

**THE DEVELOPMENT OF  
CONSTITUTIONALISM  
IN THE TRANSITION OF  
CHINESE SOCIETY**

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## I. THE TRANSITIONS AND CRISES OF CHINESE SOCIETY

China's economy has been growing at a rate of approximately 8% annually over the last decade, and its GDP has reached about ¥13.65 trillion. These dramatic economic developments have been accompanied by great changes in people's lives, especially in the cities. In contrast to the "proletarian" status they held in the communist past, citizens now hold private interests in real property, business enterprises, and personal investments.<sup>1</sup> Many people now enjoy a happier, higher quality of life than they ever knew in the past. Especially in the country's developed regions, lifestyles and consumption patterns have reached an international standard. The achievements of China's economic development are indeed remarkable.

Nonetheless, with economic development come social problems. With a Gini coefficient recently reaching 0.5,<sup>2</sup> the income gap between the haves and the have-nots in China continues to widen. In addition, unemployment plagues the Chinese economy.<sup>3</sup> In some extreme cases, living conditions have not improved but have in fact deteriorated.<sup>4</sup> Pressing issues of national concern include environmental destruction, stagnation—even decline—of education and public health services, and increasingly problematic issues surrounding public security in rural areas.

A series of contentious social problems has appeared over the course of China's modernization. A large floating population has become a significant minority in the cities, and urban residents often discriminate against these migrants. Adolescents succumb to addiction, prostitution, and destitution. Public order in China's vast rural areas is breaking down. Traditional administrative organs and governmental authorities have weakened, whereas modern governance is far from established. The relationship between peasants and those in authority is often unstable, with social order maintained mainly by administrative punishment and

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<sup>1</sup> Household saving totaled ¥7 trillion in 2001 and ¥11 trillion in 2004.

<sup>2</sup> According to research by the Chinese Academy of Social Science's Institute of Economics, in 2004 the Gini coefficient had reached 0.454, while statistics released by Fudan University's Institute of Economics reported a coefficient of 0.5.

<sup>3</sup> According to statistic released by the PRC's Ministry of Labor and Social Security, at the end of the third quarter of 2004, 8.21 million urban residents were registered as unemployed, constituting an unemployment rate of 4.2%. This figure does not include unregistered residents and "ahead-of-schedule" retirees who were forced to retire with relatively low wages in their forties and fifties.

<sup>4</sup> According to the Human Development Report published by the United Nation Development Program, when China's annual per-capita GDP ranked 123<sup>rd</sup> in the world, its Human Development Index ranked 111<sup>th</sup>. This indicated that China had reached a higher standard of human development with a lower per-capita annual income. China ranked 96<sup>th</sup> in both categories in 2000, while in 2001, it ranked 102<sup>nd</sup> in per-capita GDP, yet 104<sup>th</sup> in the Human Development Index.

coercive measures. Sharp and violent conflicts sometimes break out between peasants and local government representatives.

Like so many other elements of Chinese culture, corruption has changed with the times, despite extensive central government campaigns to stamp it out. These changes in the nature of corruption in China may be described in four general ways. First, corruption is more widespread than it was before. It concerns not only a small handful of government officials, but almost every government agency. It is often considered normal for officials to take unfair advantage of their authority and resources.<sup>5</sup> Second, several cases have indicated a high degree of collusion among a large number of cadres. The Ma De case<sup>6</sup> in Heilongjiang province, for example, involved hundreds of government officials. Third, signs indicate that corruption is reaching increasingly higher levels of government. According to statistics released by the Central Discipline Review Commission and the Ministry of Supervision, 166,795 cases were investigated in 2004 alone. As a result of those investigations, 170,850 people were punished: 5966 were county-level officials, 431 were municipal-level, and sixteen others were provincial-level.<sup>7</sup> Fourth, the problem of judicial corruption is more severe now than it has been in the past. In 2004 alone, two members of a Higher Level People's Court and two officials in a Higher Level People's Procuratorate, both provincial-level institutions, were investigated for corruption and bribery.<sup>8</sup> In the same year, 35,031 government officials were tried for corruption and bribery, and more than 1275 of those bribery and appropriation cases involved more than ¥1 million.<sup>9</sup>

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<sup>5</sup> Officials' salaries, bonuses, and benefits vary widely among the various organs of government. As a result, it is occasionally the case that cadres in local departments of education inflate students' fees and embezzle the surplus funds, police department officials use money collected through fines to fund bonuses and purchase supplies, and municipal court officers finance their own salaries and supplies through the court fees they collect.

<sup>6</sup> Ma De was the former Chairman of the Communist Party's Committee of Suihua city, Heilongjiang province. He accumulated more than ¥5 million and an additional US\$25,000 by selling official titles to people. 256 officials were involved in this case. See 刘畅, 绥化马德卖官案侦查终结 透视绥化畸形官场生态 [Liu Chang, *The Investigation of Ma De Case in Suihua Concludes, Perspective on Suihua Official Corruption Emerges*], 中国青年报 [CHINA YOUTH DAILY], Aug. 25, 2004, at A3.

<sup>7</sup> Li Zhilun spoke at the State Council's third working meeting on corruption on February 16, 2005.

<sup>8</sup> They were Wu Zhenhan, President of the People's High Court of Hunan Province; Ding Xinfu, President of the People's Procuratorate in Shanxi province; Xu Yandong, President of the People's High Court in Heilongjiang province; and Xu Fa, President of the People's Procuratorate in Heilongjiang province. See 2005: 两会热门词汇 - 编织体系反腐的天罗地网 [2005: *Popular Vocabulary of Two Congresses - Knitting a Meshwork of Systemic Anti-Corruption*], 工人日报 [WORKERS DAILY], March 11, 2005, at 11.

<sup>9</sup> The President of the Supreme People's Procuratorate spoke at the third meeting of the tenth National People's Congress on March 9, 2005.

The mechanisms of social justice in China have lost their ability to function. First, inequitable policies perpetuate the unfair distribution of wealth. For example, preferential treatment towards particular regional economies leads to significant disparities in regional economic development.<sup>10</sup> Additionally, officials discriminate against private enterprises, especially where foreign trade is concerned. Some local governments ignore guidelines and standards regarding labor and, as a result, investors obtain disproportionately high profits while “bloody factory” and “bloody mine” scandals prevail.<sup>11</sup> Government regulators permit inadequately qualified companies to be listed on the stock market to rope in capital from ordinary shareholders. To a great extent, the prosperity of Chinese cities is due to direct administrative interference from the government, while the greater Chinese masses, including a disproportionate segment of rural peasants and disenfranchised urban residents, end up footing the bill.<sup>12</sup>

The unfair allocation of resources is the result of three major social forces. First, state-owned assets have been carved up as a result of severe upheavals accompanying the restructuring of these assets. Second, inappropriate allocation policies have led to unfair income distribution. Those economic areas monopolized by government entities—finance, telecommunications, and air travel, for example—enjoy disproportionately high profits. Managers in state-owned enterprises set their own salaries, and not surprisingly they usually decide to pay themselves a salary hundreds of times higher than that of ordinary workers. A third source of inequality is in the realm of education. Instead of guaranteeing that each rural child receives an education, the government instead diverts resources to guaranteeing a high standard of education in cities. Consequently, unequal distribution of educational resources is widespread: while universities continue to expand, they do so at the expense of providing basic educational services to primary and secondary schools in the countryside.<sup>13</sup> In addition, discriminatory admissions policies based upon testing standards that vary by geographic region perpetuate severe inequities.

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<sup>10</sup> The development strategy in the eastern coastal regions during the 1980s, for example, bestowed considerable economic privileges upon these regions, attracting cheap labor and business elites from the country's central and western provinces. This resulted in an imbalance of human resources among the country's regions.

<sup>11</sup> “Bloody factory” and “bloody mine” scandals involve factories and mines in which the work conditions are abominable. Miners typically work for low compensation over ten hours per day under conditions that violate national and international labor laws.

<sup>12</sup> The key to “managing the city” is to obtain land at a low price, then sell it to exploiters. Both the exploiters and local government representatives snatch huge profits.

<sup>13</sup> Chinese universities have expanded aggressively in recent years, especially in the field of graduate studies. This flood of graduate students consumes scarce educational resources.

Serious problems also abound regarding injustice in the legal system. Exorbitant litigation fees keep many parties with legitimate grievances from having their day in court. Some trans-regional disputes over economic matters cannot be settled because of endemic local protectionism. Corrupt judges perpetuate greater injustices, which in turn lead to an increasing number of appeals and petitions to higher authorities.<sup>14</sup>

In addition to the improper exercise of discretion in the judiciary, China's social realm bears witness to widespread discrimination and injustice as well. Due in part to the labor surplus in China's market economy, employment discrimination is rampant. In many cities, shopkeepers explicitly state that anyone not meeting certain height requirements need not apply for employment. These discriminatory practices are based on a number of criteria, including region of origin, official residence status, gender, age, socioeconomic class, and appearance.

