 4.

[31] 《民法典》第一千一百七十三条与此类似："被侵权人对同一损害的发生或者扩大有过错的，可以减轻侵权人的责任。"见《民法典》，注释3，第一千一百七十三条。

[32] Article 1173 of the *Civil Code* is similar:

> Where an infringed person is at fault for the occurrence or amplification of the same harm, the liability of the infringer can be reduced.

See Civil Code, *supra* note 4, Article 1173.

[33] 《道路交通安全法》，注释5。

[34] *Road Traffic Safety Law*, *supra* note 6.

CGCP认真对待其在帮助年轻一代中所扮演的角色。过去几年，来自世界各地的500余所大学和高中的学生参与了CGCP举办的写作竞赛。

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2021年6月，中国指导性案例项目（China Guiding Cases Project；"CGCP"）团队宣布了第四届斯坦福CGCP学生写作竞赛的获奖作品。来自世界各地的500余所大学和高中的数百支学生队伍参与了此次竞赛。

经过仔细考虑，CGCP团队评选出三篇金奖作品、五篇银奖作品和九篇荣誉提名作品。见下表，得奖个人或团队按照作者或第一位合著者的姓氏首字母顺序排列。

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June 2021 | Results of the Fall 2020 Student Writing Contest Announced

In June 2021, the China Guiding Cases Project (the "CGCP") team announced the winning pieces for the Fourth Stanford CGCP Student Writing Contest. A few hundred teams participated, representing students from more than 500 colleges and high schools in different parts of the world.

After careful consideration, the CGCP team selected three submissions as Golden Award winners, five submissions as Silver Award winners, and nine submissions for Honorable Mentions. See the list below, with individuals or teams listed in alphabetical order of the author's (or the first co-author's) family name.

The Golden Award winners' essays are presented below. To read the summaries of the Silver Award winners' submissions and/or to learn more about the next Stanford CGCP Student Writing Contest, please visit https://cgc.law.stanford.edu/student-writing-contest. ■

* 中国指导性案例项目，新闻和活动，《中国法律连接》，第13期，第81页（2021年6月），http://cgc.law.stanford.edu/zh-hans/clc-13-202106。英文原文由Liyi Ye和Jennifer Ingram撰写，并由Nathan Harpainter和Mei Gechlik博士最后审阅。本中文版本由叶里依和赵炜翻译，并由熊美英博士最后审阅。

** The China Guiding Cases Project, *News and Events*, 13 China Law Connect 81 (June 2021), http://cgc.law.stanford.edu/clc-13-202106. The original, English version of this piece was prepared by Liyi Ye and Jennifer Ingram; it was finalized by Nathan Harpainter and Dr. Mei Gechlik.

High School Group | 高中组

Golden Award | 金奖

Yizhou Hang & Xiaoxiao Ma
Hwa Chong Institution,
Republic of Singapore

The Viability of an "Opt-Out" Organ Donation System in China

Keyue Li & Ziyi Ma
Nanjing Foreign Language School,
People's Republic of China

From Qingming to Coco*:*
The Case for Promoting Life and Death Education to Chinese Minors

Silver Awards | 银奖

Xinrui Liu, Kaiyang Chen, & Youyou Xu
Shenzhen Middle School International Department,
People's Republic of China

Makeup Mimicking Domestic Violence: Its Nature and Consequences

XU Ruobei, HU Chenwei, & LIN Hongyi
Hwa Chong Institution,
Republic of Singapore

The COVAX Facility:
Equitable Vaccine Distribution Across Boundaries

Zhen Yao & Yiyang Zhang
United World Colleges, International School of Asia,
Karuizawa (ISAK), Japan

Leveraging Technology to Reduce the Strain of Overcrowding
on Urban Hospitals in China

Honorable Mention | 荣誉提名

Zitong Cui
Beijing World Youth Academy,
People's Republic of China

Do eSports Deserve to be Called Sports?

