

# **The Right to Education Proceedings before the Chinese Courts: To What Extent the Law in Paper has been Realised in Practice?**

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## **1. Introduction**

Among the economic, social and cultural rights, the right to education (hereinafter referred to as ‘RTE’) is one of the few economic, social and cultural rights which simultaneously show the features of the civil and political rights. Although the RTE belongs to the broad category of the economic, social and cultural rights, it has the feature of justiciability before the judicial bodies. In this sense, the RTE is an important and well-recognised human right in the world. Furthermore, because of this feature, the judicial bodies of a country can play a significant role in the vindication of this human right.

The purpose of this survey is to present a picture of the criminal, civil and administrative proceedings in relation to the RTE before the courts of the People’s Republic of China (hereinafter referred to as ‘PRC’),<sup>1</sup> to examine to what extent the law in relation to the RTE in paper has been realised in practice, and to explore those reasons for the picture of the RTE proceedings before the Chinese courts being that. For this purpose, besides the introduction in Part 1, this survey consists of five parts. Part 2 will provide the Chinese legislations in relation to the RTE, both at the level of the Constitution and the statute laws. Part 3 will present the picture of the signature, ratification, access and reservations of the international human rights conventions in relation to the RTE by the Chinese government, and address the issue of applicability of those conventions before the Chinese courts. Part 4 will be the most important part of this survey. It will make a survey of the judicial practice of the Chinese courts by selecting some important cases in relation to the RTE from the perspectives of criminal, civil and administrative proceedings, respectively. In Part 5, as a concluding part, I will make some comments on the judicial practice both positively and negatively, and explore the causes for the negative side of the judicial practice in the vindication of the RTE.

## **2. The Chinese Legislations in relation to the RTE**

Education is recognised to be a right as well as an obligation in the current Chinese Constitution.<sup>2</sup> Article 46 of the Constitution provides: “Citizens of the People’s

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<sup>1</sup> No constitutional review proceedings has been established and operated in today’s China. Therefore no constitutional review proceedings on the RTE will be reported in this survey.

<sup>2</sup> Since the foundation of the PRC in 1949, four Constitutions had been adopted in 1954, 1975, 1978, and 1982 respectively. The current Chinese Constitution was adopted at the 5th Session of the 5th NPC on 4 December 1982,

Republic of China have the duty as well as the right to receive education. The State promotes the all-round development of children and young people, morally, intellectually and physically.”<sup>3</sup> Moreover, as a cardinal provision in Chapter II on the fundamental rights and obligations of the Chinese citizens, Article 33 of the Constitution declares that all citizens are equal before the law. In 2004, a new amendment was introduced to Article 33 of the Constitution, which reads that “the State shall respect and guarantee human rights”.

These provisions in the Constitution are supposed to be the constitutional basis for the RTE provisions in many statute laws on various forms and categories of education and the protection of special groups of persons in China.

### *2.1. The RTE Provisions in Statute Laws on Education*

On 18 March 1995, the 3rd Session of the 8th National People’s Congress (hereinafter referred to as ‘NPC’) adopted the Act on Education. Article 9 provides the equal right and obligation to receive education, according to which, all citizens, regardless of ethnic group, race, sex, occupation, property status or religious belief, shall enjoy equal opportunities for education according to law.<sup>4</sup> Article 36 further provides that “educatees shall according to law enjoy equal rights in enrolment, admission to schools of a higher level, employment, *etc.*”, and that “schools and administrative departments concerned shall, in accordance with relevant regulations of the State, ensure that females enjoy equal rights with males in enrolment, admission to schools of a higher level, employment, conferment of academic degrees, dispatch for study abroad, *etc.*”. Article 42 elaborated the content of the RTE in this Act, providing that

Educatees shall enjoy the following rights: (1) to participate in various activities arranged according to educational or teaching programs and use educational or teaching facilities, equipment and books and materials; (2) to receive scholarships, student loans or subsidies in accordance with the relevant regulations of the State; (3) to receive a fair evaluation of his or her academic performance and moral character, and receive an education certificate or academic degree certificate, as appropriate, upon completion of the required programs; (4) to lodge a complaint with the competent department if he or she refuses to accept punishment imposed by the school, and to lodge a complaint or bring a lawsuit, in accordance with law, against an infringement upon his or her right of the person or property or other lawful rights and interests by the school authorities or teachers; and (5) other rights as stipulated by law or regulations.

On 12 April 1986, the 4th Session of the 6th NPC adopted the Act on Compulsory Education. The Act was significantly revised at the 22nd Session of the Standing Committee of the 10th NPC on 29 April 2006, which can be shown from the fact that the number of articles in the revised Act substantially increased. The 1986 Act

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and has been amended four times since then. The most recent amendment to the Constitution was adopted at the 2nd Session of the 10th NPC on 14 March 2004, when the obligation of the State to respect and guarantee human rights was provided.

<sup>3</sup> <[www.npc.gov.cn/englishnpc/Law/2008-01/24/content\\_1381976.htm](http://www.npc.gov.cn/englishnpc/Law/2008-01/24/content_1381976.htm)>.

<sup>4</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383710.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383710.htm)>.

contained only 18 articles, while the revised Act of 2006 contains 63 articles. Article 2 of the revised Act provides the number of years of the compulsory education, *i.e.* nine years. It further provides the definition of compulsory education, which means “education which is uniformly provided by the State and which all the school-age children and adolescents must receive, and constitutes a public welfare undertaking which must be guaranteed by the State”. No tuition or miscellaneous fees shall be charged for provision of compulsory education, and the State shall establish a mechanism for guaranteeing funds for compulsory education, to ensure implementation of the system of compulsory education. Article 4 provides the principle of compulsion and the principle of equality to receive compulsory education. It provides that all school-age children and adolescents of the Chinese nationality shall, in accordance with law, enjoy the equal right, and fulfil the obligation to receive compulsory education, regardless of sex, ethnic status or race, family financial conditions, religious belief, *etc.* Article 5 sets out the obligation of the governments at all levels, parents and other statutory guardians, schools, the society and individuals to ensure the right of school-age children and adolescents to compulsory education.<sup>5</sup>

On 29 August 1998 the 4th Session of the Standing Committee of the 9th NPC adopted the Act on Higher Education. Article 9(1) provides that Chinese citizens shall, in accordance with law, enjoy the right to receive higher education. Article 53 provides that the lawful rights and interests of students of higher education institutions shall be protected by law.<sup>6</sup>

On 15 May 1996 the 19th Session of the Standing Committee of the 8th NPC adopted the Act on Vocational Education. Article 5 provides that the Chinese citizens shall have the right to receive vocational education according to law.<sup>7</sup>

## *2.2. The RTE Provisions in Statute Laws on the Protection of Special Groups of Persons*

On 4 September 1991, the 21st Session of the Standing Committee of the 7th NPC adopted the Act on the Protection of the Minors. This Act was revised at the 25th Session of the Standing Committee of the 10th NPC on 29 December 2006. The right to education of minors was for the first time incorporated into the general principles of the revised Act. Article 3(2) of the revised Act provides that “the minors have the right to be educated, and the State, society, schools and families shall respect and guarantee the right to be educated of the minors”. Article 13 reiterates the obligation of parents and other guardians to respect the RTE of the minors. It provides that “the parents or other guardians of minors shall respect the minors’ right to receive education, must ensure to the minors of school age the compulsory education as provided by relevant regulations, and shall not make those minors receiving compulsory education at school discontinue their schooling”. Article 18 supplements the obligation of schools to respect the RTE of the minors. It does not only require schools to respect the minor students’ RTE, not to arbitrarily expel any minor students

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<sup>5</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383936.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383936.htm)>.

<sup>6</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383570.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383570.htm)>.

<sup>7</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383614.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383614.htm)>.

from schools, but also to take care and cherish students, patiently educate, help and indiscriminate against those students with moral flaws and incapability of studying. Article 28 of the revised Act is also a new provision, which provides that “the people’s governments at various levels shall guarantee the right to receive education of the minors, and take measures to ensure those poor, disabled and migrant minors to receive compulsory education”. Article 57 of the revised Act further clarifies the obligation of the judicial organs to respect the RTE of minors. It provides that “those minors in detention and the service of sentence shall receive compulsory education, in the case that they have not yet accomplished compulsory education”.<sup>8</sup>

On 3 April 1992, the 5th Session of the 7th NPC adopted the Act on the Protection of the Rights and Interests of Women. The Act was revised at the 17th Session of the Standing Committee of the 10th NPC on 28 August 2005. Chapter III of the revised Act concerns the rights and interests in relation to culture and education. Among others, Article 15 in Chapter III establishes a fundamental principle of women’s equal right with respect to culture and education with men. Article 15 further elaborates that “schools and departments concerned shall, by implementing the relevant regulations of the State, guarantee that women enjoy equal rights with men in such aspects as starting school, entering a higher school, job assignment upon graduation, conferment of academic degrees and dispatch for study abroad”. Article 16 was revised in 2005 to introduce a second paragraph, specifying that “with the exception of special majors, no school is allowed to refuse female student enrolment or raise the standards of enrolment based on sex”. Article 18 reiterated the obligations of parents and other guardians, schools, society and the governments to respect the right to compulsory education of the female minors, providing that “parents or other guardians must perform their duty of ensuring that female school-age children or adolescents receive the compulsory education”, and that “where parents or other guardians fail to send female school-age children or adolescents to school, the local people’s governments shall admonish and criticize them and, by adopting effective measures, order them to send their female school-age children or adolescents to school, with the exception of those who, on account of illness or other special circumstances, are allowed by the local people’s governments not to go to school”. Article 18 was also revised in 2005 in order to introduce a third paragraph, setting out the obligation of fulfilment with respect to women’s right to compulsory education. The paragraph provides that “the governments, society and schools shall take effective measures to solve the actual difficulties of female school-age children or adolescents in schooling and create conditions to ensure that poor, the disabled and migrant female school-age children or adolescents finish their compulsory education”.<sup>9</sup> This paragraph was subsequently followed by the amendment to Article 28 of the above-mentioned Act on the Protection of the Minors in 2006.