In sum, social stability has not kept pace with economic development or improvements in living conditions. Indeed, social conflicts have become even sharper precisely because of the discrepancy between economic development and social justice. New conflicts arise while old problems remain.

The incidence of people filing administrative petitions, or "letters and visits," has increased dramatically as well. The National Letters and Visits Bureau received 214,508 petitions in 2001, 370,219 in 2002, and 488,974 in 2004.<sup>15</sup> In the past, complaints concentrated on such issues as non-payment of social security benefits for employees of state-owned enterprises, collection of illegal fees in rural areas, and crude implementation of central policies by local officials. Complaints are now about judicial injustice and corruption, expropriation of rural land, and the increasing problem of forced evictions (拆迁, *chaiqian*). Other problems include illegitimate village elections, increased social discontent, and occasional mass protests.

Meanwhile, new social problems have gained prominence. The unemployment rate among recent college graduates has increased as they

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<sup>14</sup> Petitions on the grounds of judicial impropriety account for one of the four major categories of petitions in China. The other categories are claims of benefits for laid-off state workers, petitions against demolition orders, and complaints about land expropriation in rural areas.

<sup>15</sup> Petitions filed by groups increased dramatically. In 2003, the National Letters and Visits Bureau saw a 41% increase in the number of petitions filed by a group from the previous year; there was a corresponding 44.8% increase in the number of appeals filed by an individual. The largest petitioning group contained more than 800 people. Simultaneously, these petitions are becoming increasingly violent.

enter the labor market at unsustainable rates.<sup>16</sup> Other problems include villagers' fights for self-governance and their struggle to protect local natural resources.

Still more problems spring from the degradation of traditional morality and culture. The role of Confucianism in Chinese society has been a constant point of contention since the mid-19<sup>th</sup> century. In the post-Mao "reform and opening" era, people have lost faith in communism, while the central authorities continue to reject Western values. This moral vacuum leads to the exclusive pursuit of individual interests and personal wealth.

In the annals of comparative history, crises of the sort that China now faces have usually indicated the birth of constitutionalism. They are usually precipitated by inequitable distribution of resources in transitional periods, which in turn motivates the quest for the rule of law. This quest increasingly gains momentum which, while possibly constituting a real crisis for Chinese society, may be the very force for promoting constitutionalism within China.

## II. BOTTOM-UP EFFORTS FOR CONSTITUTIONALISM

With economic development come new demands for political participation. As personal assets increase and economic entities privatize and multiply, individual interests and civil society are taking shape. Individual interests lead to individual quests for civil rights. Chinese citizens have begun to fight for their rights spontaneously and consciously via such avenues as social groups, media outlets, judicial organs, and political deliberative forums. This vibrant activity illustrates the impact of social forces on the political regime of China. The quests for human rights, democracy, and rule of law become the bases of constitutionalism. These forces include the following factors.

### A. *Spontaneous Political Participation*

#### 1. "I want to be a representative"

In March 2003, when elections were held for representatives in Shenzhen's People's Congress, a remarkable event happened: twelve ordinary citizens registered as candidates and two of them were ultimately

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<sup>16</sup> See 调查报告: 我国大学毕业生平均就业率为 73% [Survey Report: National Employment Rate Among University Graduates at 73%], 新华网 [XINHUA NET], May 24, 2005, at [http://news.xinhuanet.com/edu/2005-05/24/content\\_2993650.htm](http://news.xinhuanet.com/edu/2005-05/24/content_2993650.htm) (last visited Feb. 19, 2006).

elected.<sup>17</sup> This had a great impact on Chinese politics and received intense attention from national media outlets, legal scholars, and the public in general.<sup>18</sup> Similar volunteer candidates appeared in Beijing and Hubei province. In Beijing, for example, twenty two citizens registered for the election by the end of 2003, and three of them were elected.<sup>19</sup> In Qianjiang, a city in Hubei province, forty one citizens, including twelve peasants, ran in the local election.<sup>20</sup> Such efforts are remarkable in the development of Chinese democracy.

Why have such phenomena become the highlights of democratic development in China? Campus elections became regular events in the beginning of the reform era,<sup>21</sup> those elections, however, were primarily regarded as merely the idealistic political actions of students, whereas the events surrounding the 2003 elections arose from the spontaneous quest to vindicate the interests of ordinary citizens, including peasants. As one commentator said, "If the elections in Peking University were idealistic, this time they rose from practical interests and claims."<sup>22</sup>

Typically, candidates for National People's Congress representatives are appointed by the Communist Party and hence "elected" in accordance with the Party's plans. Until recently, no independent candidates were allowed to participate in the process. The reason for the recent emergence of these independent candidates is that the volunteer candidates want to protect their economic rights by enhancing their political status. The candidates are often white-collar professionals who have benefited from the market economy with above-average incomes, and who maintain close relationships with the electorate.<sup>23</sup> Most of them are motivated by an awareness of the problems of community management, and wish to resolve these problems as

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<sup>17</sup> Hereinafter, "registering" means that citizens take the initiative to sign up for and run in elections, organize their own campaigns, and compete against other appointed candidates.

<sup>18</sup> See, e.g., 2003 年深圳竞选实录, [2003: RECORD ON THE SHENZHEN ELECTION] (唐娟 & 邹树彬编 [Tang Juan & Zhou Shubin eds.], 2003) [hereinafter RECORD ON THE SHENZHEN ELECTION].

<sup>19</sup> Ten of the twenty-two volunteers had college degrees, six were homeowners, and six were professionals such as scholars or lawyers. Some of them wanted to protect their rights, others wanted to challenge the Election Law in order to promote election reform, and still others represented activists in the public sphere. See 中国基层民主发展报告 [REPORT ON THE DEVELOPMENT OF GRASSROOTS DEMOCRACY] 25 (李凡编 [Li Fan ed.], 2004).

<sup>20</sup> Among the forty-one volunteers, there were twelve peasants, eleven teachers, five village heads, four legal practitioners, and nine workers. Due to lack of support from the organizers, all of them failed.

<sup>21</sup> Between 1980 and 1986, elections were held in universities throughout China, with particular prominence in Beijing, Wuhan, and Hunan.

<sup>22</sup> See RECORD ON THE SHENZHEN ELECTION, *supra* note 18, at 363.

<sup>23</sup> Four of the candidates in Shenzhen were representatives of the Community Home Owner Committees, two were migrant or laid-off workers, and the two others were a school president and an engineer.

People's Congress representatives. In the past, responsibility for resolving these issues fell to the government and relevant work units. Now, however, with the withdrawal of the government from many areas of civic life, it is up to the residents themselves to work out a solution. An intermediary is therefore necessary for these individuals to communicate and cooperate with the government. Representatives of the People's Congress have become such intermediaries: they speak for the residents and fight for their interests.<sup>24</sup>

What is the constitutional significance of such spontaneous political participation? It is in fact a manifestation of the reformist trend toward an electoral system, and a challenge to the appointment mechanism of the Communist Party. Some experts maintain that such bottom-up initiatives in Shenzhen are activating internal democratic mechanisms inherent in China's Constitution, indicating a middle class initiative and willingness to participate in politics and to protect their political rights.<sup>25</sup> With the development of the socialist market economy, such "Shenzhen phenomena" demonstrate the inevitability of establishing democratic mechanisms in China.

## 2. The Representatives Are Speaking Out

For a long time, becoming a representative of the People's Congress has been a political favor bestowed by powerbrokers in the Communist Party. To a great extent, being a representative was a matter of Party appointment, rather than of the will of the voters. As a result, representatives had no reason to feel accountable to their constituency, and few critical or opposing opinions were expressed in the People's Congress. In general, the institution had been considered a "voting machine."

This has changed dramatically in recent years. Representatives' accountability has been enhanced through recent electoral processes, especially among those representatives nominated by their constituency. Such representatives therefore dare to speak out.

For example, in March 2004, before the convention of the National People's Congress ("NPC"), Zhou Xiaoguang, the representative of Yiwu city in Zhejiang province, placed advertisements in local media outlets inviting her constituents to submit suggestions for government action. This is a remarkable move toward greater responsiveness and accountability among representatives, and such instances are hardly

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<sup>24</sup> See RECORD ON THE SHENZHEN ELECTION, *supra* note 18, at 346.