Yu Du
Raffles Junior College,
Republic of Singapore

Mandatory Masks: Liberty, Democracy, and the Law

Jessie Li & Kim Hyein
Shanghai High School International Division,
People's Republic of China

Facial Recognition Technology in Law Enforcement:
Balancing the Pros and Cons

Yijie Liu, Mengchan Sun, & Huaize Guo
The Experimental High School Attached to Beijing Normal University,
People's Republic of China

The Chinese Education System and Class Formation:
The Perspective of International Departments of Chinese High Schools

Xiaowei Zhang & Zhang Hua
The Experimental High School Attached to Beijing Normal University,
People's Republic of China

Chinese Fan Culture: Abnormalities and Their Causes

College Group | 大学组

Golden Award | 金奖

Zuo Yang
University of Cambridge,
The United Kingdom

Global Challenges to Chinese Green Finance

Silver Awards | 银奖

Tianyue Zhang
Sun Yat-sen University,
People's Republic of China

Qinrui He
New York University Shanghai,
People's Republic of China

Women-Only Carriages on Trains: Issues and Solutions

Qiao Zheng & Jieling Mou
Southwest University of Political Science & Law,
People's Republic of China

Sign Language Interpreters:
The Protection of Language Rights in Litigation Involving the Deaf

Honorable Mention | 荣誉提名

Hanyu Cheng
Chongqing University,
People's Republic of China

The Fall of Maglev: Why It Failed to Revolutionize Railway Transportation

Jiaxi Hong
Emory University,
United States of America

Huanzhe Yuan
Chinese University of Hong Kong, Shenzhen,
People's Republic of China

Sijia Cheng
Chinese University of Hong Kong, Shenzhen,
People's Republic of China

The Food Delivery Industry: Is It In a Deadlock?

Yutong Liang & Yihao Li
Tsinghua University,
People's Republic of China

"Hardcore" Slogans: A Strong Aid in China's Battle Against COVID-19

Qianchen Zhou
South China University of Technology,
People's Republic of China

Gender Equality in the Age of COVID-19:
The Redistribution of Unpaid Labor Between Men and Women

The Viability of an "Opt-Out" Organ Donation System in China*

Yizhou Hang & Xiaoxiao Ma
Hwa Chong Institution,
Republic of Singapore

Yizhou Hang

Xiaoxiao Ma

Organ transplants are indispensable to patients suffering from terminal organ failure. The procedures save lives from irreversible diseases and dramatically improve patients' quality of life.[1] While the number of organ transplants has been increasing, there remains a great need for organ donors. In China, every year, only approximately 10,000 people out of the 1.5 million in need of transplants are able to successfully get a new organ.[2] As a result, the Chinese medical community must seek out alternative options to alleviate this dire organ shortage. This essay discusses the possibility and appropriateness of changing organ donation from the current "opt-in" system to an "opt-out" system so as to increase the rate of organ donation in China.

Effectiveness of the Opt-Out System

The opt-out system has been adopted in more than 25 countries such as Austria, Belgium, France, and Singapore, where organ donation is considered the default option for every individual unless the individual explicitly opts out of making such a donation. This policy leverages the behavioral economics concept of "status quo bias" to increase the pool of potential donors. Proposed by researchers William Samuelson and Richard Zeckhauser in 1988, the "status quo bias" concept explains how individuals tend to stick with default options, even when making a change would better align with their personal beliefs.[3] It demonstrates that people's preferences are often constructed in light of their surroundings, which can be heavily influenced by minor variations. Given this cognitive bias, behavioral economists like Richard Thaler argue that public policy should be used to influence people to act in ways that advance the public good without harming individual interests.[4]