On 28 December 1990, the 17th Session of the Standing Committee of the 7th NPC adopted the Act on the Protection of Persons with Disabilities. The Act was revised at the 2nd Session of the Standing Committee of the 11th NPC on 24 April

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<sup>8</sup> Unofficial translation by the author.

<sup>9</sup> <[www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf](http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf)>.

2008. Chapter III of the Act concerns the right to education of the persons with disabilities. The revised Act supplements and develops the duties of the governments at various levels in the protection of the RTE of the persons with disabilities. Article 21 of the revised Act reiterates the obligation of the State to guarantee the right of persons with disabilities to education. It does not only reiterate the obligation of the governments at various levels to take the education of persons with disabilities as a component of the state educational programme, include it into their overall planning, and strengthen leadership and guidance, but also imposes the obligation of the governments at various levels “to create conditions for persons with disabilities to receive education”. Furthermore, Article 21 refreshes and more accurately describes the nature of the obligations of the government, the society and the school with respect to the right to compulsory education of the persons with disabilities. It provides that they “shall take effective measures to address difficulties faced by children and juveniles with disabilities in schooling, and help them complete compulsory education”. It further concretises the content of the ‘aids’ of the governments by providing that ‘free textbooks’ shall be provided to students with disabilities and those from poor families with disabled parents, and that ‘boarding allowances and other aids’ shall be offered to them when they are receiving compulsory education. The revised Act restates the guidelines of the education of the persons with disabilities. Article 22 provides that “education for persons with disabilities shall be developed in terms of both the expansion of access and upgrading of the levels, with more emphasis on the former. Priority shall be given to guaranteeing compulsory education and developing vocational and technical education while efforts shall be made to carry out preschool education and gradually develop education at and above the senior high school level.” The revised Act makes sense because it clarifies the levels of governments which assume the obligation to deploy educational institutions according to the number of persons with disabilities, their allocation, and the type of disabilities, and to encourage private donation and participation in the running of schools. Article 24 provides that such obligation lies on the shoulder of the governments above the county level. Finally, the revised Act continues to state that “ordinary educational institutions shall be open to students with disabilities who are able to receive ordinary education, and offer them facilitation and help”.<sup>10</sup>

On 31 October 2009, the 11th Session of the Standing Committee of the 11th NPC adopted the Act on Diplomatic Personnel Stationed Abroad. The RTE of the minors of the Chinese diplomatic personnel stationed abroad is specifically guaranteed by this Act. Article 45 of the Act provides that “the State shall take various measures to guarantee the right to legally receive education of the minors of the diplomatic personnel stationed abroad”.<sup>11</sup>

### **3. Applicability of Human Rights Conventions in relation to the RTE before the Chinese Courts**

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<sup>10</sup> <[www.cdpc.org.cn/english/lawsdoc/content/2008-04/10/content\\_25056081.htm](http://www.cdpc.org.cn/english/lawsdoc/content/2008-04/10/content_25056081.htm)>.

<sup>11</sup> Unofficial translation by the author.

The PRC has been a State party to a number of international human rights conventions which contain the RTE. On 27 October 1997, the PRC signed the International Covenant on Economic, Social and Cultural Rights,<sup>12</sup> and ratified it on 27 March 2001.<sup>13</sup> On 29 November 1981, the PRC acceded to the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>14</sup> On 17 July 1980, the PRC signed the Convention on the Elimination of All Forms of Discrimination against Women, and ratified it on 4 November 1980.<sup>15</sup> On 29 August 1990, the PRC signed the Convention on the Rights of the Child, and ratified it on 2 March 1992.<sup>16</sup> On 30 March 2007, the PRC signed the Convention on the Rights of Persons with Disabilities, and ratified it on 1 August 2008.<sup>17</sup>

It should be noted that the PRC has not yet signed or ratified the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific, and Cultural Organization on 14 December 1960. It shall be further noted that the International Covenant on Civil and Political Rights might be relevant to the RTE. Although the PRC has signed this cardinal international human rights convention, it has not yet ratified it.<sup>18</sup> Nevertheless, it shall not be neglected that China was one of the original members of the United Nations, and, therefore, the provisions in relation to human rights in the Charter of the United Nations are binding on the PRC. Furthermore, the Universal Declaration of Human Rights,<sup>19</sup> adopted by the General Assembly of the United Nations on 10 December 1948, must be respected by the PRC.

Having looking at the picture of the signature, ratification and accession of the international human rights conventions in relation to the RTE, one should turn their attention to the status of international law within the Chinese domestic legal system and the applicability of international treaties before the Chinese courts. As a matter of fact, the Constitution is silent on these two issues. One cannot find any provision in the Constitution in relation to these two issues. However, these two issues have been resolved by the legislative body through the form of adopting statute laws on the basis

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<sup>12</sup> The Republic of China (ROC) signed on behalf of China on 5 October 1967. The PRC made statement upon signature and confirmation upon ratification: "The signature that the Taiwan authorities affixed, by usurping the name of 'China', to the [said Covenant] on 5 October 1967, is illegal and null and void", <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en#1](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#1)>.

<sup>13</sup> The RTE is provided in Article 13 of the ICESCR.

<sup>14</sup> The RTE is provided in Article 5(e)(v) of the ICERD. The PRC made a declaration upon accession: "The PRC has reservations on the provisions of article 22 of the Convention and will not be bound by it. The signing and ratification of the said Convention by the Taiwan authorities in the name of China are illegal and null and void", <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en)>.

<sup>15</sup> The RTE is provided in Article 10 of the ICEDAW. The PRC made the following declaration upon signature and confirmation upon ratification: "The PRC does not consider itself bound by paragraph 1 of article 29 of the Convention", <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#13](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#13)>.

<sup>16</sup> The RTE is provided in Article 28 of the CRC. The PRC made the following reservation upon ratification: "The PRC shall fulfil its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the PRC and in conformity with the provisions of article 2 of the Act on the Protection of Minors of the PRC", <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>.

<sup>17</sup> The RTE is provided in Article 24 of the CRPD, <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en)>.

<sup>18</sup> The PRC signed it on 5 October 1998.

<sup>19</sup> The RTE is provided in Article 26 of the UDHR.

of case-by-case. The applicability of the treaties concluded by the PRC has been decentralised to the level of the statute laws for the first time since the adoption of the tentative Civil Proceedings Act at the 22nd Session of the Standing Committee of the 5th NPC on 8 March 1982. Article 189 of the tentative Civil Proceedings Act provides:

If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations.

This provision was subsequently followed by many statute laws on various matters, but mainly focusing on the ones with a civil and administrative nature, such as the Act on Succession of 1985,<sup>20</sup> the General Principles of Civil Law of 1986,<sup>21</sup> the Act on Customs of 1987,<sup>22</sup> the Administrative Proceedings Act of 1989,<sup>23</sup> the Act on Copyright of 1990,<sup>24</sup> the Act on Patent of 1992,<sup>25</sup> the Maritime Act of 1992,<sup>26</sup> the Act on Trade Mark of 1993,<sup>27</sup> the Act on Civil Aviation of 1995,<sup>28</sup> *etc.*

Interestingly, this approach was not followed by those statute laws in relation to human rights, including the foregoing Act on the Protection of the Minors, the Act on the Protection of the Rights and Interests of Women, and the Act on the Protection of Persons with Disabilities. All such statute laws are silent on the issue of applicability of human rights conventions concluded by the PRC. It has been a theoretical problem of high controversy among the Chinese lawyers on whether the approach created by the tentative Civil Proceedings Act of 1982 could be extended to those statute laws in relation to human rights.<sup>29</sup>

It should be noted that on 27 August 1987 the Supreme People's Court (hereinafter referred to as 'SPC') and the Supreme People's Procuratorate, together with the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of National Security and the Ministry of Justice, jointly promulgated the Regulations on Several Issues Relating to Dealing with Foreign-related Cases. The Regulations provide that

[t]he foreign-related cases shall be dealt with in accordance with the laws of our country so as to safeguard the sovereignty of our country; meanwhile those relevant provisions of the multilateral or bilateral treaties concluded and signed by our country shall also be complied with. When the domestic laws and some internal regulations conflict with the obligations assumed by our country, the relevant provisions of the international treaties shall be applied. In accordance with the general

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<sup>20</sup> Article 36.

<sup>21</sup> Article 142.

<sup>22</sup> Article 56(6).

<sup>23</sup> Article 72.

<sup>24</sup> Article 2.

<sup>25</sup> Articles 18, 20, 29, 50.

<sup>26</sup> Article 268.

<sup>27</sup> Article 24.

<sup>28</sup> Article 184.

