

The Issue of Validity of SIPO's Gazette No.80 and Its Solution

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The Constitution is of supreme legal force. It is a common sense knowledge that any law and administrative regulations contrary to it are not valid legally. To be frank, however, it is an arduous and gradual process to build up a nation under the rule of law. Some typical events or cases often play a tremendous role in laying the foundation of the rule of law in the law-making process in various nations. As a case in point, *Marbury v. Madison*, a precedent of judicial review, in the 19th century, has contributed greatly to the promotion of the rule of law in the U.S.. In 2003, three Ph.D. scholars wrote to the Standing Committee of the National People's Congress because of the "Sun Zhigang Event"¹, which resulted in the abolishment of the Measures for Housing and Sending Back Tramps/Vagrants and Beggars in Urban Areas. This event will be kept in the history of the governance under the rule of law in China. For this writer, exploration in the issue relating to the validity of duration of patent referred to in the State Intellectual Property Office's (SIPO) Gazette No.80 (hereinafter referred to as Gazette No. 80) involves an issue within the Patent Law, and, as well, of great significance to the entire legal system. These writers hope to clarify the issue of duration of the patent right by exploring the validity of Gazette No. 80. They also hope to promote the amplification of the mechanism for review of unconstitutional actions in China.

The case of patent dispute relevant to Gazette No. 80

In 2005, a famous US pharmaceutical company accused a well-known Chinese biotechnology company in the Beijing No. 2 Intermediate People's Court of patent infringement. The US company made the accusation on the basis of 5 patents of which 2 were related to Gazette No. 80. The case is now pending.

In fact, cases related to Gazette No. 80 did not start to

arise in 2005. As early as 2003, a Japanese business sued 8 Chinese enterprises because of a patent for the invention entitled "drink container". For the Japanese business, a soft package for drinks with a suction tube made, marketed and used by the 8 enterprises fell within the extent of protection for the patent for the invention of the "drink container", and they infringed its patent right. An application was filed for patent for the "drink container" in China on 2 August 1987, and was granted the patent on 5 June 1991. The duration of the invention patent was 15 years, and the patent would expire on 2 August 2002. According to Gazette No. 80, the duration of the patent for invention is 20 years from the date of filing. The extension of the duration of the patent for invention resulted in the 8 Chinese enterprises becoming defendants one after another.

Several later patent administrative and infringement lawsuits were more or less related to the issue of the validity of Gazette 80.

Gazette No. 80 and its impact

To honour China's commitment to the WTO and to bring the protection accorded to invention patents in China in conformity with the requirements of the TRIPS Agreement, the SIPO issued Gazette No. 80 on 10 December 2001, setting forth the following provisions concerning the matter of extension of the duration of the right of some invention patents:

(1) The duration of the invention patent right for which applications were filed with the Chinese Patent Office on and before 31 December 1992 and which remained valid up to 11 December 2001 shall be extended to 20 years from the date of filing;

(2) For the above invention patents with the duration of the patent right extended, the patentees shall pay the annuities under Rule 95 of the Implementing Regulations of the

Patent Law. Where extension of the duration of the invention patents for which applications were filed with the Chinese Patent Office between 11 December 1986 and 11 January 1987 and which remained valid up to 11 December 2001, the patentees shall pay the annuities for the 16th year before 11 January 2002. The amount of the annuities to be paid shall be determined under the SIPO's Gazette No.75; and

(3) The SIPO will publish the extension of duration of the above-mentioned invention patents, but will not issue new patent certificates thereto, and the issued patent certificates will remain valid.

The Gazette No. 80 involves more than 50,000 invention patents and invention patent applications as tabulated below:²

Number of patents by nation or region
related to Gazette No. 80

	1987	1988	1989	1990	1991	1992
The U.S.	1276	1524	1686	1648	1594	1658
Japan	1086	1192	1087	883	850	944
Germany	10	17	22	8	1	5
France	249	291	286	251	208	219
the U.K.	265	226	226	209	190	250
Canada	70	83	71	56	58	80
Italy	92	87	99	95	75	106
Taiwan region	0	27	58	109	179	3662
South Korea	0	0	0	0	0	0
Patents under the effect of Gazette No. 80	7832	9047	9245	9725	10556	13337

The extension of the duration of the validity of these patents will result in a upward trend of the cases involving patents of the class in the years to come.