The opt-out system is, therefore, constructed with regard to behavioral economics principles. It transfers the burden of communicating and registering a preference to those who object to donating, instead of those who support it. Hence, it effectively enlarges the donor pool by bridging the gap between the number of people willing to donate their organs and the list of official registered donors. For example, in a 1993 poll, 70% of U.S. respondents said they wished to donate their organs; however, the proportion that were registered to do so was significantly lower due to inertia and procrastination.[5] Studies show that the opt-out system has generally increased the rate of organ donation. These studies include comparisons of data between opt-out and opt-in countries and those conducted before and after the adoption of an opt-out system. For example, more than 90% of the population is listed as organ donors in opt-out countries, compared with a meager 15% in opt-in countries.[6] The actual rate of organ transplantation in countries with opt-out laws is also 25 to 30% higher than that in countries requiring explicit consent.[7] The drastic impact of the adoption of an opt-out system is best illustrated by the case of Austria, where donors per million population increased more than fivefold four years after the adoption of such a system.[8]

"In opt-out countries, it is hard to distinguish people who made a deliberate and genuine choice to become organ donors from those who have not opted out simply due to inertia, procrastination, or failure to consider their preference."

Controversies Over Presumed Consent

To some, however, the opt-out system is considered to be ethically questionable. In opt-out countries, it is hard to distinguish people who made a deliberate and genuine choice to become organ donors from those who have not opted out simply due to inertia, procrastination, or failure to consider their preference. Critics believe that consent is an active process that cannot be presumed merely because of a lack of explicit objection.[9] Therefore, it is unacceptable to take over a person's bodily organs after death simply because the individual failed to opt out.

Nevertheless, proponents of the opt-out system argue that patient autonomy would not be lost from this policy.[10] Individuals retain their right to object and can exercise this right to opt out of the organ donation scheme anytime during their lifetimes. In practice, those who strongly oppose organ donation are likely to exercise this right in a timely fashion. As long as the opt-out system is made clear to the

public, shifting the burden of the administrative process to objectors without undermining their rights to object is a necessary and morally justifiable step to save numerous lives that would otherwise be lost.

Conflicts from Confucian Ethics

Another concern over the implementation of the opt-out organ donation system in China comes from the traditional objections from an ethical standpoint influenced by Confucianism. Critics have inferred that Confucianism does not support organ donation, a form of damage to the body, as the famous saying on filial piety goes: "One's body, skin, and even hair are all gifts from one's parents, so that to be a filial person one should not injure any of them."[11] Accordingly, the opt-out system, conceptually, may not be as socially popular in Chinese society as compared to western countries.

"As long as the opt-out system is made clear to the public, shifting the burden of the administrative process to objectors without undermining their rights to object is a necessary and morally justifiable step to save numerous lives that would otherwise be lost."

However, the above interpretation of Confucian ethics is incorrect. Scholars have clarified that the notion of "injury" to the body in the above saying actually means "injury via criminal penalty" instead of general injury.[12] The idea is that a filial person should not perform criminal conduct which leads to corporal punishment; therefore, organ donation in no way violates filial piety. In actuality, basic Confucian virtues and ethics align with organ donation principles, as organ donation can be seen as a form of taking care of others. Confucius in the *Analects* even advocates that "the man of *ren* is one who, desiring to sustain himself, sustains others".[13]

A "Soft" Opt-Out System and a More Integrated Approach

After considering various drawbacks of the opt-out system, the authors believe that the system could still be appropriately implemented to replace the opt-in system currently utilized in China, subject to nuanced improvements. Instead of a "hard" opt-out system, in which family members cannot object to the use of a loved one's organs after the loved one's death, a "soft" opt-out system that allows such an objection should be adopted.

A "soft" opt-out system is more ethical because in the case where no known objections were made by the individual before death, family members are most likely, compared to anyone else, to know the individual's wishes. This system would also correspond to Chinese Confucian family-based ethics, with family members being engaged in the process of consenting to organ donation.[14]

As an extra safeguard to a "soft" opt-out system, people could also be asked to update at regular intervals their preference with respect to organ donation. Such a system would considerably increase the pool of donors who are clearly committed to donating their organs and reduce the ethical dilemma that doctors may face.