<sup>29</sup> For an interesting discussion on the applicability of human rights treaties before the Chinese courts, see Sanzhuan Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects', 8 *Chinese Journal of International Law* (2009), pp. 161-179.

principle of international law, our country shall not decline to perform the assumed obligations of international treaties on the ground of the provisions of domestic laws.<sup>30</sup>

Furthermore, in 1990 the Chinese representative made a statement in the Chinese initial report to the United Nations Committee against Torture that “there was no special legislative procedure for incorporating international conventions into domestic law; they automatically entered into force upon ratification”,<sup>31</sup> and in reply to questions raised by members of the Committee, the representative explained that

[a]ny convention acceded to by China became binding as soon as it entered into force. Furthermore, in the event of a discrepancy between provisions of an international instrument and domestic law, the latter was brought into line with the former. Where subtle differences remained, international instruments took precedence over domestic law.<sup>32</sup>

Nevertheless, to date there have been no cases in which the Chinese courts ever stepped in to express their attitude on the applicability of international human rights conventions ratified or acceded to by the PRC in judicial practice.

#### **4. Criminal, Civil and Administrative Proceedings in relation to the RTE before the Chinese Courts**

##### *4.1. Criminal Proceedings*

The present Chinese criminal proceedings were established on 1 July 1979 when the 2nd Session of the 5th NPC adopted the Criminal Proceedings Act. This Act was revised by the 4th Session of the 8th NPC on 17 March 1996. It was adopted for the implementation of the Chinese Criminal Code (hereinafter referred to as ‘CC’), which was adopted on the same day when the Criminal Proceedings Act was adopted in 1979. The CC was revised on 1 October 1997, and has been subsequently supplemented with seven amendments so far.

Although Chapter IV of Part II (Specific Provisions) of the CC concerns the category of crimes of infringing upon the personal and democratic rights of the citizens, the conduct of infringing upon the RTE was not criminalised in that chapter. Throughout the specific provisions of the CC, only one article is directly related to education, *i.e.* Article 138 in Chapter II on the category of crimes of endangering public security.<sup>33</sup> That Article provides:

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<sup>30</sup> Unofficial translation by the author, *see* Research Office of the Supreme People’s Court (ed.), *Judicial Interpretations of the Supreme People’s Court of the People’s Republic of China* (Press of People’s Courts, 1994) p. 840.

<sup>31</sup> Report of the Committee against Torture, A/45/44, New York, 1990, para. 472.

<sup>32</sup> *Ibid.*, para. 487.

<sup>33</sup> “The insertion of the CMSAEF does not only to the most extent safeguard the personal interest of the teachers and students, but also guarantees the normal operation of the teaching activities, thus further indirectly protecting one of the fundamental rights of the citizens recognized and stressed by the Constitutions in the world – the right to be educated.” Wang Hongcheng, *On the Crime of Major Safety Accident of Educational Facilities*, Master Thesis, Zhengzhou University, May 2002, p. 6.

If a person who is directly responsible knowingly fails to adopt measures against dangers in school buildings or in educational or teaching facilities or to make a timely report about the matter, so that an accident involving heavy casualties occurs, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.<sup>34</sup>

The formal title of this crime is the *crime of major safety accident of educational facilities* (hereinafter referred to as ‘CMSAEF’).<sup>35</sup> This crime was provided for the first time in the 1997 modification of the CC as a response to Article 73 of the Act on Education adopted by the 3rd Session of the 8th NPC on 18 March 1995. Article 73 of the Act on Education provides:

If anyone knowingly fails to take measures with regard to the school buildings or educational or teaching facilities that are dangerous, thus causing human casualties or heavy losses of property, the leading persons directly in charge and other persons directly responsible for it shall be investigated for criminal responsibility according to law.<sup>36</sup>

Since the insertion of this crime into the CC in 1997, there have been a few convictions of this crime in judicial practice,<sup>37</sup> though the major accidents caused by educational facilities across the country are often reported.<sup>38</sup> The following cases on the CMSAEF are now to be reported in this survey.

#### 4.1.1. The Coal Gas Poisoning in a Training School

On 24 July 2002, the Haidian District People’s Court, Beijing convicted Li Mingliang of the CMSAEF in Article 138 of the CC, and sentenced him to six months’ imprisonment with one year’s probation. The Court found that the defendant rented a house to use it as the dormitory for the students in the training school he set up. He installed a furnace with coal gas inside the house, but failed to install a vent pipe for the furnace. On the early morning of 5 January 2002, four students sleeping inside the house were poisoned by the coal gas, and one of the poisoned students was declared dead at the hospital. The Court took the view that the defendant, as a principal of a school, knew the potential risk to the safety of the dormitory but failed to take measures, resulting in heavy casualties including the death of one student, and that his conduct constituted the CMSAEF in Article 138. This was the first reported case by

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<sup>34</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384075.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm)>.

<sup>35</sup> SPC, Regulation on Implementation of the Titles of Crimes Provided by the Criminal Code of the People’s Republic of China, 9 December 1997.

<sup>36</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383710.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383710.htm)>.

<sup>37</sup> Liu Zhiwei and Li Hui, ‘Discussions on the Subject and Mens Rea of the Crime of Major Safety Accident of Educational Facilities’, No. 1 *Journal of Shandong Public Security College* (2002) p. 50.

<sup>38</sup> For example, in the Wenchuan Earthquake which caused the death of thousands of students in Sichuan Province on 12 May 2008, some Chinese criminal law experts said that the CMSAEF might have been committed in the collapse of a lot of teaching buildings caused by the earthquake, <[review.jcrb.com/200806/ca718705.htm](http://review.jcrb.com/200806/ca718705.htm)>. In another survey on the recent serious campus stampede incidents in China, a few persons responsible for the incidents were not prosecuted later due to unknown reasons, <[www.chinarm.cn/article/2010/0113/article\\_76.html](http://www.chinarm.cn/article/2010/0113/article_76.html)>.

the media where Article 138 was applied for the first time after 1997.<sup>39</sup>

#### 4.1.2. The Collapse of a Wall or Fence in Kindergartens

On the morning of 27 August 2003, a wall in a kindergarten in Gongyi city, Henan Province collapsed, causing seven infants who were playing besides the wall to die and four infants severe injury. Li Xiaohei, principal of the kindergarten, was convicted of the CMSAEF by the People's Court of Gongyi on the ground of failing to take necessary safe and preventive measures in knowing of the safety risk of the educational facilities, and was sentenced to four years' imprisonment.<sup>40</sup>

Similarly, on noon of 19 February 2009, a fence in a kindergarten in Youxian County, Hunan Province collapsed, causing one child who was playing besides the fence to die and 12 infants to be injured. Zhu Guanghai, principal of the kindergarten, was convicted of the CMSAEF by the People's Court of Youxian on the ground that the constructed fence was not stably fixed with the walls. The Court found that the structure of the fence did not comply with the requirements of the construction and was incapable of resisting any pressure, thus seriously violating the provisions of the construction norms of building projects and the diagram of project standards. He was then sentenced to one year's imprisonment.<sup>41</sup>

#### 4.1.3. The Fire Deaths in a Primary School

On the night of 9 June 2002, Sanyuanzhuang Primary School in Yangjie Town, Xundian County, Yunnan Province caught on fire. The fire killed eight and destroyed four classrooms and seven student dormitories. On 27 August 2003, the People's Procuratorate of Xundian County charged Yu Changsuo, principal of Sanyuanzhuang Primary School, with the CMSAEF in Article 138 for his organisation of students to self-study in the classrooms at night, which was prohibited by the Bureau of Education of Xundian county, and to sleep in the dangerous dormitories, which were built with wood and clay and had a history of at least 53 years.<sup>42</sup>

The charge was dismissed by the People's Court of Xundian County on 19 November 2003. The Court said that Yu's conduct was not *actus reus* of the CMSAEF. It further held that the accused organised the students to self-study in nights in violation of the prohibitions and allowed them to sleep in the dormitories without any superintendents, thus constituting the crime of breaching duty of State-owned companies, enterprises and institutional units in Article 168(2) of the amendment to the CC of 1999.<sup>43</sup> He was then sentenced to two years' imprisonment

<sup>39</sup> <[news.xinhuanet.com/st/2002-07/25/content\\_497362.htm](http://news.xinhuanet.com/st/2002-07/25/content_497362.htm)>.

<sup>40</sup> <[learning.sohu.com/2004/04/22/70/article219917042.shtml](http://learning.sohu.com/2004/04/22/70/article219917042.shtml)>.

<sup>41</sup> <[www.hn.xinhuanet.com/newscenter/2009-08/07/content\\_17335834.htm](http://www.hn.xinhuanet.com/newscenter/2009-08/07/content_17335834.htm)>.

<sup>42</sup> <[news.sina.com.cn/w/2003-09-24/0929809828s.shtml](http://news.sina.com.cn/w/2003-09-24/0929809828s.shtml)>.

