Citizens? The legal and political status of peasants and peasant migrant workers in China

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Abstract: Social bias and invidious legal distinctions affect— to varying degrees—the lives of China's ca. 900 million peasants and peasant migrants. We should not compare the iniquitous treatment of these groups with racial discrimination in matured and well-functioning legal systems, because it lacks the coherent and principled character that makes racist law so revolting. But the treatment of Chinese peasants and peasant migrants is connected in a special way to the fragmentation of law in conditions of political authoritarianism. These conditions cater to a perceived need to provide an exploitable workforce with diminished legal rights, and enable local despotism by party and government officials especially in rural areas.

Household registration rules under the hukou *system and strong social perceptions of origin designate certain citizens as peasants and, together with legal mechanisms such as collective ownership in Chinese land law, tie their lives to particular localities. At a local level, especially in some rural areas, officials govern through locally created norms which may violate central legal norms, central party documents, or the Chinese Constitution without any effective checks. In the cities, peasant migrant workers* (nongmingong) *are denied public services and a co-equal status of full citizenship with registered urban residents.*

In 2003, it appeared as though constitutional challenges to legal discrimination against peasant migrant workers might help to change this situation in China. The revocation of an infamous State Council regulation violating constitutional rights, which had often been used to detain and exploit rural migrants, seemed like an important step on the way toward constitutionalism and better rights protection for the disadvantaged "peasant" majority. There was general public enthusiasm for the rule of law, to some extent encouraged by China's rulers. But despite many rule of law reforms in the past two and a half decades, the most important preconditions for effective legal challenges to illegal or unconstitutional state action are still lacking in China. In many ways, law has no effective generality. Abstract constitutional principles have little bearing on judicial and legislative practices. The judiciary is weak, particularly in those cases in which it should act to constrain officials and rulers. Laws fail to impose genuine political obligations on citizens, partly because citizenship itself is fragmented. Legal fragmentation, which affects not only substantive law but also the rules of law-making, diminishes the prospects for a thorough legislative reform of the hukou *system.*

While the Constitution and the rule of law now furnish an important vocabulary for challenges to unjust state action in China today, such challenges can only rarely occur within institutional channels provided by the party-state, and sometimes instead take the form of moral appeals and physical resistance to this state. So far as they expose contradictions between different justifications proposed by

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China's rulers for staying in power, they discredit rather than strengthen China's current legal and political institutions.

Two cases.

Wang Xingmao and his 16-year-old son Wang Chaozheng had been working in a coal mine near Lianyuan, a city in Hunan province, for three months, but because Wang Chaozheng had fallen ill, they were on their way home on 22 April 2002. [1] Before they could board their train at the railway station of Lianyuan, they were arrested by the local police and held in the Lianyuan "station for internment and deportation," situated at a few kilometres' distance from Lianyuan City. They were detained on the grounds that they were not able to show sufficient documentation of their identity, and of being allowed to be in Lianyuan, even temporarily. The following morning, the father was told that "in accordance with a station regulation," [2] unless Wang Xingmao paid 1200 Yuan Renminbi to the internment and deportation station, his son would continue to be locked up there. Wang Xingmao himself was released so that he could go and get the money.

He hastened home and tried his best, borrowing from family and friends, but he could not find so much money in a short time. After three days, in despair, he drank a bottle of pesticides in an apparent attempt to kill himself. He was taken to the hospital. In reaction to this development, someone in the local government made a phone call to the Lianyuan internment and deportation station, telling them they had better release Wang Chaozheng. But for whatever reason, Chaozheng was not released. A year later, the whereabouts of Wang Xingmao after his being taken to hospital were not known. When, a month after Wang Xingmao's attempted suicide, relatives of the

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[1] This story is told by Cao Yongwen (曹勇文) in the Hong Kong-based weekly magazine *Phoenix Weekly* (凤凰周刊). *See* "An investigation into the true story of trading people at Hunan Lianyuan's internment station" (湖南涟源收容站 "买人卖人" 真相调查), summer 2003, available at http://www.phoenixtv.com.cn/ home/phoenixweekly/116/48 page.html.