Evaluation and Policy Recommendations in the Case of China

In conclusion, the opt-out system is a powerful yet controversial policy to increase the rate of organ donation. After careful consideration, the authors of this essay support a "soft" opt-out system in China, as this will enable the achievement of a socially good outcome without taking away the freedom of choice of people and their families. A "soft" opt-out system retains the utilitarian benefit of general opt-out policies while considering the ethical implications of presumed consent. As the British Medical Association has stated, the shift from opt-in to a "soft" opt-out system is "not only feasible […] but is also the right and morally appropriate thing to do."[15] Cultural differences may persist between the East and West, but China's adoption of an adapted version of the opt-out system like that used in some Western countries could be an appropriate policy to address the issue of organ shortages in the country.

A "soft" opt-out system itself is certainly not a one-size-fits-all panacea to the problem of organ shortages, however, and other complementary measures need to be taken. Organ donation systems could be improved in terms of increasing their transparency and enforcement. It would also be beneficial to develop a culture that respects organ donors. Additionally, China could combine with the opt-out system its existing priority rule, in which people listed as organ donors are given priority if they later need an organ themselves. Considering the successful Singapore example, where the number of registered donors extends to 97% of the resident population,[16] the dual incentives of avoiding the cost of opting out and receiving priority on waiting lists could be an ideal two-pronged approach for future organ donation policies in China. ■

* This essay was written by Yizhou Hang & Xiaoxiao Ma, the authors of the original piece recognized for a Golden Award (High School) in the Fourth Stanford CGCP Student Writing Contest (Fall 2020), with editorial support provided by the China Guiding Cases Project (the "CGCP"). The focus of the editing process is to produce some necessary editing so as to improve the organization and delivery of the content, while keeping the authors' main ideas and/or arguments. The information and views set out in this essay are the responsibility of the authors and do not necessarily reflect the work or views of the CGCP.

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Keyue Li *Ziyi Ma*

From Qingming to *Coco*: The Case for Promoting Life and Death Education to Chinese Minors*

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Introduction: Life and Death Education in China

The popularity in China of the Disney movie *Coco* (2017), which follows a 12-year-old, music-loving boy's unforgettable journey to the Land of the Dead, has raised heated discussions about whether Chinese minors should be taught about life and death and, if the answer is in the affirmative, how to teach them. Life and death education can be traced back to the modern death movement, which began with American psychologist Herman Feifel's 1959 book, *The Meaning of Death*.[1] Noting the taboo on discussions of death and dying, Mr. Feifel, as well as other scholars who later joined the movement, challenged individuals to acknowledge their personal mortality, as they suggested that doing so is essential to living a meaningful life. Their suggestions have been well received in the United States and European countries, where life and death education has gained momentum. A notable exception to this trend is China, whose large population generally shows a deep-rooted cultural resistance against the discussion of death primarily due to inadequate understanding of the subject.

In this essay, the authors first discuss, through key cross-cultural comparisons, the roots of Chinese people's avoidance of discussing death and the common arguments against offering life and death education to minors. The authors then analyze three reasons why, despite such resistance, teaching Chinese minors about life and death is important. On this basis, the authors conclude the essay with a call for the enactment of related legislation and the establishment of a mechanism to allow for the cooperation of schools, family, and society to improve education about life and death for future generations in China.

The Cultural Roots of Chinese Attitudes Towards Death

While Mexicans celebrate Día de los Muertos (the Day of the Dead) with carnivals, prayers, and music, Chinese people sweep tombs and burn ghost money to grieve for the dead under the gloomy atmosphere of the Qingming Festival. Guided by Confucianism, which, for thousands of years, has been the most influential belief system in China,[2] many Chinese people have followed the mainstream Confucian principle of "If we don't understand life, how can we understand death?" (*未知生，焉知死; weizhisheng yanzhisi*)[3] to focus on one's life instead of reflecting on the meaning of death.[4] As a result, "death" has become a taboo in China, in stark contrast with the Mexican approach of treating death as a reflection of and the ultimate culmination of life.[5] In addition, China embraces collectivism, which emphasizes one's role in society, while western countries embrace individualism, which stresses one's *personal* experiences on earth.[6] All of these factors lead to a lack of protocols in China for teaching minors how to positively view life and death issues and, by extension, how to protect themselves physically and psychologically.