<sup>43</sup> Article 168 provides, "(1) Where an employee of a State-owned company or enterprise, because of being seriously irresponsible or abuse of power, causes bankruptcy or heavy losses to the said company or enterprise, thus occasioning major losses to the interests of the State, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if especially major losses are occasioned to the interests of the State, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years; (2) Any employee of a State-owned institution commits any of the crimes mentioned in the preceding paragraph and causes major losses of the interests of the State, he shall be punished in accordance with the provisions in the preceding paragraph; (3) Any employee of a State-owned company, enterprise or institution who engages in malpractices for selfish ends and commits any of the crimes mentioned in the preceding two paragraphs shall be a

with two years' probation.<sup>44</sup>

#### 4.1.4. Fire Deaths in a Vehicle of a Kindergarten

On 2 June 2002, the first defendant, Gao Zhixian, was appointed as principal of a village kindergarten in Zhongyuan District, Zhengzhou, capital of Henan Province. He then hired the second defendant, Qiao Yongjie, as the driver of a vehicle of the kindergarten to receive and send the infants from their homes to the kindergarten every day. Before the accident, the principal knew that the accelerator of the vehicle had some faults and needed to be repaired, but he still ordered the driver to drive this vehicle. On 7:00 p.m. of 14 June 2002, the vehicle broke down and stalled, and was incapable of sending the infants to their homes. The driver then called the principal, who then arrived to the spot with Meng Huijun, and rented another vehicle to send the infants to their homes. He further ordered the driver and Meng to continue to repair the vehicle. After a brief maintenance, the driver went back to the kindergarten to take other infants back to their homes. On the way, the vehicle stalled again. The driver ordered Meng to use a gas oil pot to provide oil to the vehicle, which caught fire after awhile. The fire killed three infants and Meng who were in the vehicle, and seriously injured two infants.

The People's Procuratorate of Zhongyuan District charged the principal and the driver of the crime of negligently causing death of persons in Article 233 of the CC.<sup>45</sup> The charge was dismissed by the People's Court of Zhongyuan District. The Court said, although the two defendants were negligent for the serious consequence of the accident, the CC contained other provisions about the negligence of the two defendants. Therefore, the *actus reus* of the defendants does not constitute the crime of negligently causing death of persons in Article 233. Instead, the Court found that the crime of causing traffic accident in Article 133 of the CC had been committed.<sup>46</sup> In accordance with Article 7 of the Interpretations concerning Several Issues on the Concrete Application of Law in the Trial of Crimes of Causing Traffic Accidents, delivered by the SPC, "the governors of the units, the owners of the vehicles or the contractors of the vehicles shall be convicted of the crime of causing traffic accidents if they instigate or order others to illegal drive the vehicle and cause major traffic accidents with one of the conditions of Article 2 of this Interpretations". Article 8 of the Interpretations further stipulated that "the major traffic accidents occurring in the scope of public traffic management shall be dealt with in accordance with Article 133 of the CC". The Court said the place of the accident at issue was on the public way,

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given heavier punishment in accordance with the provisions in the first paragraph."

<sup>44</sup> <edu.sina.com.cn/1/2003-11-19/56732.html>.

<sup>45</sup> Article 233 provides, "Whoever negligently causes death to another person shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not more than three years, except as otherwise specifically provided in this Law."

<sup>46</sup> Article 133 provides, "Whoever violates regulations governing traffic and transportation and thereby causes a serious accident, resulting in serious injuries or deaths or heavy losses of public or private property, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. Whoever runs away from the spot after he has caused a traffic accident or is involved in other especially flagrant circumstances shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years; if his escape results in the death of another person, he shall be sentenced to fixed-term imprisonment of not less than seven years."

thus falling with the scope of public traffic management, and that the driver drove the vehicle despite knowledge of serious problems with the vehicle, and in the case of malfunction, he provided the gas oil to the vehicle in violation of regulations on management of traffic transportation. The principal ordered the driver to use the vehicle with the knowledge of serious problems with the vehicle. Therefore, the two defendants committed the crime of causing traffic accident in Article 133 of the CC, and were sentenced to five years' imprisonment respectively.

The principal then appealed to the Intermediate People's Court of Zhengzhou, the higher court of the People's Court of Zhongyuan District, but the driver did not appeal. The Intermediate People's Court delivered its final judgment on 26 March 2003. The Court said that the governors or the managers of the vehicle in question could be convicted of the crime of causing traffic accidents only when they instigated or ordered others to illegally drive the vehicle and caused major traffic accidents. In the present case, neither was the appellate the direct perpetrator of the accident, nor was there sufficient evidence to prove that the principal instigated or ordered the driver to make the illegal operation. What could be proved was the fact that the principal rented another vehicle to send the infants and told the driver to repair the vehicle in question. Therefore, the trial judgment made an error in the conviction. Instead, the Court found that the kindergarten is an educational institution for infants, and that the vehicle in question is a specific tool for the transportation of infants from the kindergarten to their homes. The appellate, as principal of the kindergarten, assumed direct responsibility for the safety of the educational facilities. He failed to ask the professional maintenance staff to maintain the vehicle to exclude the risk despite knowing that the vehicle needed to be repaired. Even if the accident was directly caused by the illegal operation of the driver, the causal relationship between the omission of the principal and the accident actually existed. Therefore, the Court found that the conduct of the principal was of the nature of serious social danger, and that he committed the CMSAEF in Article 138 of the CC.<sup>47</sup> He was then sentenced to four years' imprisonment.

Similarly, on the morning of 12 May 2007, a vehicle in charge of transporting the infants from the kindergarten to their homes caught fire in Caoxian, Shandong Province. Li Qifu, the driver, failed to actively rescue two remaining infants inside the vehicle after taking two with Wang Hongmei, another driver. They then fled away after claiming that there were no infants left inside the vehicle. The accident killed the two infants inside the vehicle. The People's Procuratorate of Caoxian then charged Hao Meirong and Zhou Mo, the couple who were principals of the kindergarten, with the CMSAEF in Article 138 on the ground that they knew there was risk in the educational facilities but failed to take measures. The Procuratorate further charged Li Qifu and Wang Hongmei with the crime of intentional killing of a person through omission in Article 232 of the CC.<sup>48</sup> The judgment seems not to be delivered yet

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<sup>47</sup> <[www.chinacriminaldefenselawyer.com/ShowArticle.shtml?ID=200991413101857900.htm](http://www.chinacriminaldefenselawyer.com/ShowArticle.shtml?ID=200991413101857900.htm)>.

<sup>48</sup> Article 232 provides, "Whoever intentionally commits homicide shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years", <[www.jcrb.com/n1/jcrb1334/ca613900.htm](http://www.jcrb.com/n1/jcrb1334/ca613900.htm)>.

because the author could not find any subsequent development concerning this case.

#### 4.1.5. Deaths and Injuries in Stampede at Teaching Buildings in Middle Schools

On the evening of 23 September 2002, 21 students were killed and 47 students were severely injured in a stampede in Fengzhenshi No. 2 Middle School, Wulanchabu Meng, Inner Mongolia Autonomous Region. At about 1900 on that date, the students were rushing downstairs to go back home after the supplementary lectures. Due to the malfunction of the lights in the corridors and stairs, hundreds of students were crowded and fell in the corridors and stairs and crushed by other students. Some of students were even forced to fall from the fence of the stairs of the building to the ground. On 26 February 2004, the Intermediate People's Court of Wulanchabu Meng delivered its judgment, convicting Fan Qi, principal of the middle school, and Yi Yu, director of the general affairs of the middle school, of committing the CMSAEF, and sentenced them to three years' imprisonment and three years' imprisonment with three years' probation, respectively. The Court said that Fan Qi, as principal of the middle school, was responsible for the overall work of the school including the general affairs and financial work; despite that he had been notified that the lights in the corridors and stairs were malfunctioning and that they should have been examined and repaired in time, he failed to take any preventive measures. He therefore should take direct responsibility for the heavy casualties. The Court further said that Yi Yu, as director of the general affairs of the school, failed to perform his duty. Even if he went on errands, he knew of the malfunctioning of the lights in the corridors and stairs before he went on errands. Therefore, he should also take direct responsibility, regardless of his absence and unawareness of the accident.<sup>49</sup>

Similarly, on the night of 7 December 2009, a stampede occurred in Yucai Middle School, a private middle school in the city of Xiangxiang, Hunan Province, causing the death of 8 students and the injury of 26 students. This incident occurred when the students were rushing downstairs back to their dormitories. A student tumbled on the ground, suddenly causing a crowd of rushing students. After the casualties, the People's Procuratorate of Xiangxiang charged three defendants, Ye Jizhi (president of Yucai Middle School), Peng Heliang (disciplinary cadre of Yucai Middle School), and Chen Xinwei (director of supervision of teachings of Yucai Middle School), with the CMSAEF in Article 138 of the CC on 22 December 2009. On the morning of 10 March 2010, the criminal tribunal of Xiangxiang People's Court in Hunan Province publicly tried the case. The defendants pleaded not guilty.<sup>50</sup> On 27 April 2010, the Court convicted the defendants of the CMSAEF.<sup>51</sup>

## 4.2. Civil Proceedings

The present Chinese civil proceedings were established on 8 March 1982 when the 22nd Session of the Standing Committee of the 5th NPC adopted the tentative Civil Proceedings Act. The Act was replaced by the Civil Proceedings Act adopted at the

<sup>49</sup> <[www.nmg.xinhuanet.com/xwzx/2004-02/26/content\\_1688168.htm](http://www.nmg.xinhuanet.com/xwzx/2004-02/26/content_1688168.htm)>.

<sup>50</sup> <[xtzy.chinacourt.org/public/detail.php?id=610](http://xtzy.chinacourt.org/public/detail.php?id=610)>.