<sup>25</sup> 黄卫平 [Huang Weiping], *Preface* to RECORD ON THE SHENZHEN ELECTION *supra* note 18, at 1, 2.



isolated. In recent years, increasing numbers of representatives from throughout the country have been speaking out for their electorate. When the People's Congress convenes, representatives propose bills reflecting their constituents' interests and requests, and after the session, they visit those constituents to assure them that their rights are being protected.<sup>26</sup> Wang Yuancheng, for example, identifies himself as a national representative of migrant workers.<sup>27</sup> During the convention in Beijing, he visited several construction sites to acquaint himself with the opinions of migrant workers, and proposed to the National People's Congress a number of bills guaranteeing employment rights. A national representative from Hunan province, Wang Tian, spent ¥10,000 to hire legal experts for assistance in drafting an NPC bill.<sup>28</sup> Simultaneously, legal experts, NGOs, and lawyers offer their legislative services to representatives, an emerging phenomenon similar to lobbying in Western countries.

Conversely, representatives who do not perform their appropriate functions are forced to resign or are dismissed by the government.<sup>29</sup> Being a representative is no longer solely a political honor, but has become a position with genuine duties and obligations. Both the growth of representatives' accountability and the increasing awareness of the electorate signal hope for the development of China's mechanism of democratic representation.

### 3. Public Participation: Hearings

Prior to 1996, the concept of a hearing was alien to most Chinese people. In that year, the Law on Administrative Punishment required that a hearing be held before the imposition of any sanction concerning citizens' property in excess of a small fine.<sup>30</sup> In the following year, the

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<sup>26</sup> Former NPC representative Yao Xiurong actively helps citizens solve problems. He has accepted more than 1000 citizen appeals. Beijing representative Wu Qing used the Constitution to protect civil rights everywhere. Shenyang representative Feng Youwei and Hubei representative Yao Lifa exposed government problems and disclosed corruption.

<sup>27</sup> Wang Yuancheng actively calls for the rights of migrant workers. When asked about his motivation, he said that he simply wanted to be "a representative with a sense of justice and a conscience." He explained: "I am just trying to fulfill my responsibility as a representative." See 王元成代表口述：农民工代表的心愿 [The Dictation of Wang Yuancheng: Wishes of Migrant Workers], 光明日报 [GUANGMING DAILY], March 7, 2004, at B2.

<sup>28</sup> Wang Tian proposed a draft of The Law on Large Business Companies to the NPC in March 2003.

<sup>29</sup> In 2003 in Ningbo, Zhejiang province, more than 100 representatives were required to resign because they were unable to fulfill their duties. See, "建议代表辞职"起争议 [ "Suggesting that Representatives Resign" Gives Rise to Controversy], at [http://www.e-cpcs.org/yhyj\\_readnews.aspx?id=2218&cols=2612](http://www.e-cpcs.org/yhyj_readnews.aspx?id=2218&cols=2612) (last visited Feb. 19, 2006).

<sup>30</sup> 中华人民共和国行政处罚法 [Law on Administrative Punishment] art. 42 (promulgated by the

Price Law required a public hearing before any price increase of certain important services or products.<sup>31</sup> The problem, however, was that such requirements were seldom enforced. That changed on January 18, 2001, when Qiao Zhanxiang, a lawyer in Hebei province, challenged the state to implement the long-neglected hearing system. He claimed that the Ministry of Railways had raised train fares during the Spring Festival of 2001 without a prior public hearing, a violation of the Price Law and an infringement upon his legal rights. He applied to the Ministry for an administrative reconsideration of the price hike, as well as a review of the legality of the State Planning Commission's Reply on Questions Regarding the Implementation of Government-Guided Pricing on Train Fares. The Ministry accepted—and later rejected—the appeal. Despite the fact that Qiao's appeal ultimately failed, it had a significant impact on the role of public hearings in Chinese civic life. When the Railway Ministry wanted to raise fares again during the 2002 Spring Festival holiday season, the State Planning Commission held a public hearing and broadcasted it live on CCTV. Were it not for Qiao's appeal the previous year, such a hearing would probably never have occurred. Similarly, his appeal raised awareness among ordinary Chinese citizens of their rights in the government decision-making process. Since then, extensive public hearings have been held on such issues as price fixing, administrative punishment, and urban planning.

Public hearings are held not only on administrative matters, but on legislative issues as well. According to the 2000 Law on Legislation, the public can take part in hearings on important legislation. The first legislative hearing was held in Guangzhou in 2000, and the practice soon spread to other regions. By the end of 2004, legislative hearings had become commonplace in local people's congresses, having been held in more than twenty provinces.<sup>32</sup>

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Standing Comm. of the Nat'l People's Cong., Mar. 17, 1996, effective October 1, 1996) 03/1996 全国人民代表大会常务委员会公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] (P.R.C.), available at [http://news.xinhuanet.com/legal/2003-01/22/content\\_701464.htm](http://news.xinhuanet.com/legal/2003-01/22/content_701464.htm) (last visited Feb. 20, 2006).

<sup>31</sup> 中华人民共和国价格法 [Price Law] art. 23 (promulgated by the Standing Comm. of the Nat'l People's Cong. Dec. 29, 1997, effective May 1, 1998) 07/1997 全国人民代表大会常务委员会公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] 783 (P.R.C.), available at [http://news.xinhuanet.com/legal/2003-01/22/content\\_701763.htm](http://news.xinhuanet.com/legal/2003-01/22/content_701763.htm) (last visited Feb. 20, 2006). The requirement covers prices for public utilities, natural monopolies, and other goods and services subject to government "guidance pricing" or mandatory pricing.

<sup>32</sup> Since 2002, Peking University's Center for the Study of the People's Congress and Foreign Legislation, cooperating with the NPC Legal Committee's Domestic Law Office, has held frequent domestic and international symposia on legislative hearings, which have greatly promoted the development of legislative hearings in China.

Both administrative and legislative hearings have been established as important mechanisms of public participation in state affairs. With such a system, democracy is no longer some unattainable realm of civic life, but is instead becoming a process in which every citizen may be directly involved.

### B. *Media Oversight and Public Opinion*

Among the most dramatic changes in recent years is the active role played by the Chinese media and public opinion, including communication via the Internet, in monitoring government activities and protecting civil rights. The 2003 Sun Zhigang case,<sup>33</sup> for example, is a prominent example of cooperation between the media and legal experts. Three graduate students of law appealed to the NPC Standing Committee, calling for constitutional review of the State Council's Detention and Repatriation Measure Regarding Vagrant and Mendicant People. Under nationwide media pressure, the State Council abolished the measure. This is only one of many cases in recent years in which media scrutiny facilitated protection of civil rights.

Other cases that fell under the media spotlight include the Shenyang "Liu Yong case,"<sup>34</sup> the "BMW case,"<sup>35</sup> the Hebei "Entrepreneur Sun Dawu Illegal Financing case,"<sup>36</sup> the Bazhou city

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<sup>33</sup> At 10 PM on March 17, 2003, Sun Zhigang, a young college graduate who had recently moved to Guangzhou in search of work, was detained by the police because he didn't have his identification with him. Three days later, he died in a police clinic. This was disclosed by the Southern Metropolitan News (南方都市报, *Nanfang Dushi Bao*) and had a great impact on the public. Not only was there public outcry over the police's action, but this event led to questions about the legality of the measure promulgated by the State Council in the 1950s pursuant to which he had been detained. As part of an initiative targeting vagrants, this measure granted police the authority to detain those citizens not carrying identification papers.

<sup>34</sup> Liu Yong was accused of being the ringleader of the Shenyang Mafia and sentenced to death. His lawyer claimed that the police had tortured him to extract a confession, and the appeals court changed the sentence to death subject to a two-year suspension. This was greatly criticized by the public. Many believed that the crimes he committed were so appalling that he should be sentenced to death regardless of police procedural impropriety. Under the pressure of public opinion, the Supreme People's Court finally sentenced him again to death without suspension. See 最高人民法院判处刘涌死刑 [*Supreme People's Court Sentences Liu Yong to Death*], 人民网 [PEOPLE'S DAILY ONLINE], at <http://www.people.com.cn/GB/shehui/8217/29349/> (last visited Feb. 7, 2006).

<sup>35</sup> A citizen of Shenyang named Su Xiuwen killed a peasant with whom she had quarreled while driving her BMW, but she was only sanctioned mildly by the court. The disclosure of this case on the Internet aroused public suspicion about courtroom justice. The public opinion was that Su was granted leniency because of her wealth and power. Upon review of the case, however, the court still held that this was a traffic violation and not murder. See 刘鉴强, "宝马案"疑云 [Liu Jianqiang, "*BMW Case*" Suspicions], 南方周末 [S. WEEKEND] Jan. 8, 2004, at A5.