> ***"Death education is not submerging people in darkness; it is teaching us about our finite nature, which reminds us of the meaning of life."***

Common Arguments Against Life and Death Education for Minors

The Chinese cultural resistance against discussing death has led to many objections to the promotion of life and death education targeting Chinese minors. For example, an assignment by a Chinese middle school teacher asking her students to write their bucket lists and epitaphs sparked a great deal of criticism and complaints from parents, who claimed that the teacher was cursing their children.[7] Opponents of life and death education hold the view that the subject is too difficult for students to grasp. They also state that the subject induces anxiety and fear towards death because it exposes minors to morbid themes that arouse difficult and sometimes concerning emotions from which adults should seek to protect them.[8]

Three Reasons for Teaching Chinese Minors About Life and Death

Despite the controversy surrounding life and death education, this type of education should be promoted to Chinese minors for three main reasons.

First, the mental health of minors closely correlates to how well they comprehend tragedies, and death education helps minors resolve their own feelings about the fate that all people must eventually face[9] and, therefore, leads to more rational thinking. Knowledge gives people, regardless of their age, a measure of control while ignorance produces more panic and anxiety. Even more, there seems to be some correlation between death anxiety and somatic symptoms.[10] Feeling like one has control is useful even in the extreme case of people facing imminent death. For example, research has found that after educating 92 cancer patients about life and death, their fear of death dropped from 73.91% to 9.78%, while their resistance towards death decreased from 67.39% to 11.96%.[11]

> ***"Guided by Confucianism, which, for thousands of years, has been the most influential belief system in China, many Chinese people have followed the mainstream Confucian principle of 'If we don't understand life, how can we understand death?' (*未知生，焉知死; **weizhisheng yanzhisi*****) to focus on one's life instead of reflecting on the meaning of death."***

Second, through life and death education, young people receive well-structured instructions that can help them better understand the meaning of life and, accordingly, value their lives more. In this era of developed technology and material abundance, the rise of consumerism, together with the utilitarianism that follows, has become popular and has, to some degree, caused a shallow view of life. This problem is also prevalent among young people, as demonstrated by the large numbers of increasingly younger children who commit suicide or self-harm.[12] Facing these challenges, adults generally try to protect minors by avoiding any discussion of life and death, not knowing that a better way to help minors withstand these challenges is to counter them directly.

Third, a warm and colorful delivery of life and death education cultivates a positive attitude towards life among minors. In an attempt to change the general impression that such education must be gloomy and abstruse, Chinese scholar Feng Jianjun has suggested weaving lessons about life and death into other courses and combining related lessons with other activities in an interdisciplinary approach focused on real-life relevance.[13] For example, in Japan, life and death education is integrated into various curricula like psychology, physical education, and biology. Also, in the United States, based on Jean-Jacques Rousseau and John Dewey's suggestion to combine education with life experience,[14] the subject is taught in an open and pluralistic way, with such activities as raising a virtual child, plants, or animals, role play, discussing related books and films, and visiting hospitals, orphanages, and prisons. In addition, films like *Coco* and picture books like the beloved 1982 classic from *New York Times* bestselling author Leo Buscaglia *The Fall of Freddie The Leaf (A Story of Life for All Ages)* are perfect examples illustrating the warmth that can be at the core of life and death education and the colorful ways it can be presented to minors.

Concluding Remarks: The Future of Life and Death Education in China

The lack of life and death education for Chinese minors is a problem rooted in Chinese culture, which has long avoided discussions about death and the limits of one's natural life. In Chinese society, there is strong resistance to the promotion of life and death education, with opponents claiming that such education will increase people's anxiety about death and that the subject is too difficult for minors to grasp.[15] However, these arguments are weak because they are inconsistent with the facts, ignore the relationship between many social problems and the lack of life and death education, and reflect a conventional stereotyping of life and death education. As the Indian philosopher Rabindranath Tagore said, "Death is not extinguishing the light; it is only putting out the lamp because the dawn has come."[16] Death education is not submerging people in darkness; it is teaching us about our finite nature, which reminds us of the meaning of life.