<sup>51</sup> <[news.cyol.com/content/2010-04/28/content\\_3205953.htm](http://news.cyol.com/content/2010-04/28/content_3205953.htm)>.

4th Session of the 7th NPC on 9 April 1991, which was amended at the 30th Session of the Standing Committee of the 10th NPC on 28 October 2007. The adoption of the Civil Proceedings Act was for the implementation of civil law, such as the General Principles of Civil Law,<sup>52</sup> the Act on Contract,<sup>53</sup> the Act on Property,<sup>54</sup> the Act on Tort Liability,<sup>55</sup> etc.

Section IV of Chapter V of the 1986 General Principles of Civil Law provides the personal rights, including the rights to life and health (Article 98), the right to name (Article 99), the right to portrait (Article 100), the right to reputation (Article 101), the right to honour (Article 102), the right to autonomy on marriage (Article 103), the protection of marriage, family, the elder persons, the mothers, the children, and the persons with disabilities (Article 104), and women's right to equality with men (Article 105).<sup>56</sup>

Meanwhile, Article 2 of the 2009 Act on Tort Liability provides that "those who infringe upon civil rights and interests shall be subject to the tort liability according to this Act. 'Civil rights and interests' used in this Act shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to portrait, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests."<sup>57</sup>

In the above two statute laws on civil matters, the right to education is not provided therein. In the following selected civil cases in relation to education, the key point is whether the right to education of every citizen provided in Article 46 of the Constitution could be directly invoked as the legal basis to make civil judgments.

#### 4.2.1. *Qi Yuling v. Chen Xiaoqi et.al.*

The plaintiff, a female worker, 28 years old, at an iron factory, filed a lawsuit with Zaozhuang Intermediate People's Court, Shandong Province, against the defendants, including Chen Xiaoqi, a staff at the branch of Bank of China in Tengzhou city, Chen Kezheng, Xiaoqi's father, the Commercial School of Jining city, No. 8 High School of Tengzhou city, and the Education Committee of Tengzhou city. The plaintiff claimed that she had been admitted by the Commercial School of Jining city to study finance and accounting by taking the uniform examination and filling in the application form in 1990, and that her right to name, the RTE and other relevant rights and interests were infringed upon by the defendants because they jointly faked materials and made Chen Xiaoqi admitted to the School by using the plaintiff's name. She claimed the economic loss of CNY 160,000 (about USD 20,000 at that time) from the defendants.

Among others, the first defendant, Chen Xiaoqi, did not challenge the fact, but

<sup>52</sup> It was adopted at the 4th Session of the 6th NPC on 12 April 1986.

<sup>53</sup> It was adopted at the 2nd Session of the 9th NPC on 15 March 1999.

<sup>54</sup> It was adopted at the 5th Session of the 10th NPC on 16 March 2007.

<sup>55</sup> It was adopted at the 12th Session of the 11th NPC on 26 December 2009.

<sup>56</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383941.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm)>.

<sup>57</sup> <[www.procedurallaw.cn/english/law/201001/t20100110\\_300173.html](http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html)>.

contended that the plaintiff's RTE had not been infringed upon because this right is not provided in the General Principles of Civil Law, and therefore the plaintiff's claim on basis of the RTE should not be sustained.

Zaozhuang Intermediate People's Court found that the second defendant, Chen Kezheng, planned and implemented the illegal use of the plaintiff's name for her daughter, the first defendant, with an aim to making her cause admitted by the Commercial School. The Court held that this conduct was the embezzlement and pass-off of the plaintiff's name, and one particular form of the infringement of the right to name. The Court further held that the plaintiff's right to name under Article 99 of the General Principles of Civil Law was infringed upon, and therefore the plaintiff's claim should be sustained. The Court, however, dismissed the plaintiff's claim on basis of the RTE. The Court held that the RTE fell within the scope of general personal rights of the citizens, and that the right is a discretionary right for the citizens to enrich and development of their personality. The Court found the plaintiff had waived this right by waiving the opportunity of being admitted to study as a trusted trainee, and that there was no sufficient evidence to show that her RTE was infringed upon.

The plaintiff was not satisfied with the judgment and appealed to Shandong Province High People's Court on the ground that, among others, the defendants committed joint tort against her. She claimed that she would not have waived any opportunity to be admitted to the School if she was duly notified of the result of examination by the No. 8 High School of Tengzhou city. Therefore, the appellate claimed that her RTE was infringed upon and that Zaozhuang Intermediate People's Court was in error in that her RTE has not been infringed upon.

Shandong Province High People's Court decided to request the SPC to interpret the relevant laws in accordance with Article 33 of the Act on the Organizations of the People's Courts<sup>58</sup> because it considered there had been difficult in the application of laws. The SPC, on research, replied in No. 25 Judicial Interpretation that the RTE claimed by Qi Yuling derived from Article 46(1) of the Constitution, and that Chen Xiaoqi, the defendant, should assume civil liability for the harmful consequences to Qi Yuling because Qi's RTE under the Constitution was infringed upon by Chen's use of Qi's name without the consent.

Based on Article 46 of the Constitution and the above Judicial Interpretation of the SPC, Shandong Province High People's Court held on 23 August 2001 that formally speaking the conducts of the defendants infringed upon the plaintiff's right to name, but substantially speaking they infringed upon plaintiff's RTE.<sup>59</sup>

This case was claimed by many as the first case in China where the Constitution was directly applied in a people's court as a legal basis to try a civil case. Prior to this case, the SPC used to be reluctant to allow the lower courts to invoke the Constitution as a legal basis to try criminal or civil cases. For example, the SPC replied to Xinjiang Province High People's Court in 1955 that "in the criminal judgment, the Constitution is not suitable to be the legal basis". In 1986, a reply from the SPC to Jiangsu

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<sup>58</sup> Article 33 provides that "the Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings".

<sup>59</sup> <[www.chinacourt.org/html/article/200211/04/16750.shtml](http://www.chinacourt.org/html/article/200211/04/16750.shtml)>.

Province High People's Court further said, "in the civil judgment, what could be applied are law, administrative regulations, [...]" Therefore, the reply from the SPC in the case of *Qi Yuling v. Chen Xiaoqi et al.* attracted much attention and debate among Chinese lawyers, in particular the academia of constitutional law. Those who support the approach of the SPC in this case made positive comments, and even described it as the Chinese "*Marbury v. Madison*" case. They were confident that this case would start the applicability of the Chinese Constitution in the future administrative, civil and criminal trials, even if there had been no constitutional litigations in China.<sup>60</sup> On the contrary, those who opposed to the approach of the SPC in this case argued that the application of the Constitution in the civil dispute as the direct legal basis was wrong because it mistook the application scope and legal relationship where the Constitution may be invoked. Some even considered the approach unconstitutional in accordance with the Constitution.<sup>61</sup>

Nonetheless, the No. 25 Judicial Interpretation of the SPC in 2001 ceased to be applied on 18 December 2008 when the SPC itself promulgated the Decision on Abolishment of the Relevant Judicial Interpretations Issued before the End of 2007, but the SPC did not explain why the No. 25 Judicial Interpretation should cease to be applied.<sup>62</sup>

#### 4.2.2. *Qiu Dongfang v. Wu Xiaoyan et al.*

Just one month before the abolishment of No. 25 Judicial Interpretation, a similar judgment was delivered by Shangrao Intermediate People's Court, Jiangxi Province. The facts of this case were similar to the *Qi Yuling* case. The plaintiff attended the uniform examination at her local county to enter to high school in 1995, but received no admission from any school. She was then forced to leave her village and became a migrant worker in another province. In 2006, when she came back to her village, she found that the first defendant, Wu Xiaoyan, by using her name for more than one decade, worked as a teacher in a primary school in her village. She then filed a lawsuit against Wu Xiaoyan, Wu's father, the middle school where she studied, and the local bureaus of education and public security. On 10 December 2007, the People's Court of Guangfeng County, Jiangxi Province, held that the plaintiff's right to name and RTE were infringed upon by the defendants, and that they should assume civil liability. The plaintiff was not satisfied with the amount of the compensation decided by the court, and then appealed to Shangrao Intermediate People's Court. On 14 November 2008, Shangrao Intermediate People's Court delivered judgment in favour of the appellate, and increased the amount of the compensation.<sup>63</sup>

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<sup>60</sup> Mr. Wang Songyou, former Vice President of the SPC, published an article titled 'The Applicability of the Constitution and Its Implications: Discussion on a Recent Reply from the Supreme People's Court', in which he argued that this case "created a precedent for the courts to protect the fundamental rights of the citizens in accordance with the Constitution", and that "it created a precedent for the applicability of the Constitution", see *Daily of the People's Courts*, 13 August 2001. See also Wang Lei, *Applicability of the Constitution* (Press of China University of Political Science and Law, 2001).

<sup>61</sup> See e.g. Mo Jihong, 'Research on Applicability of the Constitution in the Judicial Trials', No. 3 *North Legal Science* (2007); Tong Zhiwei, 'The Application of the Constitution Shall Follow the Approaches Stipulated in the Constitution', No. 6 *Legal Sciences of China* (2008); etc.

<sup>62</sup> <[www.chinacourt.org/flwk/show.php?file\\_id=132344](http://www.chinacourt.org/flwk/show.php?file_id=132344)>.

<sup>63</sup> <[news.mzyfz.com/mag/h/20090203/155746.shtml](http://news.mzyfz.com/mag/h/20090203/155746.shtml)>.