Analysis of legality of Gazette No. 80

As for the issue of legality of Gazette No. 80, the Beijing No.1 Intermediate People's Court believes in the administrative ruling in the case the Ningxia Qiyuan Drug Industry Co.,

Ltd. v. the Patent Reexamination Board (PRB) that:

The SIPO issued Gazette No. 80 on 10 December 2001 to set forth the provisions concerning the extension of the duration of some invention patents in order to comply with the provisions of the WTO's TRIPS Agreement. As the administrative department authorised by the State Council for the nationwide work on patent, the SIPO issued Gazette No. 80 under the Patent Law as of on 1 July 2001 as an adjustment in the application of the relevant law; hence the Gazette was not contrary to the relevant law provisions, and should be complied with".

Although the Beijing No. 1 Intermediate People's Court recognised the validity of the Gazette No. 80, the conclusion is not to be applied to the trial of other similar cases since China is not a case law nation. Unfortunately, this ruling has failed to address the issue related to the amendment of the Patent Law as of 1992, and lacks substantial analysis of the issue.

To address the issue of legality of Gazette No. 80 that involves thousands of patents, we need to first understand the background against which it was issued.

1. Background against which Gazette No. 80 was issued

Since it took the Chinese Government 14 years to wind up the negotiation for China to accede to the WTO and the relevant accession treaties were not concluded until 11 November 2001, China missed the best opportunity to amend its Patent Law for the second time to integrate the relevant provisions of the TRIPS Agreement in the newly-amended Patent Law. Gazette No. 80 was issued on 10 December 2001, and the following day was 11 December 2001, on which China officially acceded to the WTO.³ Under Gazette No. 80, China has honoured its commitment to conform to the relevant requirements of the TRIPS Agreement on the duration of the patent right.

However, Gazette No. 80 issued after the amendment of the current Patent Law is in direct conflict, in some aspects, with the amended Patent Law and its Implementing Regulations as of 1992. Thus, the issue of validity of Gazette No. 80 is unavoidable.

2. Validity of Gazette No. 80

The Chinese Patent Law entered into force in 1985, under which, the duration of the patent right for invention was 15 years. The Standing Committee of the Seventh National People's Congress reviewed, at its 27th Meeting, the bill of the State Council for the amendment of the Patent Law of the People's Republic of China, deciding to amend the Patent

Law of the People's Republic of China. The amended Patent Law was issued on 4 September 1992 and entered into force on 1 January 1993.

In the Patent Law of 1992, Article 45 of the former Patent Law of 1985 was changed into article 45 as of "the duration of patent right for inventions shall be twenty years and the duration of patent right for utility models and patent right for designs shall be ten years, counted from the date of filing." The law-making body expressly pointed out in the Decision on the Amendment of the Patent Law that the former Patent Law applied to applications filed before this decision took effect and to the patent right granted to these applications. Relevant provisions were also set forth in the Implementing Regulations of the Patent Law entering into force on 1 January 1993.

In the legal practice in China, provisions on the duration of the patent right should only be set forth in legislation. All the provisions on duration of the patent right in the Patent Laws as of 1985, 1992 and 2000 and the Decision on the Amendment of the Patent Law ratified by the Standing Committee of the National People's Congress in 1992 have been formulated by the Standing Committee of the National People's Congress, and without whose ratification, any other authorities have no power to make any decision on the duration of the patent right.

No doubt, Gazette No. 80 has been issued in compliance with the TRIPS requirement. However, extension of the duration of the patent right in it is related not only to the civil rights of so many patentees, but also to the interests of the public at large. The SIPO has extended the duration of part of the patents in the form of patent gazette without seeking opinions from the public, nor being authorised by the Standing Committee of the National People's Congress. Its action has exceeded its empowerment under the law. Since the provision on the duration of the patent right is contrary to the current Patent Law and its Implementing Regulations, its overall validity is challenged. Under the Legislation Law, any law of lower level that is contrary to the law of the higher level should be nullified under the Legislation Law.

Inadequate mechanism for review of unconstitutional actions

Conflicts between laws of lower level and laws of higher level are by no means rare in the current legal system in China. Besides the "Sun Zhigang event", in August 2005, some

suggested, in the name of citizen, to the Standing Committee of the National People's Congress that the Standing Committee of the National People's Congress review the Regulations of Heilongjiang Province on Health Care for Mothers and Infants and the Regulations on Marriage Registration to see whether they were in conflict with the Law of the People's Republic of China on Health Care for Mothers and Infants.⁴ The suggestion drew wide attention from the media and the law community. It is another clear indication that "law making in violation of the law" is a serious problem.