In recent years, Chinese officials and scholars have begun to realize the significance of promoting life and death education to minors. The *Outline of the National Long-Term Education Reform and Development Plan (2010–2020)* issued by the Chinese government lists life and death education as a strategic theme.[17] Despite this milestone and the fact that this plan ended in 2020, there remains no framework that clearly defines the objectives, contents, and delivery of life and death education, nor have the related duties of the government, schools, media, enterprises, and communities been clarified. China must enact laws and regulations to define and guide life and death education, as well as establish a mechanism to allow for cooperation among schools, family, and society. This will allow the country to fully realize the value of life and death education and impact future generations of Chinese youth in a positive way. ■

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Global Challenges to Chinese Green Finance*

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Introduction: China's Green Initiatives

Pungent smog mixed with coal ash released from steel factories, sandstorms, and polluted, smelly groundwater: this is what comes to mind when one thinks of China whose economy grew at an impressive rate in the 2000s. In the late 2010s, in an attempt to tackle the dire environmental problems facing China, the country's central government and central bank, the People's Bank of China, spent roughly RMB 3–4 trillion per year on pollution control schemes in five pilot zones in Guangdong, Guizhou, Jiangxi, Zhejiang, and Xinjiang.[1] This expensive mission was later transformed into a hugely profitable investment when the People's Bank of China unveiled its *Guidelines for Establishing the Green Financial System*[2] and the Chinese government established a G20 Green Finance Study Group under its presidency of the G20 in 2016.[3]

These efforts cover green bonds, green credits, green development funds, and green insurance. They, together with China's Belt and Road Initiative, signal the country's commitment to transforming its environmental debt into an asset by financing green projects both domestically and abroad. Despite their promising and innovative nature, China's green initiatives are facing challenges in their implementation overseas, revealing the need for more negotiation and harmonization with international standards.

How China's Green Finance Works

First and foremost, it is imperative to understand how China transforms environmentally friendly but expensive projects into profitable assets through green finance. Due to China's state-led financial system, state-owned banks like the People's Bank of China are the most important players in green financing, both as issuers and holders of green instruments. Both green loans and green bonds are approaches commonly used by these banks. With respect to the latter, these banks first give out green credits to burgeoning green enterprises, including solar or wind energy companies, low-carbon transportation solutions such as subway projects, and electric car manufacturers. Then, these banks refinance the green credits through green bonds for financial investment.

These approaches have produced quite impressive results. For example, in 2018, green loans exceeded RMB 8.23 trillion, with RMB 3.83 trillion going towards green public transportation and RMB 2.07 trillion supporting renewable energy projects.[4] In the same year, Chinese local governments and select corporations issued at least USD 5.9 billion worth of green insurance in 2018 to fund clean and low-carbon industries located mostly in pilot green finance zones.[5] China issued RMB 282.6 billion worth of green bonds in 2018, making it the second largest market for green bonds in the world after the United States.[6] Twenty-eight percent of these bonds were aimed at financing solar, wind, and other clean energy projects, while 33% targeted low-carbon transportation solutions.[7]

> ***"Around USD 24.2 billion in green bonds issued in China in 2019 did not meet global standards and, as a result, could not be purchased by foreign investors."***