#### 4.2.3. *Luo Caixia v. Wang Jiajun, Wang Zhengrong, Guizhou Normal University et al.*

If Qiu Dongfang in Jiangxi Province was lucky because the final judgment of her case was delivered just one month before the abolishment of No. 25 Judicial Interpretation of the SPC, then Luo Caixia from Hunan Province seemed not to be so lucky, though she had a similar experience with the former in education. Her lawsuit is still pending before the court. The lawsuit was filed on 15 May 2009 in Xiqing District People's Court, Tianjin. She filed suit against the defendants also on the ground that her right to name and RTE were infringed upon by the defendants.

The plaintiff was born in Shaoyang city, Hunan Province. She attended the national entrance examination to universities and colleges in 2004, but was not admitted to any university or college, though her final score was not low. One year later, she was admitted to Tianjin Normal University. In 2009, when she applied to open a bank account, she found there was the same name with the same identity card in the banking system, and she was told that she was not qualified to apply to open a bank account. The identity card in the banking system had the same name as hers and the same identity card as hers, but with different photos and a different issuing bureau of public security. The police found, after investigation, that the second defendant, Wang Zhengrong, father of the first defendant, had faked the relevant materials and sent bribery to other defendants in 2004. The defendants succeeded in using the plaintiff's archives without consent. The first defendant was then admitted to Guizhou Normal University.

On 26 October 2009, the second defendant, Wang Zhengrong, was convicted of the crime of counterfeiting the certificates of the state organs by Beita District People's Court, Shaoyang city, Hunan Province.<sup>64</sup> However, until the date of writing this survey, the parallel civil proceeding claiming for compensation for the infringement of the right to name and the RTE is still pending. Many observers are concerned about the plaintiff's claim on ground of the RTE because No. 25 Judicial Interpretation was abolished in 2008.<sup>65</sup>

#### 4.2.4. *Yu Tingting v. High School Affiliated to College of Mechanic Engineering of Chaoyang District*

This is also a civil proceeding in relation to the RTE, notwithstanding irrelevance to the right to name. Furthermore, it should be noted that the date of delivering a decision in this case was only a little more than two months subsequent to the issuing of No. 25 Judicial Interpretation by the SPC.

The plaintiff was a student at High School affiliated to College of Mechanic Engineering of Chaoyang District, Beijing. When she studied in the second year in the High School, the defendant intentionally asked extremely difficult questions in the examinations to the students so that those who failed to pass the examinations could

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<sup>64</sup> <politics.people.com.cn/GB/14562/10317712.html>.

<sup>65</sup> On 13 August 2010, Luo Caixia concluded an agreement with the defendant in the mediation of the judges. In the agreement the defendant paid 45,000 CNY to Luo as compensation money, and Luo withdrew any other claims. <<http://news.163.com/10/0813/15/6DVOJN5C0001124J.html>>.

not continue to study in the third year but had to continue to study in the second year or be transferred to other classes with low grades. The reason for adopting this measure by the defendant was to raise the rate of enrolment to universities or colleges of the students. Since the plaintiff was incapable of passing those extremely difficult examinations, she had to be transferred to study in a private high school. One year later, when she was admitted to a university, she filed a lawsuit to Chaoyang District People's Court against the defendant in May 2001 on the ground that her RTE was infringed upon by the defendant.

The Court delivered its judgment on 9 November 2001, subsequent to the *Qi Yuling* judgment, that the plaintiff's cause of action "is one of those issues present in the process of education reform, and does not fall within the competence of the people's courts, but shall be resolved by other relevant authorities". The Court then dismissed the plaintiff's file on basis of Article 111(3)<sup>66</sup> of the Civil Proceedings Act.<sup>67</sup>

#### 4.3. Administrative Proceedings

The present Chinese administrative proceedings were established on 4 April 1989 when the 2nd Session of the 7th NPC adopted the Administrative Proceedings Act. It was enacted to ensure the correct and prompt handling of administrative cases by the people's courts, to protect the lawful rights and interests of citizens, legal persons and other organizations, and to safeguard and supervise the exercise of administrative powers by administrative organs in accordance with the law (Article 1). The Act further provides that if a citizen, a legal person or any other organisation considers that his or its lawful rights and interests have been infringed upon by a *specific administrative act* of an administrative organ or its personnel, he or it shall have the right to bring a suit before a people's court in accordance with this Act (Article 2).

Articles 11 and 12 of the Act detail the categories of the *specific administrative acts* of the administrative organs or personnel, which are justiciable before the people's courts, from the positive and negative perspectives respectively.

Article 11 provides positively:

The people's courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts:

- (1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept;
- (2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept;
- (3) infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ;
- (4) refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application;

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<sup>66</sup> Article 111(3) provides that "in case of disputes which, according to the law, shall be dealt with by other organs, the people's court shall advise the plaintiff to apply to the relevant organ for settlement".

<sup>67</sup> *Daily of People's Courts*, 23 November 2001.

- (5) refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of property, as one has applied for, or its failure to respond to the application;
- (6) cases where an administrative organ is considered to have failed to issue a pension according to law;
- (7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and
- (8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property.

Apart from the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.

Article 12 provides negatively:

The people's courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters:

- (1) acts of the state in areas like national defence and foreign affairs;
- (2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs;
- (3) decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel; and
- (4) specific administrative acts that shall, as provided for by law, be finally decided by an administrative organ.<sup>68</sup>

The following administrative cases are selected to illustrate how the Chinese courts are reviewing some specific administrative acts.

#### 4.3.1. Expulsion of Undergraduates from Universities or Colleges

The legality of expulsion of undergraduates from universities or colleges on various grounds has been a main legal issue of concern with the people's courts. The people's courts have to decide whether this issue falls within the scope of administrative proceedings in the Administrative Proceedings Act. The people's courts have to further decide whether the RTE of the undergraduates was infringed upon by the universities or colleges substantially or procedurally. On this issue, the case law of the people's courts seems not to be consistent. In some cases, the people's courts held that this issue did not fall within the scope of administrative proceedings because this was an internal administrative act of the university or college, while in other cases the courts held that this issue was not an internal administrative act, thus falling within the scope of administrative proceedings.

For example, in *X and Y v. Chongqing College of Posts and Telecommunications*, both the plaintiffs were undergraduates studying at the defendant. They were expelled by the defendant because the first plaintiff was pregnant while living with the second plaintiff without being married. The plaintiffs filed a lawsuit against the defendant

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<sup>68</sup> <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383912.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm)>.

before the Nan'an District People's Court, Chongqing by claiming that their RTEs and the rights to status as a university student were violated by the defendant. The Court held in January 2003 that the expulsion of undergraduates from the universities or colleges constituted an *internal administrative act*<sup>69</sup> of an institution authorised by the statute laws, administrative regulations or rules, and that it was not justiciable by the people's courts, and therefore did not fall within the scope of administrative proceedings. The Court then dismissed the lawsuit. The judgment was maintained by the Chongqing No. 1 Intermediate People's Court in March 2003.<sup>70</sup>

Similarly, in *X and Y v. A university in Chengdu*, the plaintiffs were expelled by the defendant because they were kissing and hugging in the classroom on the night of 9 May 2004. The defendant contended that they violated Article 13(3) of the Disciplinary Regulations laid down by the defendant that those who conduct illegal sexual activities should be expelled. The plaintiffs then filed a lawsuit against the defendant before the Wuhou District People's Court, Chengdu, capital of Sichuan Province on 17 August 2004. The Court dismissed the lawsuit on 6 December 2004 on the ground that the lawsuit did not fall within the scope of Article 11 of the Administrative Proceedings Act and therefore it was not justiciable.<sup>71</sup>

On the contrary, quite a number of the expulsions made by the universities and colleges were considered justiciable before the courts in some provinces. For example, in *Dong Fei v. Zhengzhou University*, the plaintiff was an undergraduate at Zhengzhou University, Henan Province. He failed to pass the examination of a course. The defendant then gave him a chance to re-examine the course. However, in the re-examination, the plaintiff asked another student to examine for him, which was discovered by the defendant. On 4 April 2003, the defendant decided to expel the plaintiff from the university. The plaintiff then requested the defendant to mitigate the punishment several times, but was rejected by the defendant. He then filed a lawsuit against the defendant by claiming that both the substantial RTE and the procedural right to petition were violated because the defendant did not give opportunity to petition to the plaintiff. He further claimed that the decision of the defendant should be cancelled or altered.

The defendant contended that the decision was appropriate because the plaintiff violated the university disciplinary regulations by asking other student to examine for him. The defendant further contended that the plaintiff's procedural right to petition was not infringed upon because the opportunity to petition had been given to the plaintiff. The defendant proved that the department of teachings of the defendant had replied to the plaintiff's request to continue to be educated to the effect that the

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<sup>69</sup> There is no explicit provision on the so-called 'internal administrative acts' in the Administrative Proceedings Act. Many commentators considered Article 12(3) of the Administrative Proceedings Act as an example of 'internal administrative acts', which provides that "decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel".