[2] The Chinese expression is *"zhanshang guiding* (站上规定)."

still interned Wang Chaozheng had collected 1000 Yuan Renminbi and were able to buy him out with this sum, they had to tell him that his father had disappeared. It is reported that Chaozheng "left [home] in search for his father," and that of him, too, there was no trace a year later.

According to the Chinese newspaper reports on which this account is based, Wang Xingmao and his son had become the victims of a systematic collaboration between the local police station and the local internment and deportation station which allegedly had thousands of victims.[3] The aim of this collaboration was to extort as much money as possible from migrant workers, whose arrest was "justified" because they had insufficient papers on them and they could therefore be regarded as vagrants. An "agreement" between the Lianyuan internment station and the local police stipulated that the police would get a provision of 50 Yuan for every person they brought to the internment station. Under a "tariff" system according to the station's "regulation," the detainee or his friends or relatives paid a sum determined according to their place of residence and the grounds on which they were interned—as vagrants, drug addicts, prostitutes or prostitutes' clients, etc. The whistle-blower reported that these "grounds" were faked in the majority (95%) of cases. In his words, the people interned were simply peasants, or "rural residents," and workers. To use a common phrase, Wang and his son were "peasant migrant workers" (*nongmingong* 农民工), a term used for people with a rural residence registration, who spend widely varying lengths of time in urban areas to work there, and could under certain conditions be subjected to legal internment and deportation back "home." The unhappy inmates of stations like these were not just systematically "sold" to their relatives and friends;

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[3] *See* Chen Feng (陈峰), "A former internment secretary lifts the dark curtain to make revelations about internment: over a million Yuan extorted in 6 years" (前收容站书记披露收容黑幕：6年搜刮上百万元), in the newspaper *Southern Metropolitan* (南方都市报), 19 June 2003, at http://news.xinhuanet.com/legal/ 2003-06/19/content_945548.htm.

they were not only subjected to grossly unreasonable "fees" in the detention stations. In some places, they were also forced to do heavy and sometimes dangerous work on special sites, such as building sites in many larger cities.

In April 2003, the death of another interned "vagrant" inmate, a university graduate named Sun Zhigang, was reported in the media as a likely murder.[4] It had occurred in March 2003 in the clinic of an internment and deportation station in Guangdong. Many regarded the death itself as a common incident; but what was uncommon was that it was reported widely and in great detail.[5] Thirteen persons, including officials of the clinic, were tried in June 2003, and this generated a lot of further media attention. In the wake of the trial, some some earlier cases which had remained unreported were also brought to light by the media. Wang Xingmao's case was one of them.[6]

Public outrage over Sun Zhigang's case and such practices, expressed in the media, in public letters released online, and in internet chat-rooms, was overtaken by the abolition of the *Measures for Internment and Deportation of Urban Vagrants and Beggars,* which was the ostensible authority justifying practices such as the one

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[4] "The death of the interned inmate Sun Zhigang (被收容者孙志刚之死)," *Southern Metropolitan* (南方都市报) 24 April 2003.

[5] *See* Beech, Sophie, "Rise of Rights?," 27 May 2005, available at http://chinadigitaltimes.net/2005/05/rise_of_rights.php, for a short English language account. The fact that it could be reported has by some been attributed to the relative media freedom following the chaotic time of the SARS outbreaks in Guangdong, Beijing, and other places, when people started talking about a right to information.

[6] For further examples, s*ee, e.g.,* "A youth interned for the second time in Beijing Luoyang not heard about for two years after his release (少年在北京洛阳被两度收容 出站两年下落不明)," *Wuhan Morning Post*, at http://news.xinhuanet.com/legal/2003-07/09/content_987615.htm; Lin Jie (林洁), "In the case of 25 internees burnt to death in a car the court hearing has been adjourned indefinitely (25名被收容人员烧死车中 案件庭审被无限期推迟)" at http://news.xinhuanet.com/legal/2003-08/27/content_1047117.htm (a *Xinhuawang* report on 25 migrant workers burned to death in a transport van because the van's construction had been altered so as to make it difficult to open the back door); and a report on the internment of an eighty-year-old in Shenzhen who had forgotten his papers when going out for a walk.

described above.[7] On May 18, 2003, three legal scholars in Beijing petitioned to the Standing Committee of the National People's Congress to declare the main legal basis for the internment and deportation system, the *Measures for Internment and Deportation of Urban Vagrants and Beggars,*[8] promulgated in 1982 by the State Council, unconstitutional.[9] The basis for their "suggestion letter" addressed to the NPC Standing Committee was a new provision contained in China's 2000 *Legislation Law.* On 20 June 2003, the State Council announced that as of 1 August 2003, the old *Measures* would be replaced by the new *Measures for Aid for Urban Vagrants and Beggars*.[10] Past malpractices, including "detention," "verbal abuse, physical punishment, and maltreatment," as well as exploitation and forced labour, were expressly prohibited.