China's Domestic Green Finance Market & the Lack of International Standards

Despite the above-mentioned results, there remains much room for improvement for Chinese green finance, especially in the global market. For example, the International Capital Market Association and some other global organizations have set up the Green Bond Principles as international standards,[8] but, in 2018, 26% of China's green bonds were channeled to projects that did not meet these standards.[9] This may be attributed to China's being a latecomer to green finance and having a unique path towards development, which has led China to have different priorities and standards, compared with those in many developed countries. An example illustrates this difference. China's urgent need to make "dirty" projects "cleaner" motivates it to invest heavily in more efficient coal-fired power plants. While this is a step forward, this solution—which essentially involves the replacement of smaller, less efficient coal-fired power plants with larger, more efficient ones and the adoption of new technologies to produce cleaner coal through coal washing and carbon capture—is deemed by some economists to be

inconsistent with stricter climate mitigation goals, because such coal-fired power plants still emit large amounts of carbon dioxide and pollutants.[10] In light of this difference, China's approach, though an improvement, will never meet the stricter standards for green finance set by developed countries and international organizations.

As a result of this divergence between China's green finance activities and international standards, the prosperous financial market of green bonds and green loans in China has largely remained exclusive to domestic investors and institutions, whilst foreign fund managers who are interested in investing in China's blooming green financial market are not allowed to invest in such financial products that fail to align with international standards because these greens bonds are considered "uninvestable".[11] The amount involved is tremendous. Around USD 24.2 billion in green bonds issued in China in 2019 did not meet global standards and, as a result, could not be purchased by foreign investors.[12] Therefore, as China endeavors to develop its green financial market and globalize it, experts have urged the country to revise its conception of green finance and harmonize its requirements with international standards.[13]

China's Overseas Green Investment & Different Standards Used in Host Countries

Another area for improvement with respect to China's green finance is overseas investment, especially infrastructure projects in developing countries in Asia and Africa under the Belt and Road Initiative. Chinese officials and entrepreneurs often encounter standards for green finance in these countries that are different from Chinese standards. For example, high-speed passenger rail is not categorized as green in China's National Development and Reform Commission 2019 Green Industry Guiding Catalogue but is supported by sustainable financing in many countries.[14] In contrast, some overseas projects receiving Chinese financial support have raised environmental concerns, such as coal-fired power plants in Turkey, a gold-processing plant in Kyrgyzstan, the Karakoram Highway in Pakistan, and palm oil plantations in Cameroon.[15]

Consequently, it is not surprising that many infrastructure projects under the Belt and Road Initiative have received criticism from environmentalists in host countries. They are concerned that these projects may lead to soil erosion, deforestation, and loss of biodiversity.[16] In fact, many African communities have a strong commitment to renewable energy and favor development projects using green energy.[17] Objectively speaking, some of these projects should be replaced by more environmentally friendly solutions that make use of renewable energy, such as solar energy, because these solutions yield the maximum benefit for local communities in the long run[18] and renewable energy is likely to become cheaper, more popular, and sustainable.[19] For example, in April 2020, 260 environmental organizations around the world, including China's oldest environmental NGO, Friends of Nature, urged China not to bail out 60 failing China-backed overseas projects[20] because of environmental, social, and climate risks of those projects.[21]

> *"Aside from pressure from environmentalists, the divergence between China's standards for green finance and local standards could also lead to serious legal risks."*

Aside from pressure from environmentalists, the divergence between China's standards for green finance and local standards could also lead to serious legal risks. For example, in June 2019, a court in Kenya ruled to stop the construction of the country's first coal-fired power station on the ecologically sensitive island of Lamu due to environmental concerns. This led to the cancellation of a USD 2 billion project which was largely financed by the Industrial and Commercial Bank of China under the Belt and Road Initiative.[22]

Concluding Remarks: Success of China's Green Finance Lies in Compliance with International Standards

Green finance is certainly one of the most promising areas of the Chinese economy. Currently, it is playing a central role in transforming the country's budgetary burden of upgrading and reconfiguring polluting industries and supporting environmentally friendly projects into a financial asset. However, the divergence between China's own aims for and conception of green energy and the standards set by international organizations and other countries has prohibited China's green financial market from realizing its full potential[23] and has limited the success of its green investments overseas under the aegis of the Belt and Road Initiative. To ensure the success of China's Green Finance, the country must maximize its efforts to harmonize its domestic laws and regulations with international standards. ■

* This essay was written by Zuo Yang, the author of the original piece recognized for a Golden Award (College) in the Fourth Stanford CGCP Student Writing Contest (Fall 2020), with editorial support provided by the China Guiding Cases Project (the "CGCP"). The focus of the editing process is to produce some necessary editing so as to improve the organization and delivery of the content, while keeping the author's main ideas and/or arguments. The information and views set out in this essay are the responsibility of the author and do not necessarily reflect the work or views of the CGCP.