<sup>70</sup> <[news.xinhuanet.com/focus/2003-04/23/content\\_844432.htm](http://news.xinhuanet.com/focus/2003-04/23/content_844432.htm)>. Notably, the Ministry of Education adopted a new version of the Regulations on Administration of the Students in Regular Higher Educational Institutions on 4 February 2005. The old version of the Regulations was adopted by the National Committee on Education, the predecessor of the current Ministry of Education, in 1990, according to which the undergraduates must be expelled if they are married during the study in the universities or colleges. Many observers are convinced that the provision in the 1990 Regulations violated the Act on Marriage and the Act on Higher Education.

<sup>71</sup> <[www.people.com.cn/GB/shehui/1061/3106546.html](http://www.people.com.cn/GB/shehui/1061/3106546.html)>.

request would not be accepted after prudent research and that the decision should be maintained on 16 October 2003. The defendant further contended that in accordance with the Act on Higher Education, universities or colleges have the right to manage the enrolment of the students and to reward or punish the students. The punishment of the plaintiff by the defendant was an internal administrative act, rather than an external administrative act, and therefore the claim fell outside the scope of administrative proceedings. The defendant further contended that after the decision was made, the defendant had sufficiently considered the documentary petition of the plaintiff and replied to the petition, and therefore the claim that the right to procedural petition had been infringed upon should not be established, and that the result had been informed to the plaintiff after the decision was made, and therefore the claim that no document was given to the plaintiff should not be established either.

The Erqi District People's Court, Zhengzhou, the Court trying this case, delivered its judgment in this case on 3 March 2005. It held that the plaintiff was an undergraduate at the defendant, and that a special administrative relationship on management was present during the time the plaintiff was studying at the defendant. The Court said, although the defendant was not an administrative organ, it exercises partial administrative powers on the educated including the plaintiff by the authorisation of the statute laws and administrative regulations. The Court further said that the decision of the defendant had infringed upon the RTE of the plaintiff, and therefore such a decision was not an internal administrative act, but a quasi-administrative act, thus falling within the scope of the administrative proceedings. The Court said that the dispute arising from expulsion between the plaintiff and the defendant fell within the scope of the administrative proceedings of the people's courts.

Having establishing the competence to try this case, the Court further said that in the present case the defendant failed to serve the decision to the plaintiff and to inform the right to petition to the plaintiff. The defendant failed to report the decision to the relevant authorities for filing. These constituted the procedural violations. Furthermore, the Court said the defendant's disciplinary actions were not consistent with the Regulations on Administration of the Students in Regular Higher Educational Institutions<sup>72</sup> because the punishment was manifestly too harsh and unfair, and therefore the contentions of the defendant should not be admitted.<sup>73</sup>

In another case, *Wang Huimin v. Zhengzhou University*, the same defendant also lost the lawsuit filed by another student studying at the defendant on 15 November 2005, because the decision of expulsion was procedurally in error and substantially too harsh. The same Court held that the decision of expulsion of the universities fell within the scope of administrative proceedings, because by reference to the Regulations on Administration of the Students in Regular Higher Educational

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<sup>72</sup> The new version of the Regulations on Administration of the Students in Regular Higher Educational Institutions was adopted by the Ministry of Education on 4 February 2005, <campus.xjtlu.edu.cn/campuslife/Documents/Accommodation/Code%20of%20Regulations/%E6%99%AE%E9%80%9A%E9%AB%98%E7%AD%89%E5%AD%A6%E6%A0%A1%E5%AD%A6%E7%94%9F%E7%AE%A1%E7%90%86%E8%A7%84%E5%AE%9Aregulations-on-administration-of-students-in-regular-higher-education-institutions.pdf>.

<sup>73</sup> <www.chinacourt.org/public/detail.php?id=152772>.

Institutions, the defendant assumed the statutory power to make a decision on expulsion, and that such decision exercised the actual impact on the RTE of the plaintiff. The Court further held that the expulsion concerns the RTE of the plaintiff, and that the defendant must directly inform and serve the decision to the plaintiff and allow the plaintiff to file petition in terms of the sufficient protection of the rights and interests of the parties.<sup>74</sup>

In the case of *Wang Hongjie v. Mudanjiang Medical College*, the plaintiff was expelled by the defendant because the former gave birth to a male infant during the time of internship. The Aiming District People's Court, Mudanjiang city, Helongjiang Province, held that the disciplinary regulations or rules stipulated by the universities or colleges should not violate the statute laws, administrative regulations and rules, though they had the right to autonomy on education. In the present case, the defendant had not served the decision of expulsion to the plaintiff. Neither had the defendant informed the plaintiff of relevant rights. Therefore, the decision of the defendant violated the relevant provisions of the Act on Administrative Penalties and the Regulations of the Ministry of Education. The Court thus cancelled the decision of expulsion of the defendant by declaring that the decision was inconsistent with the abovementioned procedures.<sup>75</sup>

#### 4.3.2. Refusal of Issuing Diplomas and Certificates of Degrees by the Universities or colleges

The second issue which has been frequently giving rise to administrative proceedings in relation to the RTE before the Chinese courts is the refusal of issuing diplomas and certificates of degrees by the universities or colleges.

The case of *Tianyong v. University of Sciences and Technology Beijing* represented the first administrative proceedings case against the universities or colleges on this point. The plaintiff was an undergraduate studying at the defendant. On 29 February 1996 the plaintiff was found to have on himself a note with a formula when he was on the way to the toilet during the examination. Although the supervisor of the examination did not find that the plaintiff had seen the formula in the note, he nevertheless stopped the plaintiff from the examination. The defendant then expelled the plaintiff in accordance with Article 3(5) of the Message No. 068 on 5 March 1996, which provided that "any student who cheats in the examination shall be expelled". The defendant then filed for a change of enrolment on 10 April 1996, but it had never been announced to the plaintiff. Therefore the plaintiff continued to study at the defendant as a normal undergraduate. The defendant even registered the plaintiff and accepted education fees from him in the subsequent years. The plaintiff then completed all the required courses and successfully defended his bachelor thesis. In June 1998 the defendant refused to issue the diploma to him on the ground that he had been already expelled from the defendant on 10 April 1996. The plaintiff then lodged an administrative proceeding against the defendant before Haidian District People's Court, Beijing.

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<sup>74</sup> <[news.xinhuanet.com/legal/2005-11/15/content\\_3782967.htm](http://news.xinhuanet.com/legal/2005-11/15/content_3782967.htm)>.

<sup>75</sup> <[www.law-lib.com/fzdt/newsthtml/szpl/20060217163102.htm](http://www.law-lib.com/fzdt/newsthtml/szpl/20060217163102.htm)>.

On 14 February 1999 the District Court delivered its judgment in favour of the plaintiff, ordering the defendant to issue the bachelor diploma to the plaintiff. The Court held that although the defendant was not an administrative organ, it nevertheless was exercising some powers of administration authorised by the statute laws, and that the relationship between the plaintiff and the defendant was not the equal relationship of a civil nature, but the special administrative relationship, and that any dispute arising from the administration was not the civil proceeding, but the administrative proceeding. The Court further held that the issue in the present case was whether the plaintiff still was enrolled. The Court held that the plaintiff was qualified to study at the defendant after he was enrolled by the defendant, but at the same time the plaintiff should be subject to the management of the defendant. The Court continued to hold that although the defendant had the corresponding autonomy on education in the management of the plaintiff, the management should not violate the provisions of the statute laws, administrative regulations and rules. On this point, the Court made reference to Article 12 of the Regulations on Administration of the Students in Regular Higher Educational Institutions promulgated by the National Committee on Education, the predecessor of the current Ministry of Education, on 20 January 1990, which provided that in the case that a student was absent or cheated in the examination, the result of the examination would be zero, and that if that student repented, he or she could have another chance to attend the examination after the approval of the department of teachings, and that any student who cheated in the examination should be subject to disciplinary sanctions. In this case, the Court found, that Message No. 068 of the defendant provided much more severe punishment on the cheating than the Regulations. The Court then held that the Message should be null and void. Furthermore, the Court held that the decision of expulsion was directly related to the plaintiff's RTE, and that the defendant must directly announce the decision and serve it to the plaintiff, and allow the plaintiff to make a petition from the perspective of protecting the rights and interests of the plaintiff. In this case, the Court found that the defendant failed to perform these obligations by neglecting the right to petition of the plaintiff, and therefore such managements were illegal. The defendant was not satisfied with the judgment and appealed to Beijing No. 1 Intermediate People's Court. The Intermediate Court then maintained the judgment of the District Court.<sup>76</sup>

Another well-known case in this regard is the case of *Liu Yanwen v. Peking University, and the Academic Degree Evaluation Committee of Peking University*. In this case, the plaintiff was a Ph.D. candidate at the Department of Wireless Electronics, Peking University. He orally defended his doctoral dissertation before the Committee on the Oral Defense of the Department, which eventually suggested Peking University to give him a doctoral degree with the condition to make necessary revision of the dissertation on 10 January 1996. It was further suggested that he be given a doctoral degree nine days later by the Academic Degree Evaluation Committee of the Department with 12 votes in the affirmative and 1 vote in the negative. On 24 January 1996, the 41st Session of the Academic Degree Evaluation

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<sup>76</sup> *Gazette of the Supreme People's Court of the People's Republic of China*, 1999, No. 4, p. 141.