China had had its first highly publicized instance of abolition of a law[11] on the grounds that it was bad law. It had infringed constitutional rights and had provided an institutional framework in which further rights violations could occur. Even though no state official, not to mention any court, ever publicly stated these deficiencies of the old legislation, and even though the State Council pre-empted the "striking down" of the regulation by simply revoking it, the fact that the abolition was contextualized by a highly illustrative case, and the (for China) remarkably free and heated media discussion surrounding the scholars' petition and Sun Zhigang's case, made this

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[7] *See* Wang Lei (王磊), 选择宪法/*To Choose Constitutional Law*, (Beijing, Beijing University Press, 2nd edition 2004), at 127 ff.

[8] 城市流浪乞讨人员收容遣送办法, published by the State Council on 12 May 1982.

[9] *See* Yu Jiang, Teng Biao, Xu Zhiyong, (俞江、滕彪、许志永) "Suggestion Letter on Reviewing the *Measures for Internment and Deportation of Urban Vagrants and Beggars*" (关于审查《城市流浪乞讨人员收容遣送办法》的建议书)*,* 14 May 2003, at http://law-thinker.com/show.asp?id=1959. *See* also Zhao Xiang (赵翔) and Wan Xuezhong (万学忠), "Three citizens suggest a review of the 'internment law' [sic], and experts enthusiastically support this" (三公民建议审查《收容法》有关专家给予积极肯定), *Legal Daily* (法制日), May 18, 2003.

[10] In Chinese, 城市生活无着的流浪乞讨人员救助办法. See also the Civil Affairs' Bureau's *Specific guidelines for applying the Measures for Aid to the urban homeless* published on 21 July 2004 (城市生活无着的流浪乞讨人员救助管理办法实施细则).

[11] Although formally this was an administrative regulation it was law in a broad sense.

sequence of events appear dramatic and indicative of an important legal and political change. There seemed to be a promise of further development toward a working mechanism of constitutional review. The imprisonment of two of the courageous editors of the newspaper that first reported on Sun Zhigang's case in 2004, upon convictions for "corruption,"[12] is symbolic of the way in which the discussion has since been muted.

The following discussion traces some of this discussion in China, by first providing some background on legislative and constitutional structure, then discussing the substantively unequal treatment affecting peasants and peasant migrants, and finally turning to an assessment of the chances that a sufficiently strong constitutional rights practice to address these iniquities might develop in the current Chinese legal system. I argue that these chances are slim given entrenched local autocracy and given the weakness of the judiciary; but that constitutionalism and rights furnish an important vocabulary to various activities of protest and dissent outside the legal and political institutions of the Chinese state.

Fragmented law and autocratic governance.

From the perspective of constitutional rights, the case of the migrant worker Wang Xingmao and his son would have seemed easy; no more complicated certainly than that of Sun Zhigang. In protest against their detention they might have said, for instance, that laws which restrict the constitutional right to freedom of the person of Chinese citizens must themselves be constitutional. They might have added that the *Measures for Internment and Deportation of Urban Vagrants and Beggars* were unconstitutional, because Article 37 of the Constitution says that only the police may

[12] Beech, *supra* note 7.

detain citizens, [13] and pointed to further legislation clarifying that a court or people's procurator should approve of such a measure, and that it should be a "statute," not a mere administrative regulation, which restricted the constitutional right to personal freedom as guaranteed in Article 37 of the Constitution.