<sup>36</sup> Farmer-entrepreneur Sun Dawu was arrested for the crime of illegal financing, but the public was moved by reports depicting him as an advocate of charity. Furthermore, the difficulties procuring financing that Sun faced as a peasant entrepreneur were common knowledge. Consequently, Sun

"Police False Imprisonment, Murder and Concealment of the Body case,"<sup>37</sup> and Hunan's Jiahe County "Violent Demolition case."<sup>38</sup> The resolution of these cases in the public interest would not have happened without media oversight. In addition, the media has published accounts of many other instances of corruption and liability-triggering accidents, resulting in many government officials being held accountable under the law.<sup>39</sup> Media and public opinion have become influential social forces and have dramatic influence over government decisions.

Not all the impacts of media scrutiny are positive, of course. Especially in judicial cases, media exposure might prove to be a harmful intervention into the realm of fair adjudication.<sup>40</sup> In general, however, the media's emerging role as watchdog is an important contribution to China's democratic development. Heretofore, public opinion and the

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was sanctioned mildly and quickly released from prison. See 万静波, 亿万富翁孙大午的梦和痛 [Wan Jingbo, *The Dream and Pain of Billionaire Sun Dawu*], 南方周末 [S. WEEKEND], Nov. 6, 2003, at A2.

<sup>37</sup> In Bazhou city, Hebei province, a policeman falsely imprisoned a person, tortured him to death during an interrogation, and then buried the corpse to conceal his crime. Police investigated the case after media disclosure. The policeman in question was sentenced to life imprisonment. While this case resembled in the past, the common sentences were typically no more than three to five years of imprisonment with probation. The severe sanctioning of a policeman in this case indicated an evolving respect for the lawful rights of citizens. See 人民检察院公布 4 起挂牌督办重大渎职侵权案件 [People's Procuratorate Announces Four Major Cases of Supervisory Malfeasance and Dereliction of Duty], 人民网 [PEOPLE'S DAILY ONLINE], at <http://www.people.com.cn/GB/shizheng/1027/2945054.html> (last visited Feb. 19, 2006).

<sup>38</sup> Due to public pressure, the central government sent special teams to inspect and investigate allegations of forced eviction, resulting in the resignation of two main county leaders. See 建设部, 湖南省委严查嘉禾拆迁案县委书记被撤 [Construction Bureau, Hunan Provincial Party Committee Investigate the Jiahe Forced Eviction Case, County Magistrate, and Party Secretary Removed] (June 4, 2004), at <http://news.sina.com.cn/c/2004-06-04/20442719546s.shtml> (last visited Feb. 19, 2006).

<sup>39</sup> Other cases include a fake lottery case in Shanxi, in which the salespeople bribed government officials and kept the lottery's grand prize—cars—for themselves. The media disclosed this and the persons involved bore criminal liability. See 杨永明原想独吞四辆宝马 [Yang Yongming Wanted to Keep All 4 BMWs], 新京报 [NEW CAPITAL NEWS], May 9, 2004, at A18. In the "Inferior Milk Powder case" in Anhui province's Fuyang county, it was discovered that there were 55 different brands of inferior milk powder in the Anhui market, all of which were unlicensed. After CCTV broke this story, it attracted Premier Wen Jiabao's attention. The counterfeiters and involved officials bore criminal liability; some associated leaders were forced to resign. See 阜阳奶粉案五被告分别被判 4 至 8 年 5 人提出上诉 [Five Accused in Fuyang Milk Powder Case Get Four to Eight Years in Prison, All Five to Appeal Decision], 人民网 [PEOPLE'S DAILY ONLINE], Jan. 7, 2005, at <http://www.people.com.cn/GB/shehui/1061/3103482.html> (last visited Feb. 19, 2006).

<sup>40</sup> In the Liu Yong case, the appellate court confirmed the defense lawyer's claim regarding police use of illegal evidence. This is an improvement in China's legal system because in the past courts did not review procedural matters in appeals. However, media scrutiny prompted political leaders to intervene in this case, thus inhibiting the prospect of independent adjudication. The negative effect of media supervision is especially severe in circumstances where judicial independence has not been established, the quality of judges is still low, and intervention from leaders at higher levels is frequent.

media had never been so powerful as to influence legislation or government action. It is important, therefore, to acknowledge the positive role that the media plays in the process of democratization, while simultaneously recognizing that a small number of media outlets may abuse their prerogatives. Though not all media outlets exercise the appropriate degree of judgment, Chinese society nevertheless needs the voice of the media and public opinion. The emergence of independent media supervision of the government is an important force for the development of constitutionalism in China.

### C. *Constitutional Protection of Civil Rights*

#### 1. Challenging the System of Constitutional Review

The Chinese Constitution has long been regarded not as a legal vehicle for the protection of citizens' rights, but as merely a political document. The 2001 Qi Yuling case, however, breathed some life into this document. The Supreme People's Court ("SPC") issued a historical judicial interpretation, holding that the defendant in this case should bear civil liability for infringement upon the constitutional right to an education, via violation of the right of name.<sup>41</sup> The role of constitutional rights in the realm of Chinese law has since become a popular topic in both academic and popular discourse. Though some legal experts question whether this is a real constitutional case,<sup>42</sup> its significance lies in the fact that it was the first interpretation from the SPC explicitly endorsing lawsuits with constitutional claims.<sup>43</sup> This is a significant stride toward the actualization of constitutional rights.

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<sup>41</sup> A junior college accepted plaintiff Qi Yuling in 1990 after her graduation from middle school. However, the daughter of a local official impersonated Qi and attended college in her place. In 1999, when Qi discovered the fraud, she filed an administrative lawsuit, claiming identity theft and violation of her right of education. She appealed to the Shandong Higher Level People's Court after she failed in the first instance. Subsequently, the Shandong Higher Level People's Court asked for advice from the Supreme People's Court, which issued a judicial interpretation. See 宪法因何而美丽 [*How the Constitution is Beautiful*], at <http://www.chinalawinfo.com/xin/index3.asp?code1=179> (last visited Feb. 19, 2006); see also Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"*, 12 PAC. RIM L. & POL'Y J. 199 (2003).

<sup>42</sup> The query mainly concerned whether this was a constitutional case. Some argued that this was a case in tort, rather than a claim of constitutional rights. See 童之伟, 宪法司法适用研究中的几个问题 [Tong Zhiwei, *Several Problems About Judicial Implementation of the Constitution*], in 公法 [PUBLIC LAW] 324, 331-33 (信春鹰编 [Xin Chunying ed.], 2002).

<sup>43</sup> In a 1955 interpretation, the SPC prohibited courts from convicting defendants of crimes on the basis of language in the Constitution; in a 1986 interpretation, the SPC listed the norms courts may cite in support of their judgments but failed to mention the Constitution. Both of these documents have been widely interpreted in the Chinese legal community as making the Constitution non-

The Qi Yuling interpretation initiated a domino effect, with a series of cases concerning constitutional rights brought in the following years, the most notable of which were the “Three High School Graduates vs. the Ministry of Education case”<sup>44</sup> and the “Hepatitis B Carriers case.”<sup>45</sup> Unlike the Qi Yuling case, an application of the Constitution to protect individual rights in a civil matter, the “High School Graduates vs. Ministry of Education case” was a deliberate attempt by lawyers and academics to activate constitutional review: it was impact litigation with Chinese characteristics.

The petition submitted to the NPC Standing Committee by three JSD students following the Sun Zhigang case is one effort in which citizens succeeded in challenging the system of constitutional review. In the petition, they asked the Standing Committee to review the constitutionality of the 1982 Detention and Repatriation Measure. Ultimately, the government abolished the measure, in part because of constitutional complaints by citizens; this is unprecedented in the history of the PRC.<sup>46</sup> Its success is significant both theoretically and practically. In the past, constitutional review was no more than a topic in constitutional law classes; few citizens knew what the phrase even meant. One of the rationales for bringing this petition, therefore, was to compel the Standing Committee to activate the mechanism.<sup>47</sup> Though the parties involved failed to meet this goal, it still served as an important lesson in constitutional law for Chinese leaders: that the Constitution imposes a constraint on state power. It also sparked interest in constitutional issues among ordinary citizens. Constitutional review has now become a topic

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justiciable.

<sup>44</sup> On August 23, 2001, three high school graduates filed an administrative lawsuit against the Ministry of Education on the grounds that the universities’ 2001 recruitment plans infringed upon their right to equal education. The claim was based on the assertion that a Qingdao student needed significantly higher results on the standardized entrance examination than a Beijing student for university admission. See generally 俞梅荪, 从教育部当被告的两案看招生制度创新的迫切性 [Yu Meisun, *On the Exigency of Renovating the College Recruiting System, Judging From the Two Cases Where the Ministry of Education is the Defendant*], 大纪元 [THE EPOCH TIMES], Apr. 23, 2004, available at <http://www.epochtimes.com/gb/4/4/23/n519496.htm>.