Committee of Peking University (hereinafter referred to as ‘Committee’) convened. The Committee was composed of 21 members; however only 16 members were present in the session. The result of the voting was: 6 voted in the affirmative, 7 voted in the negative, and 3 abstained from voting. On the basis of the voting result, Peking University then refused to issue a doctoral diploma and a certificate on doctoral degree to the plaintiff because the defendant contended that less than half of the voting members supported the plaintiff. On 24 September 1999, the plaintiff filed an administrative litigation against the defendants before the Haidian District People’s Court, Beijing, requesting the Court to order the defendants to give him both the diploma and the certificate on degree.

On 17 December 1999, the Court delivered its judgment in favour of the plaintiff. In the first place, the Court concluded that the plaintiff had the right to lodge an administrative litigation against the defendant because, although the defendant, a university, was not an administrative organ, it nevertheless had the power to manage the enrolment of the university students and to issue diplomas and certificates of degrees on behalf of the State. The Court held that this power was delegated by the statute laws, in particular Articles 28 and 29 of the Act on Education. Furthermore, the Court held that in accordance with Article 9 of the Regulations on Academic Degrees of the PRC,<sup>77</sup> a special Committee on the evaluation of the degrees was established by the defendant, and that in accordance with Article 10(2) of the Regulations, the Committee had the exclusive power to decide whether the defendant should issue the diplomas and certificates of degrees, therefore the defendant was qualified to be the defendant in the administrative proceedings in the sense of Article 25(4) of the Administrative Proceedings Act.<sup>78</sup>

In accordance with Article 10(2) of the Regulations, “the academic degree evaluation committee shall be responsible for examining and approving the list of holders of the bachelor’s degree and for making a decision whether or not to approve each resolution on the conferment of a master’s or doctor’s degree submitted by the dissertation defence committee. Each decision shall be adopted by secret ballot and with a simple majority of the committee members supporting.” The Court held that the expression ‘the committee members’ should be interpreted to be all of those members of the Committee, *i.e.* 21 members in the present case, instead of those members who were present in the voting, and therefore the decision of the defendant violated Article 10(2) of the Regulations. Furthermore, the Court held that since the decision not to issue diplomas was related to the right to get diplomas of the plaintiff, the Committee should inform the plaintiff and hear the petition of the plaintiff before a decision not to issue diplomas was to be made, and that once a decision not to issue diploma was made, the Committee must serve the decision or directly announce the

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<sup>77</sup> The Regulations were adopted at the 13th Meeting of the Standing Committee of the 5th NPC on 12 February 1980, and was Amended at the 11th Session of the Standing Committee of the 10th NPC on 28 August 2004, <[www.moe.edu.cn/edoas/en/level3.jsp?tablename=1242700726117393&infoid=1248314096311670&title=Regulations%20on%20Academic%20Degrees%20of%20the%20People%27A1%AFs%20Republic%20of%20China](http://www.moe.edu.cn/edoas/en/level3.jsp?tablename=1242700726117393&infoid=1248314096311670&title=Regulations%20on%20Academic%20Degrees%20of%20the%20People%27A1%AFs%20Republic%20of%20China)>.

Article 9 provides that “[e]ach degree-conferring entity shall establish an academic degree evaluation committee and form dissertation defence committees for the disciplines concerned”.

<sup>78</sup> Article 25(4) of the Administrative Proceedings Act provides that “if a specific administrative act has been undertaken by an organization authorized to undertake the act by the law or regulations, the organization shall be the defendant”.

decision to the plaintiff. In this case, however, none of these procedures had been performed by the defendant, and therefore the Court held that the decision of the defendant should be cancelled and that a new decision must be made on whether a diploma should be issued to the plaintiff in accordance with the stipulated procedures.<sup>79</sup>

The defendant was not satisfied with the judgment, and appealed to Beijing No. 1 Intermediate People's Court. On 30 April 2000, the Intermediate Court ordered the District Court to make a new trial of this case on the ground that the statute of limitation of lodging an administrative litigation in this case had expired. The District Court then dismissed the administrative litigation on the same ground.

#### 4.3.3. The Plan for Enrolment of Undergraduates by the Ministry of Education

On 20 August 2001, Jiang Yan, Luan Qian and Zhang Tianzhu, three female students from a high school in Qingdao, Shandong Province, lodged an administrative litigation against the Ministry of Education before the SPC. The plaintiffs requested the SPC to declare that the administrative act of the Enrolment Plan for National Universities and Colleges of 2001 violated the relevant provisions of the Constitution and the Act on Education, and to propose a judicial recommendation that the defendant refrain from conducting similar illegal administrative acts in the future. The plaintiffs contended that their right to equal education, including the higher education, in the Constitution and the Act on Education was infringed by the defendant because the Enrolment Plan made different limitations on the numbers of the enrolment on basis of different regions, which set the different levels of the students to be enrolled to the universities or colleges since the gap of the enrolment scores among the regions was enormous.<sup>80</sup>

On 3 September 2001, the SPC dismissed the lodgement of the proceedings by replying that this lodgement should be filed before Beijing No. 1 Intermediate People's Court where the Ministry of Education is located because in accordance with Article 14(2) of the Administrative Proceedings Act the case against the ministries shall be filed before the intermediate people's courts where they are located.<sup>81</sup> On 8 September 2001, the plaintiffs declared that they would not lodge this proceeding again.<sup>82</sup>

## 5. Some Comments on the RTE Proceedings before the Chinese Courts

The above survey presents a picture of to what extent the international and Chinese law on the RTE has been realised in the Chinese judicial practice. Although the survey does not cover all of the cases in relation to the RTE dealt with by the Chinese courts, it does demonstrate some positive and negative aspects on how cases are

<sup>79</sup> <[www.publiclaw.cn/Comment/Details.asp?NewsId=629&Classid=&ClassName=典型案例](http://www.publiclaw.cn/Comment/Details.asp?NewsId=629&Classid=&ClassName=典型案例)>.

<sup>80</sup> <[hnews.sohu.com/42/01/news146510142.shtml](http://hnews.sohu.com/42/01/news146510142.shtml)>.

<sup>81</sup> Article 14(2) of the Administrative Proceedings Act provides: "The intermediate people's courts shall have jurisdiction as courts of first instance over the following administrative cases: [...] (2) suits against specific administrative acts undertaken by departments under the State Council or by the people's governments of provinces, autonomous regions or municipalities directly under the Central Government; [...]"

<sup>82</sup> <[chinalawlib.com/358950369.html](http://chinalawlib.com/358950369.html)>.

developing the Chinese law on the RTE.

In terms of the positive aspects, cases could possibly play a significant role in the vindication of the RTE. Many cases selected in this survey indicate that the Chinese courts are playing an increasingly important role in the respect, protection and fulfilment of the RTE through their judicial practice, whether through criminal, civil or administrative proceedings. They imposed penalties on those who were found to infringe upon the RTE of the citizens, especially those minors under education. They made the educational institutions take civil liability for the infringement of the RTE either through the right to name in civil law or the RTE provision in the Constitution. They further promoted and facilitated those educational institutions entrusted with the public authorities or autonomy to properly administrate them and their students.

With regard to the negative aspects, to begin with, the development of law in relation to the RTE through cases is not satisfying. In the field of criminal proceedings, it is doubtful whether the police or prosecutors have seriously investigated those cases in which the CMSAEF were believed to be committed in the incidents such as those massive earthquakes where many school buildings collapsed, resulting in a lot of casualties of the teachers and students. In the field of civil proceedings, the fire of hope to invoke the RTE provision in the Constitution in the civil cases has been extinguished. Indeed, the application of the Constitution in all the criminal, civil and administrative proceedings has been blocked. Thus, in a situation where there is no mechanism to review the constitutionality of the statute laws, administrative regulations and rules, it is very difficult to prevent the RTE from being infringed by them. This is particular evident in the administrative proceedings since the scope of administrative acts of the government which can be reviewed by the courts is much limited.

Secondly, the jurisprudence of the courts at various jurisdictions is not always consistent with each other. This problem is actually present in criminal, civil and administrative proceedings. The silence of the SPC in this regard exasperates the situation.

Thirdly, the silence of the Constitution to international law, in particular those international human rights conventions ratified or acceded to by the Chinese government, is another big cause for the situation at hand. In this regard, the Chinese judges should be blamed for their timidity to invoke those international human rights conventions ratified or acceded to by the Chinese government. In my opinion, if the Chinese judges were bold enough to invoke those international human rights conventions ratified or acceded to by the Chinese government, they would have applied them, or at least made reference to them, in the judgments. As a matter of fact, it could be strongly argued that the invocation of those human rights conventions ratified or acceded to by the Chinese government is not prohibited by any law, including the Constitution. This can be demonstrated by the fact that the Constitution itself is silent on the status of international law in the Chinese domestic legal system, there is no provision which prohibits the Chinese judges from invoking international human rights conventions ratified or acceded to by the Chinese government in any statute law in relation to human rights, and international civil and criminal

conventions ratified or acceded to by the Chinese government have been often applied in the civil and criminal judgments before the Chinese courts. It is argued that in the situation that neither the Constitution nor the statute law in relation to the RTE makes reference to international human rights law, the power to apply them is supposed to rest on the Chinese judges.

It should further be noted that the Chinese advocates need to be trained in international law because their records of requesting the judges to apply those international human rights conventions ratified or acceded to by the Chinese government are disappointing. There was not any record that any Chinese advocate had ever requested the judges to apply the relevant international human rights conventions ratified or acceded to by the Chinese government or even at least make reference to them. The ignorance of international human rights law by the Chinese advocates is one reason why no case had ever considered international human rights law before the Chinese courts.