They would have been right, since the 1982 *Measures on the Internment and Deportation of Urban Vagrants and Beggars* (hereinafter "the Measures") issued by the State Council were unconstitutional.[14] In a formal respect, the *Measures* had been issued by the State Council, but according to the 2000 *Legislation Law* (Article 9 in conjunction with Article 8) and the *Law on Administrative Punishment* (Article 9), only a "statute"—*falü* (法律)[15]—created by the National People's Congress can restrict the right to personal freedom.[16] According to the 2000 Chinese *Legislation Law*, only the National People's Congress and its Standing Committee produce "statutes." The State Council makes merely "administrative regulations." Moreover, departments subordinate to the Ministry of Civil Affairs were in charge of the internment and deportation stations, running them with co-operation from the police, and were therefore jointly responsible for decisions about internment and deportation.

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[13] "Article 37. The freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a People's Procuracy or by decision of a People's Court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited." In Chinese, there is a terminological difference between *daibu* (逮捕) and *shourong* (收容) and some argue that Article 37 can only apply to laws or regulations using the actual word *daibu*. This is unconvincing.

[14] The famous constitutional scholar He Weifang and others sent an open letter to the National People's Congress, in which they reaffirmed this view first taken by Xu Zhiyong, Teng Biao (*supra* note 9). *See* "To the National People's Congress Standing Committee" by He Weifang, Shen Kui, Xiao Han, He Haibo, and Sheng Hong (贺卫方, 沈岿, 萧 瀚, 何海波, 盛 洪), 22 May 2003, available at http://www.legaltheory.com.cn/info.asp?id=3891, in which they suggested investigating the reality of the implementation of the *Measures*, and considering a reform of the system.

[15] This expression is commonly translated as "law" but for the sake of clarity the translation "statute" has been chosen here.

[16] A further regulation on the implementation of the *Measures* had been produced jointly by the Ministry of Public Security (of the Police) and the Civil Affairs Ministry. But the State Council had no authority to produce the *Measures* and the ministries' legislative power would have had to be derived (delegated). Wang Lei, *supra* note 7, at 144.

A further, more general complaint would have been that many internment measures could not even be construed as being in accordance with the *Measures* themselves, which required that beggars from rural families, "rogue" urban residents, tramps or beggars, and other people who lived in the streets and had no livelihood, be interned and deported from the cities. There were further regulations requiring such measures to be imposed on anyone who did not have the so-called "three permits" or "three documents": identity card, temporary residence permit and work permit.[17] People coming under this rule were called "three-lacks-persons."[18] Such further regulations could not be constitutional, it seemed, if the *Measures* which they purported to elaborate on were already unconstitutional themselves, and if they extended the application of detention measures. The same logic must apply to the document used as the direct "basis" for the fee required of Wang Xingmao. He was told by the Lianyuan internment station that "there was a regulation" stipulating tariffs for different kinds of detainees; the fees were not only exorbitant, but their payment was also turned into a precondition for release and thus the rights-invasive impact and scope of detention were again further extended. Such a "regulation" could serve no possible justificatory function toward Wang Xingmao and his son.[19] It could not count as law.

Yet in a process of court litigation, if we imagined it had ever taken place, it could have become difficult to argue why the court must not count illegal and

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[17] Zhang Wen (章文) refers to this 1991 "[*State Council*] *View on the reform of internment and Deportation Work* (关于收容遣送工作改革问题的意见)" in "Why can we only 'reside temporarily' in our own country? (为什么在祖国我们只能站住)" *Southern Window* (南风窗), 19 November 2001, reprinted in Wang Zhenmin (王振民), *Case Reader in Constitutional Law* (中国宪法案例教程 Tsinghua University, Beijing: 2002) p. 115. Feng Xiaotong in her "Recent policing reforms in Beijing" (August 2005, paper on file with author), says that the State Council regulations themselves did not directly require internment of "three not people" but that further local regulations often did.