It has been more than four year since Gazette No. 80 was issued. So far, the law-making body has not done anything to address the issue of validity of Gazette No. 80. Like the issue involving the Law on Health Care for Mothers and Infants, the Regulations on Marriage Registration, and the Regulations of Heilongjiang Province on Health Care for Mothers and Infants, the cause of the issue lies in the absence of an adequate system for review of unconstitutional actions.

There are mainly three patterns of the system devoted to the review of unconstitutional actions in today's world: (1) the legislature exercises the power of such review as in the case of the United Kingdom; (2) the ordinary courts exercise the power by accepting actions instituted by citizens as typically in the U.S.; and (3) a special body does the review, such as the Constitutional Commission in France and the Constitutional Court in Germany. Besides, any stakeholder may initiate review of an unconstitutional action on a case-for-case basis.

As is shown by the provisions of the Constitution and the Legislation Law in China, there exist the pre-review and post-review of alleged unconstitutional actions. The former is the review by the Standing Committee of the National People's Congress on its own initiative when administrative and regional regulations are submitted to it for filing; the latter is one done after the administrative and regional regulations take effect. The relevant State organs, social body and citizen have the right to suggest that the Standing Committee of the National People's Congress conduct the review. But this suggestion is not directed to a particular case.

Meanwhile, we have also seen progress being made in this aspect. In 2005, the Standing Committee of the National People's Congress finalised the amendment of the Procedure of Work on Registration and Review of Administrative Regulations, Regional Regulations, Autonomous Regions' Regulations and Separate Regulations, and Special Eco-

conomic Regions' Regulations, and adopted the Procedure of the Work on Registration and Review of Judicial Interpretations. In this was the system has been further improved for registration and review of regulations and judicial interpretations.

However, there are, so far, not any provisions set forth on the initiation of review of laws made in violation of the Constitution. Besides, it has not been provided in China that any special court (say, a constitutional court) is devoted to the judicial view. Therefore, the problem of "law making in violation of the Constitution" will be eliminated only by way of improvement of the mechanism of review for this purpose.

Recommendations

To properly address the issue arising from Gazette No. 80, these writers would like to request the relevant department to take corresponding actions. Further, to solve the problem once and for all, an adequate mechanism of review of unconstitutional actions should be established as soon as possible.

As attorneys-at-law, these writers request that the practitioners in the community pay great attention to the series of problems resulting from Gazette No. 80. When deciding to provide service and to undertake product trade, we should remember to conduct search of relevant patents, and then make legal, market and value assessment according to the search findings in an effort to stay away from any disputes when working with other businesses in the future. ■

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¹ On 17 March 2003, Sun Zhigang, a college student in Guangzhou City, was taken in as an urban tramp by the public security authority while walking along the street, and died on 20 March the same year when he was housed as such. Medical check-up showed that he was beaten to death. This event drew extensive attention from the society. On 14 May 2003, Yu Jiang and other two Ph.D. scholars in law wrote to the Standing Committee of the National People's Congress, suggesting that the Committee review the Measures for Housing and Sending Back Tramps/Vagrants and Beggars in Urban Areas, which was final abolished.

² The tabulated statistics represents the findings of the search on the SIPS website through the addressed shown in patent applications, excluding the patents granted between 11 December 1986 and 31 Decem-

ber 1986.

³ The Chinese Government ratified the Agreement on the Accession of the WTO on 11 November 2001, and China became a member of the organisation with the corresponding rights and obligations on 11 December 2001.

⁴ The Law of the People's Republic of China on Health Care for Mothers and Infants is a law enacted by the Standing Committee of the National People's Congress in 1994, in which the compulsory pre-marriage medical check-up is provided for. The Regulations on Marriage Registration is a set of administrative regulations formulated by the State Council in 2003, in which it is provided that the pre-marriage medical check-up is not required for the marriage registration. The Regulations of Heilongjiang Province on Health Care for Mothers and Infants is a set of provincial regulations revised in 2005. Yang Tao and Wang Jingui, as citizens, made the suggestion that the Standing Committee of the National People's Congress review the provisions on pre-marriage medical check-up of the Regulations on Marriage Registration as amended by the State Council on 8 August 2003 and the Regulations of Heilongjiang Province on Health Care for Mothers and Infants as amended on 24 June 2005.

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