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陈训成
CHEN Xuncheng

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《紫气东来》| *A Purple Aura from the East*
（吉祥的征兆）| (a propitious omen)

陈训成

陈训成是中国广东省陶瓷艺术大师。自1994年毕业于景德镇陶瓷大学后，他展开了精彩的艺术旅程。他荣膺由中国企业领袖与媒体领袖年会颁发的“影响中国2012年度媒体关注的中青年陶艺家”荣誉称号。他的作品曾在亚洲卫视、广东卫视、南方卫视、东莞电视台、汕尾电视台、《环球时报》、《中国收藏》、《中国陶瓷》、《新周刊》、《中国当代艺术》、《艺术前沿》、《粤港直通》、南航《云中往来》、《广州文艺》、《南方都市报》、《广州日报》、《汕头特区报》、《汕尾日报》、《汕尾文艺》、《东岸》、《艺术市场》等媒体、刊物发表。

此外，陈训成的作品已被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆、广州美术学院大学城美术馆、广东美术馆·深联美术馆、岭南美术馆、深圳罗湖美术馆，以及西班牙、法国、日本、香港、国内等私人机构收藏。

陈训成亦积极推动中国艺术发展，其要职包括：广东省美术家协会艺术委员会陶艺委员会副主任、粤港澳大湾区美术家联盟理事、广东省陶瓷艺术和设计专家库成员、广东省中国画学会理事、广州画院特聘画家、“广州国家青苗画家培育计划”课题组专家、广州大学美术与设计学院硕士研究生导师、广东技术师范大学产业教授、景德镇学院客座教授。

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. After his graduation from Jingdezhen Ceramic Institute in 1994, he began his wonderful journey of art. He was awarded the honorary title of “Young and Middle-Aged Ceramic Artists Influencing China's Media in 2012” by the Chinese Business and Media Leaders Annual Conference. His works have been featured in various media and publications, including Star TV, Guangdong Radio and Television, TVS Television, Dongguan Radio and Television, Shanwei Radio and Television, *Global Times*, *China Collections*, *China Ceramics*, *New Weekly*, *Contemporary Chinese Art*, *Art Avant Garde*, *Let's Go*, China Southern Airlines's *Travel in the Air*, *Literature & Art of Guangzhou*, *Southern Metropolis Daily*, *Guangzhou Daily*, *Shantou Special Economic Zone Newspaper*, *Shanwei News*, *Literature and Art of Shanwei*, *East Coast Media*, and *Art Market*.

Furthermore, Mr. Chen's works have been collected by the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, the Jiangxi Arts and Crafts Museum, the University Town Art Museum at the Guangzhou Academy of Fine Arts, the Guangdong Museum of Art—Shenlian Art Museum, the Lingnan Museum of Fine Art, and the Shenzhen Luohu Art Museum, as well as by many private organizations in Spain, France, Japan, Hong Kong, and mainland China.

Mr. Chen also actively promotes the development of Chinese art. His major leadership roles include serving as a deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, a council member of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Alliance, a member of the Guangdong Ceramic Art and Design Expert Pool, a council member of the Guangdong Chinese Painting Institute, a distinguished painter of the Guangzhou Painting Academy, an expert for the “National Cultivation Program for Young Painters in Guangzhou” course series, a graduate program advisor for the School of Fine Arts & Design at Guangzhou University, an industry professor at the Guangdong Polytechnic Normal University, and a visiting professor at the Jingdezhen Institute.

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