<sup>45</sup> On November 20, 2003, a petition signed by 1161 citizens demanded constitutional review of a regulation barring Hepatitis B carriers from recruitment as civil servants and called for more protection for Hepatitis B carriers. The petition pointed out that the regulation excluded 120 million Hepatitis B carriers from positions as civil servants, infringing upon their constitutional rights of labor and equal protection. See generally “乙肝歧视”第一案, 张先著胜诉 [Plaintiff Zhang Xianzhu Wins The First Case Of Discrimination Against Hepatitis B], 野草先锋 [Ye Cao Xian Feng], Apr. 3, 2004, at <http://www.yecao.net/html/20044324116-1.html> (last visited Jan. 14, 2006).

<sup>46</sup> It cannot be said that the case was completely successful. Legal scholars aimed to establish a system of constitutional review in China through this case. However, their efforts only served to cause the government to abolish this regulation.

<sup>47</sup> According to the Constitution, the Standing Committee has the authority to explain and interpret the Constitution.

of public discourse, and citizens are learning how to protect their basic rights via this mechanism. This case has greatly enhanced the authority of the Constitution.

The key factors that contributed to success in this instance are: First, the parties seized the opportunity when the leadership was “highly emphasizing the Constitution”<sup>48</sup> and made strategic use of this discourse. Second, the apparent conflicts between the 1982 Measure and the 2000 Law on Legislation provided a strong basis for their petition.<sup>49</sup> Finally, the media played a key role in this process: its extensive coverage of this case exerted great social pressure on the government.

Emboldened by the qualified success of the Sun Zhigang case, reformers subsequently filed a series of complaints. For instance, tens of thousands of Hepatitis B carriers demanded that the State Council undertake a constitutional review of the Provisional Statute of Civil Servants, in which the Standard of Civil Servant’s Health Examination is purportedly discriminatory. Similarly, other complaints filed by female civil servants demanded constitutional review of a statute articulating gender-based disparities in the retirement age. Thousands of citizens appealed to the Standing Committee regarding the constitutionality of the State Council’s Management Measure on Housing Demolition and related local regulations.<sup>50</sup> During the constitutional amendment process in March 2003, the NPC passed an amendment on the protection of private property, directly advancing citizens’ constitutional rights and bolstering ordinary citizens’ appeals to the Constitution in attempts to protect their private property. For instance, a Beijing resident tried to protect his

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<sup>48</sup> Leading up to this case, the new leadership had increasingly emphasized the importance of the Constitution, notably in 2002 when Hu Jintao gave a speech at the Great Hall of the People’s Congress during the twentieth anniversary of the 1982 Constitution. This was the first speech by the General Secretary of the Party addressing the Constitution. In a 2004 constitutional amendment, protection of human rights and private property were introduced into the Constitution. After the amendments, the central government called for cadres of various levels to study the Constitution. Though it may be argued that these actions are motivated more by politics than by policy, they reflect the new leadership’s emphasis on the document; such emphasis provides a broader platform and legitimate grounds for citizens to protect their constitutional rights.

<sup>49</sup> The Article 8 of the Law on Legislation stipulates that only the NPC can make laws that impose constraints on individual liberty. See 中华人民共和国立法法 [Law on Legislation] art. 8 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 03/2000 全国人民代表大会常务委员会公报 [STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.] 112 (P.R.C), available at <http://www.cnlawservice.com/chinese/law&regulation/flcx/a003.htm> (last visited Feb. 22, 2006).

<sup>50</sup> In his capacity as a prominent law professor with a longstanding interest in and distinguished expertise on the topic, the author has received appeals for judicial review of the Measure on Housing Demolition from residents of Zhejiang, Beijing, and Shanghai, some of which were signed by thousands of inhabitants. However, the author has never brought a housing demolition case to court and is not qualified as a plaintiff under Chinese law.

house from demolition by posting the Constitution on his front door.<sup>51</sup> Another case involves the protection of villagers' constitutional rights in Guangzhou's Xiaoguwei village.<sup>52</sup> Though not all of these efforts succeeded, they were still significant in that they attempted to cite the Constitution in the vindication of citizens' rights.

These cases show that the Constitution, formerly a document significant only for politicians and therefore detached from ordinary citizens, now has a real potential to become a powerful legal weapon to constrain the government and protect individuals' constitutional rights.

## 2. Anti-Discrimination Litigation

Similar to the challenges to the system of constitutional review, anti-discrimination lawsuits have become another venue in which legal experts promote constitutionalism. According to the Constitution, the authority of constitutional review belongs to the legislature, namely the NPC and its Standing Committee. The problem with this mechanism, however, is that the NPC has not exercised this authority. An alternative to this dilemma, therefore, is for litigants to assert constitutional rights via administrative litigation. Under the Administrative Litigation Law, citizens can bring lawsuits only in relation to concrete rather than abstract administrative actions—in other words, they may complain about the specific application of laws and regulations to them, but not about the content of laws and regulations themselves. As a result, constitutional review of laws and regulations through the court system is not permitted. Issues relating to discrimination, however, are directly related to constitutional rights, and so they become areas where breakthroughs in constitutional litigation may happen.

Employment discrimination on the basis of residence or migrant status is common in contemporary China. The field is rife with instances of discrimination based on immutable characteristics such as gender, height, and physical attractiveness. These issues concern citizens' basic

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<sup>51</sup> When the police came to demolish his house, Huang Zhenyun referred to the new amendments as guaranteeing "protection of private property" and "protection of human rights." Yet the house was demolished within the month. The media covered this case and it had a great impact on the constitutional movement in China. See 田雨, 李薇薇 & 沈路涛, 宪法走进寻常百姓家 [Tian Yu, Li Weiwei & Shen Luta, *The Constitution Enters the Homes of Ordinary People*], 人民日报海外版 [PEOPLE'S DAILY OVERSEAS ED.], Dec. 4, 2004, available at <http://www.people.com.cn/GB/paper39/13547/1213154.html> (last visited Feb. 20, 2006).

<sup>52</sup> Faced with coercive demolition, residents hired lawyers to protect their constitutionally guaranteed property rights. Each household placed a Constitution in front of their homes. See 黄培坚, 广州大学城拆迁中的冲突 [Huang Peijian, *The Conflicts of University Demolition in Guangzhou*], 经济观察报 [ECON. OBSERVER] Aug. 14, 2004.



constitutional rights. Though anti-discrimination litigation is not recognized by law as falling within the scope of acceptable cases, the constant occurrence of this type of litigation is catalyzing systemic progress.

China's first anti-discrimination case was *Jiang Tao v. The People's Bank of China*.<sup>53</sup> In December 2001, the Chengdu Branch of the People's Bank of China advertised in local media to recruit clerks. In the advertisement, it stated certain qualifications for the position, including education level and major area of study. In addition to these qualifications, it specified a minimum height requirement of 168 centimeters for men and 155 centimeters for women. Jiang Tao, a graduate from Sichuan University's School of Law, was 165 centimeters tall and therefore automatically ineligible for the position. He considered this a form of discrimination in violation of his constitutional right to equal protection.<sup>54</sup> The Wuhou District Level People's Court dismissed the case on May 21, 2002 on the grounds that it did not fall within the scope of acceptable administrative cases, and that, because the bank had cancelled the height requirement after the suit began, Jiang's claim was rendered moot.

In a similar July 2002 case, eight law students from Sichuan University brought suit against the management committee for the park at Emei Mountain.<sup>55</sup> The committee set the admission fee for local students at ¥10, whereas the price of admission for other students was ¥80. The students saw this as discrimination on the basis of home region and brought suit against the committee. Their suit asked for an apology as well as an injunction against such regional pricing discrimination. The local court dismissed the case on the rationale that it lacked a legal basis.

The most influential case in this regard was *Zhang Xianzhu v. The Wuhu City Bureau of Personnel*.<sup>56</sup> In June 2003, Zhang ranked first on both written and oral exams for the recruitment of civil servants in Anhui Province. The personnel bureau rejected his application because Zhang is a Hepatitis B carrier. He appealed to Anhui's Office of Personnel for administrative reconsideration, but the appeal was promptly dismissed. Zhang then filed suit in local court, accusing the personnel bureau of

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<sup>53</sup> See 王磊, 选择宪法 [WANG LEI, THE CHOICE OF CONSTITUTION] 86 (2003) [hereinafter THE CHOICE OF CONSTITUTION].

<sup>54</sup> The People's Bank of China is a state-owned bank, and so its employees are civil servants.

<sup>55</sup> THE CHOICE OF CONSTITUTION, *supra* note 53, at 90.

<sup>56</sup> See 唐建光, 乙肝病毒携带者维权运动 [Tang Jianguang, *The Rights-claiming Movement of Hepatitis Carriers*], 中国新闻周刊 [CHINA NEWS WEEK], Nov. 24, 2003, available at <http://www.chinanews.com.cn/n/2003-11-24/26/372556.html> (last visited Feb. 20, 2006).

discrimination against Hepatitis B carriers. The court ruled on April 2, 2004 for the plaintiff, but failed to specify any concrete remedies.

In these ways, members of the legal profession have tried to protect citizens' constitutional rights through administrative litigation. Though no verdict of any substance has emerged from these cases, the efforts have proven profoundly influential in, for example, the revision of discriminatory rules regarding health examination standards in 2004.

#### *D. Autonomous Local Democratic Reforms*

Since the implementation in 1987 of a system of village self-governance, rural areas have seen the rise of grassroots democracy in the form of elections, management methods, and supervisory practices. Farmers are participating in comprehensive experiments in democracy, and their enthusiasm toward these democratic practices has greatly facilitated the development of grassroots democracy. The NPC's 1998 Organic Law on Village Committees promoted village elections and self-governance. After the establishment and development of village elections, people then began to seek ways to directly elect township or county leaders.

Entire regions, therefore, began to experiment with democratic election reforms, including the introduction of public recommendations for township leaders and party committee chairs.<sup>57</sup> In some places, even county-level leaders were nominated and elected directly. Simultaneously, other democratic reforms within the party system were carried out, establishing a standing body of the Party's Congress and allowing for the direct election of representatives in county-level party congresses. Two consecutive direct elections of township leaders were carried out in Sichuan's Buyun County in 1998 and 2001.<sup>58</sup>

The problem with such local practices, however, is that they are not codified in law and therefore cannot be carried out extensively. This nonetheless has become an unstoppable trend in some places. According to some investigations, about 40% of Sichuan's townships had competitive elections for township and party leaders in 2002.<sup>59</sup> In

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<sup>57</sup> "Public recommendations" are quasi-elections in which the electorate recommends the candidates. For instance, in an election for the head of a county, candidates must be elected by cadres of the county, village heads, and representatives of the villagers; then the People's Congress at the county level will vote to elect the head of the county. The candidate pool varies by region.

<sup>58</sup> At the same time, Sichuan's Nancheng county in Qingshen township began its own experiment with electoral democracy. In Shenzhen, a "two ballot system" was introduced in January 1999. The voters elected the candidates, and the representatives of the People's Congresses elected the township leader from that candidate pool.

<sup>59</sup> 赖海榕, 竞争性选举在四川省乡镇一级的发展 [Lai Hairong, *The Development of Competitive*

September 2003, for instance, Pingba, a township in Chongqing, implemented a reform on direct elections of party and township leaders.<sup>60</sup> Indeed, this phenomenon is spreading: in April 2004, seven towns in Yunnan's Shiping County and ten towns in Luxi County elected their own township leaders.<sup>61</sup> Direct, open, and competitive elections are becoming an irreversible trend in China.

Of course, obstacles persist in the development of grassroots democracies, especially in village elections. These obstacles generally take the form of either local cadres or other troublemakers attempting to exert undue influence on the electoral process. They may prevent elected village heads from exercising their authority, block democratic decision making among villagers, void democratic oversight processes, or make it difficult for the village's finance committee to function properly. In some extreme cases, the very security and property of elected village heads are threatened, some of whom are even beaten or illegally imprisoned. Many villagers struggle against these unlawful interferences via petitions or collective protests. The development of grassroots democracy, therefore, requires legislative support from the government. The NPC should draft and enact a national law on village elections, thereby defining electoral procedures, guaranteeing fairness of the elections, and providing for the punishment of any illegal interference.

#### *E. Establishing a Rule-of-Law Government*

The development of constitutionalism in China requires more input from the government itself than from the public. Constitutional reform should be a two-pronged effort. First, political institutions should be diverse and open, with extensive opportunities for public participation. Second, governmental actions need to be constrained. A rule-of-law government operates according to the law: openly, transparently, and efficiently. Recent years have seen little progress on the first front, but significant progress on the second.

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*Election in the Towns of Sichuan Province*], in 战略与管理 [STRATEGY AND MANAGEMENT] 57, 57 (2003).

<sup>60</sup> The election failed because of the upper government's interference on the eve of the polling day. See 王巧丽, 一场夭折的乡镇直选 [Wang Qiaoli, *A Failed Direct County Election*], Oct. 20, 2003, available at [http://www.e-cpcs.org/oldweb/jqhd\\_d.asp?id=1227](http://www.e-cpcs.org/oldweb/jqhd_d.asp?id=1227) (last visited Feb. 20, 2006).

<sup>61</sup> Some villagers even resorted to excessive measures to protest flawed elections; they were often imprisoned for disturbing social order or elections.

## 1. Building a Transparent and Constrained Government

The Wen Jiabao administration made explicit the goal of establishing a rule-of-law government. The State Council's March 2004 Outline of Promoting Governance According to the Law stated that a rule-of-law government should be established within ten years.<sup>62</sup> Though it is still too early to judge the feasibility of this proclamation, the past year has been one of noticeable progress.

First, information regarding governance is increasingly open to the public. Almost all departments of the central government, as well as those at the provincial and lower levels, have established websites to facilitate the free flow of information from government to citizen. State Council ministries have established a "spokesman" system allowing publication of relevant information. Shanghai has local laws concerning the openness of government information, requiring that all normative documents of governmental departments be put on record in the Shanghai Institute of Archives, a database accessible to the public.

Second, the decreased scope of administrative licensing regulations and the transformation of governmental functions also indicate a shift to a less intrusive government. Administrative permission was formerly one of the major functions of government offices. The practice had become so extensive that the government played a role in significant aspects of citizens' social, economic, and private lives. Such officially sanctioned intervention inevitably led to graft and corruption, with bribes and special favors being doled out for licenses and government approval. Some administrative licenses required complicated application procedures, yet applications often sat in limbo in government offices. Ultimately, many citizens came to feel that the system of administrative licensing amounted to little more than a black box into which applications were placed, and an indeterminate amount of time later, a license was mysteriously produced—or not.

Such a labyrinthine system is a breeding ground for corruption and rent-seeking behavior. Administrative licensing had, to a large extent, become a serious obstacle to the transformation of governmental functions. The 2003 Administrative Licensing Law<sup>63</sup> was designed to

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<sup>62</sup> 温家宝, 全面推进依法行政实施纲要 [WEN JIABAO, OUTLINE OF PROMOTING GOVERNANCE ACCORDING TO THE LAW] (2004), *available at* [http://news.xinhuanet.com/zhengfu/2004-04/21/content\\_1431232.htm](http://news.xinhuanet.com/zhengfu/2004-04/21/content_1431232.htm) (last visited Feb. 7, 2006).

<sup>63</sup> See 中华人民共和国行政许可法 [Law on Administrative Licensing] (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 27, 2003, effective July 1, 2004) 05/2003 全国人民代表大会常务委公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] 439 (P.R.C.), *available*

solve such problems. It identifies the scope of administrative licenses and accordingly restricts their application. The law states that no administrative license should be required for matters that can be addressed independently by citizens, enterprises, and other organizations, or that can be addressed by competitive market mechanisms, guilds, or other intermediary organs. Other reforms include the articulation of administrative licensing requirements, simplification of procedures, and strengthening of supervisory mechanisms. Despite varied opinions on the matter, the author is of the opinion that the law has had a great impact upon the transformation of governmental functions, the reform of administrative management, and ultimately the establishment of a rule-of-law government. In line with the State Compensation Law, Administrative Punishment Law, and Administrative Reconsideration Law, this legislation is a significant step forward in the process of China's political and legal reform.

## 2. Accountability of Government Officials

The current administration has taken significant steps towards establishing a responsible government. A rule-of-law government should be, first of all, a government with accountability, subject to public supervision. The public should hold government officials responsible for their actions. Specifically, any breach of duty or malfeasance ought to result in that official's resignation or dismissal. Under a top-down regime, government officials are more responsible to the party in charge of promotions than they are to ordinary citizens. As long as that party is satisfied, an official will remain in power, regardless of any breach of duty or degree of popular dissatisfaction.

To embody the credo of governance for the people, the current government is devoted to establishing a service-oriented model of governance. As a result, a system of accountability has been established and officials have been dismissed as a result of unfortunate events under their watch. Proof of this mechanism's efficacy was seen in the wake of the SARS crisis of 2003. The activities of the Minister of Public Health and the mayor of Beijing were investigated, and as a result of their inept crisis management, they were forced to resign as part of an attempt to restore the government's credibility.<sup>64</sup> It was not until 2004, however, when the State Council published the Outline for Comprehensive

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at [http://news.xinhuanet.com/zhengfu/2003-08/28/content\\_1048844.htm](http://news.xinhuanet.com/zhengfu/2003-08/28/content_1048844.htm) (last visited Feb. 21, 2006) [hereinafter Law on Administrative Licensing].

<sup>64</sup> These two leaders were forced to resign for not openly and truly informing the public of the disease.

Promotion of Administration According to Law,<sup>65</sup> that such mechanisms were established extensively. Mid-April saw a spate of forced resignations around China arising from mismanagement of local disasters. In the wake of a December 2003 mine explosion claiming more than 200 lives in Chongqing Municipality, Ma Fucui, general manager of the China National Petroleum Corporation, was forced to step down from his post.<sup>66</sup> Former county head Zhang Wen resigned from his post after the trampling death of thirty seven people during a February 2004 lantern festival in his Beijing suburb.<sup>67</sup> After fifty three people died in a fire in the Zhongbai Shopping Mall in Jilin, Gang Zhanbiao, the mayor of that city, was forced to resign.<sup>68</sup> From these events emerged the rule that responsible government officials must resign if a catastrophe results in a significant number of deaths on their watch. Since April 2004, about 200 officials, some at the provincial level, have received sanctions for their failure to effectively manage fatal accidents.

Accountability has become one of the means by which the rule of law is established among government officials in China. A position in the government is no longer an “iron rice bowl,” but an occupation with great responsibilities. As a result, this establishes a channel for the public supervision of government officials.

### 3. “The Storm of Audits”

Previously, independent voices were not allowed in the Chinese government. It was a government of top-down personal rule, requiring absolute obedience, not to the law, but to the senior leadership. Therefore, government administration according to the law was impossible.

This has changed in recent years. Respect for the law has increased, and the independence and autonomy of those cadres charged with checking government power have been enhanced. This was illustrated in June 2004 when General Auditor Li Jinhua disclosed to the NPC Standing Committee serious legal infractions and instances of corruption in at least forty one central government departments and

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<sup>65</sup> See Law on Administrative Licensing, *supra* note 63.

<sup>66</sup> See *Local drilling company chief sacked for SW gas blowout*, PEOPLE'S DAILY ONLINE, May 14, 2004, at [http://english.people.com.cn/200405/14/eng20040514\\_143332.html](http://english.people.com.cn/200405/14/eng20040514_143332.html) (last visited Feb. 21, 2006).

<sup>67</sup> See *Two police jailed over Miyun stampede case*, XINHUA, Nov. 26, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-11/26/content\\_395220.htm](http://www.chinadaily.com.cn/english/doc/2004-11/26/content_395220.htm) (last visited Feb. 21, 2006).

<sup>68</sup> See *Leaders held responsible for accidents*, CHINA DAILY, May 6, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-05/06/content\\_328434.htm](http://www.chinadaily.com.cn/english/doc/2004-05/06/content_328434.htm) (last visited Feb. 21, 2006).

twenty one infractions at the provincial level.<sup>69</sup> These illegal activities included the use of shoddy materials to construct a dike on the Yangtze River, the National Sports Bureau's abuse of ¥131 million of Olympic funds, and the National Electric Company's potential loss of ¥3.28 billion due to mismanagement. In 2005, the Auditing Bureau continued to disclose financial impropriety. The 2005 audit disclosed the misuse, typically by budget inflation and embezzlement, of ¥9.06 billion, 6% of the total amount audited by thirty eight central ministry organs during the 2004 fiscal year. In several audits of universities, hospitals, and scientific research institutes, it was found that water conservation efforts and antipollution projects in key drainage areas were poorly regulated and capital was seriously misused.<sup>70</sup>

These shocking reports drew such attention that the media named them "the storm of audits." General Auditor Li Jinhua was thus highly lauded and praised by the public, who dubbed him the "Iron Auditor."<sup>71</sup> The report garnered such intense support because it daringly revealed the unlawful activities of government officials. Further, these problems primarily concerned sitting ministry officials with real power. Finally, these problems were made known to the public as well as the relevant government bodies.<sup>72</sup>

The "Storm of Environmental Protection," occurring shortly after the audits and their fallout, is another example of state organs functioning independently and lawfully. The State Environmental Protection Administration announced on January 18, 2005 that more than thirty construction projects in over ten provinces and cities were illegal.<sup>73</sup> These projects were initiated without first undertaking the requisite environmental impact assessments, and so were suspended.<sup>74</sup>

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<sup>69</sup> See 李金华, 审计长作 2003 年度审计工作报告 (全文) [LI JINHUA, 2004 AUDIT REPORT TO THE STANDING COMMITTEE OF THE NPC (COMPLETE TEXT)], available at [http://news.xinhuanet.com/zhengfu/2004-06/24/content\\_1543949.htm](http://news.xinhuanet.com/zhengfu/2004-06/24/content_1543949.htm) (last visited Feb. 21, 2006).

<sup>70</sup> *Id.*

<sup>71</sup> Li was elected in the 2004 China Economic Annual Figures with a 70.83% vote, far exceeding other candidates. See 新浪财经, 经济年度任务: 李金华为何成大热 [NEW WAVE FIN. & ECON., LI JINHUA BECOMES A BIGSHOT], at <http://www.yrsri.cn/xinwenzhitongche/ReadArticle13.asp?ID=4960&BoardID=99999> (last visited Feb. 21, 2006).

<sup>72</sup> See 文平, 李金华拨动法治政府的琴弦 [Wen Ping, *Li Jinhua Plays the Strings of a Rule-of-Law Government*], 人物 [PEOPLE MAG.], Feb. 2005.

<sup>73</sup> See "环保风暴" 给 "经济过热" 降温 ["Storm of Environmental Protection" Cooled the "Overheated Economy"], 21 世纪经济报 [THE ECON. REP. OF 21<sup>ST</sup> CENTURY] (Jan. 31, 2005), available at <http://cn.news.yahoo.com/050131/346/28kny.html> (last visited Feb. 21, 2006).

<sup>74</sup> This was the first time in the history of the 2003 Environmental Impact Assessment Law that large-scale projects were ordered to halt and their names publicized. It was a rare public disclosure and broke with the customary way of dealing with such issues. See 孙展, 访环保总局副局长潘岳: 环保已到最紧要关头 [Sun Zhan, *Interviewing Pan Yue, Vice Minister of State Environmental*

One government organ's disclosure of another's problems was rare in the past. Typically, such problems would be reported to the relevant leader and resolved through internal negotiations. At most, an official would be criticized, but no publicizing of the conflicts was allowed; to allow otherwise would be to undermine the legitimacy of the government. Significantly, these recent actions indicate that a handful of state organs are daring to supervise others according to the law, and this, to some extent, reflects the advantages of an open and transparent form of governance. Moreover, it indicates the evolution of an increasingly powerful rule-of-law model of governance, and the establishment of mutual checks and balances.

It is noticeable that this trend began with state organs that, in the past, wielded little if any real power. To establish their legitimacy, these offices have relied upon the letter of China's law. This desire for legitimacy within the government itself is among the motivations underlying these governmental organs' struggle for a supervisory role.

### III. THE POSSIBILITY FOR THE DEVELOPMENT OF CONSTITUTIONALISM IN CHINA

Since the initiation of reform and opening in the late 1970s, China's protection of its citizens' civil rights has been an evolving process. In the 1980s, this process began with a movement to correct the miscarriages of justice resulting from large-scale trampling of individual rights during the Cultural Revolution and other political campaigns. In the 1990s, the civil rights movement was a consequence of a two-pronged desire: first, to protect economic rights—most notably consumer rights—and second, to remedy government misdeeds in the form of administrative litigation. The beginning of the 21<sup>st</sup> century, however, has witnessed the expansion of citizens' grievances regarding social and cultural rights to include issues of environmental protection, historical heritage preservation, and education. Protection of constitutional rights has become a focus of serious attention over the past few years. The right to freedom of movement, embodied in the millions of migrants within the country, continuously challenges such fundamental government policies as the system of household registration (户口, *hukou*). Citizens have begun to demand equal rights in the arenas of work and education, and to fight against discrimination in employment. Moreover, the desire to participate in China's political processes has become greater, from the



fight for public hearings, to the calls for constitutional review, to campaigns for the position of representatives in people's congresses. Gradually, citizens have come to demand the rights promised them in their country's Constitution.

Many researchers have expressed reservations about the extent to which civil society's campaigns for constitutional reform will be effective. Some claim that these efforts are meaningless because of the lack of real political reform. However, the efforts outlined in this essay are not only necessary but also effective.

What is constitutionalism? If it is, in essence, constraint on the exercise of state power, then the next question is where these constraints come from. These checks on state power come from a variety of state organs, as well as from the people. Does the realization of civil rights rest on radical political reform, or is it possible to gradually realize these rights through citizens' efforts via the current constitutional and legal framework?

Political reform is admittedly necessary for the construction of a constitutional framework. Nonetheless, the success of a country's political reform rests upon the spontaneous endeavors of its citizens. There will be no real constitutionalism, but instead a revolution similar to those of China's imperial history, without the conscious pursuit of basic rights by China's citizens. All in all, constitutionalism is a compromise between the government and the people—or in some cases, other political forces. The process of exercising constitutional rights is actually a form of negotiation with the government. An active constitutional movement among the citizenry proves that dialogue is possible between the government and its people, and this dialogue has resulted in some effective outcomes.

The SPC's interpretation in the 2001 Qi Yuling case opened the door to constitutional litigation, indicating that the Supreme People's Court was willing to protect constitutional rights via adjudication. The petition from the three graduate students of law directly led to the abolition of a State Council regulation. This was an education in constitutional law for the public. Though no legal basis exists for employment discrimination litigation of the sort recounted above, certain local courts have accepted such cases despite this deficiency in the current legal framework. Although the rulings of the courts were not satisfactory in the height discrimination case of 2001<sup>75</sup> and the park ticket pricing case

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<sup>75</sup> See *THE CHOICE OF CONSTITUTION*, *supra* note 53, at 86.

of 2002,<sup>76</sup> the fact that local courts are willing to accept such cases at all is itself an indication of progress.

Zhang Xianzhu's Hepatitis B discrimination case<sup>77</sup> is more significant in this regard. Not only did the court accept the case, but the plaintiff obtained a favorable ruling. Moreover, this case, coupled with other complaints filed by Hepatitis B carriers, pressured the Ministry of Personnel and the Ministry of Public Health to revise the General Standards of Health Examination in Recruiting Civil Servants in August 2004, eliminating some discriminatory standards. Public pressure is widely considered to have been a significant factor in the impact of this first successful anti-discrimination case.<sup>78</sup>

The government has taken significant steps forward to protect private property as well. The waves of demolition throughout China prior to 2004 led to large-scale protests.<sup>79</sup> Citizens from throughout the country filed constitutional complaints with the NPC Standing Committee, prompting constitutional review on the rules of demolition. The Central Office of the State Council then issued a notice to curb the scale of demolition and strengthen the management of construction projects. The notice called for the Ministry of Land Resources, the Ministry of Construction, and relevant public organs in the provinces to revise unreasonable rules, raise the level of compensation offered to homeowners, establish stricter procedures, and provide mechanisms for public hearings. These measures have abated conflicts on this issue.

These cases illustrate how citizens' efforts to promote constitutionalism have met with a certain degree of success. These claims have the potential to influence the establishment of China's rule of constitutional law, the spread of constitutional concepts, and the promotion of academic research. For instance, while the petition that three legal academics submitted to the NPC Standing Committee after Sun Zhigang's death failed to trigger the constitutional review that it called for, it, coupled with public outcry surrounding the event, did prompt the establishment of the Review and Registration Office on Regulations in May 2004.<sup>80</sup> In 2003, the Standing Committee also

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<sup>76</sup> *Id.* at 90.

<sup>77</sup> Tang, *supra* note 56.

<sup>78</sup> Zhang Xianzhu, considered the spokesman of more than 100 million Hepatitis B carriers in China, has enjoyed broad mass media support. The Justice Department and CCTV recognized him as one of the Ten Persons of the Law in 2004. See 张先著当选 2004 年度中国十大法治人物 [Zhang Xianzhu Chosen in the 2004 National Ten People of the Law], 芜湖日报 [WUHU DAILY] (Dec. 7, 2004), available at <http://www.yfzs.gov.cn/gb/info/XXDT/2005-01/03/1712035975.html> (last visited Feb. 7, 2006).

<sup>79</sup> In one notable incident, a citizen self-immolated to protest demolitions in Beijing. Similar cases have occurred in Nanjing.

<sup>80</sup> This office conducts preliminary review of statutes submitted to the Standing Committee. If a

reacted positively to citizens who had campaigned to become People's Congress representatives in places such as Guangzhou and Beijing. The revised Electoral Law of 2004 added a procedure for primary elections, providing all citizens with an equal opportunity to win candidacy. This is in remarkable contrast to the prior process, in which the electoral committee appointed candidates behind closed doors. Such public participation in governance is a necessary first step in the process of realizing constitutionalism as an element of China's legal system.

Three motivating factors underlie the development of constitutionalism in modern China. First, the development of the market economy strengthens citizens' awareness of their benefits and rights. Their desire to vindicate property rights is motivated not by any political ideology, but by self-interest. Consequently, civil society actors push for an ever-expanding adherence to the law on the part of government officials. This constitutes an instinctive impulse to promote the implementation of the Constitution, and it makes constitutional protection practical and sustainable.

Second, the current regime's "government of the people" ideology, coupled with its introduction of clauses protecting human rights and private property into the Constitution, has broadened the size of citizens' platforms when pursuing their constitutional rights. Because they use the rhetoric of those currently in power, their constitutional claims obtain legitimacy and legal authority. The Chinese government has responded positively to a variety of reasonable and legitimate claims from civil society, improving the legal system and institutions accordingly.

Third, the media and public opinion play critical roles. In their efforts to vindicate the rights guaranteed under the Constitution, citizens use the media and public opinion to pressure the government. Some officials fear the media, and some of them even lobby the media to suppress negative disclosures of government problems. One of the reasons for this emergence of the media's role as the government's watchdog, rather than its lapdog, is the commercialization of news suppliers. These commercialized news corporations sell their products through attention-grabbing reports and articles, and therefore focus more on high-profile cases. In addition, the market economy has given rise to a group of journalists with a social conscience and sense of social responsibility. They have become the vanguard of media supervision of the government, as well as the disclosers of government corruption.

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statute is considered to be in conflict with the Constitution or law, the office requires that the Legal Committee report it to the NPC Standing Committee, which makes the final decision.

This is not, however, to say that simply because of grassroots efforts in pushing for constitutionalism, China can immediately jump to a constitutional society, change its political system, and avoid potential social crises. Civil society has not yet become a sufficiently strong force in the push for China's development of constitutional law. Furthermore, the foundation for constitutional change must be laid by basic reforms within the political system. In the absence of changes reaching to the very root of political society, the room for civil society's campaigns for constitutionalism is very limited, and these campaigns can be suppressed at any change in the political climate. This is not to deny the utility of those efforts; on the contrary, they are an indispensable part of the social forces striving for the success of constitutionalism in China. Citizens' failure to consciously pursue their constitutional rights and push for grassroots democratic reform, coupled with the absence of a strong civil society, were some of the most important reasons why China failed to establish a true, active system of constitutional law in the 20<sup>th</sup> century.

Individual quests to protect their constitutional rights contribute positively to China's political reform. As the nation's market economy develops, the need to protect citizens' rights will invite legal reform and institution building. To take one example, the controversies surrounding demolition and eviction concern the question of whether citizens can litigate to protect property rights to their houses and apartments. It also concerns judicial review of the power of local governments. As such, judicial independence becomes yet another element vital to strengthening citizens' legal and constitutional rights, and constitutional reform aimed at improving the status and independence of the judiciary becomes inevitable.

Government responses to appeals for the vindication of citizens' rights, which take the form of improved institutions, are also beneficial to the establishment of constitutionalism. The dialogue between government and citizens not only helps alleviate social conflicts and avoid crises, but also equips the government with the ability to communicate with citizens and civil organizations. Through this medium, the government may negotiate with interest groups to reach compromises.<sup>81</sup> This ability is integral to a democratic government able to communicate effectively with citizens and respond to their appeals through institutionalized mechanisms, leading to "virtuous interactions"

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<sup>81</sup> A government which does not negotiate and compromise with its people cannot be a good, representative government, and can even be a tyranny controlled by the private interests of a few people.

instead of “vicious interactions.”<sup>82</sup> Lawful appeals to vindicate citizens’ rights can become a feedback mechanism to help the government legitimize its rule in a democratic way.

The hope for constitutionalism in China rests upon continuous efforts to increase virtuous interactions between members of civil society and the government. The government should regard civil organizations’ demands for the protection of individual rights not as “unstable elements” to be oppressed, but as an accumulating series of opportunities to improve China’s legal system and institutions. This would put the country on the track of developing constitutional democracy through legal means. On this track, civil society forces are important and basic, but the key role is still lies with the government.

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<sup>82</sup> “Virtuous interactions” are ones in which (1) the government takes appeals from civil society seriously; (2) appeals for the vindication of individual rights are resolved through legal (and eventually judicial) means; and (3) reasonable mass public appeals are absorbed through improved institution building, while unreasonable appeals are alleviated through dialogue and explanation. In “vicious interactions,” the government views all appeals from civil society organs as a sign of dissatisfaction with the state, and hence suppresses them. This suppression causes further dissatisfaction and resistance, which leads to even harsher suppression. In such a pattern, reasonable, lawful appeals may escalate into serious conflicts between citizens and the state.