[18] *San wu renyuan* 三无人员. Further regulations dealing with the "three not people" includes the Ministry of Public Security's 1995 *Measures regarding application for temporary residence permits* and for Beijing City, the *Beijing administrative regulations on the administration of migrant workers of 1995.*

[19] Justification or exculpation in a criminal law context would be a more complex matter.

unconstitutional regulations as part of Chinese law. As will be explained in greater details below, courts are supposedly not allowed to conduct "judicial" review of legislation and of "normative [administrative] documents." This appears to raise the question whether there can be an unconstitutional state-imposed legal rule which cannot be invalidated simply because no procedure is available for doing so. The short answer has to be "yes, in our experience," for of course there have been legal systems which did not or do not admit the constitutional review of state legislation, and which demand judicial deference toward parliament.[20] The long answer, as is argued here, is that while in its current highly fragmented state Chinese law is more than other legal systems in need of principled constitutional scrutiny, and while it can only make sense if certain constitutional principles, and especially constitutional rights, have the power to invalidate legislation, there is little indication of a coherent system for such scrutiny or review being established.

Of course, China is not a parliamentary democracy, nor a political organization explicitly embracing any other kind of separation of powers. On the other hand, it does claim that its laws follow the principle of *democratic* centralism, and that they embody the popular will. In official proclamations at all levels, it insists on its ability to promote the welfare and protect the legal rights of the people. According to the rhetoric now commonly deployed by the party state at all levels, and in clear difference from the principles propagated during the Cultural Revolution,[21] government is to happen according to law (*yi fa zhi guo* 依法治国),[22] and to be for the

[20] An example is France well into the 20th century. The status of administrative rules and regulations is discussed further below.
[21] *See, e.g.*, Xinhua News, 'Completely Smash the Feudal, Capitalist, and Revisionist Legal System' (1968), Vol.2 No. 4 (1969-70) *Chinese Law and Government* 7.
[22] Jiang Zemin heightened the popularity of this phrase by using it in a law lecture to senior party officials in 1996 with reference to Deng Xiaoping's reform policies. *See* Xinhua News, "Ruling the Country in Accordance With Law," "Ruling the Country in Accordance with Virtue," ("依法治国"、

good of the people (*zhi zheng wei min* 执政为民).[23] The fact that such claims are open to being used hypocritically and to being abused, especially in conditions of media repression, can surprise no one. But hypocrisy on the part of governments has never been a good reason not to challenge them on their own terms.

It remains, however, very difficult to determine what these terms are in the Chinese legal and political system. To understand what was wrong, on the system's own terms, with the old (pre-2003) *Measures for Internment and Deportation*, for instance, we cannot solely look at substantive guarantees (already mentioned), but have to inquire further into the structure of Chinese legislation. This can be done by loose comparison to Western legal systems, bearing in mind the important differences with Western states, which leads to three observations. One is that we are of course not considering a "statute" in the formal sense as defined by Chinese constitutional law and further legislation. We are instead considering an "administrative regulation" created by the State Council.[24] Under the current system, "regulations" can be created not only by the State Council but also by People's Congresses at different administrative levels, and "rules" can be created by national ministries as well as by local governments.[25] The second observation is that while this system explicitly rejects separation of powers and federalism, it implicitly embraces elements of both,

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"以德治国") 6 September 2002, at http://news.xinhuanet.com/newscenter/2002-09/06/content_552721.htm, for an account of this event.

[23] Hu Jintao in 2003. *See, e.g.*, Xinhua News, "Hu Jintao gives an important speech during the study meeting for the earnest study of the guiding thoughts of the 'Three Represents': sincerely studying the Three Represents, establishing the party in the common interest, and governing for the good of the people should be [our] aims (胡锦涛在学习贯彻"三个代表"重要思想理论研讨会作重要讲话：真心学三个代表 立党为公执政为民是标志)", 1 July 2003, at http://news.xinhuanet.com/newscenter/2003-07/01/content_948197.htm.

[24] *Xingzheng fagui* (行政法规), although these characters do not appear in the name of the *Measures*.

[25] *See* Xu Chongde (徐崇德), *A Constitutional History of the People's Republic of China* (中华人民共和国宪法史, Fujian People's Press, Fuzhou: 2003), at 341 (discussing the State Council's function); the terms used here are *mingling* (命令) and *zhishi* (指示). The State Council and the ministries (*bumen, weiyuanhui*) under it had the function of issuing "decrees" and "regulations," already under the 1954 Constitution, but after the Cultural Revolution, local People's Congresses and governments were given more explicit legislative functions. (*Id.* at 834.)

and the existent separation of functions among People's Congresses and People's Governments could weaken the claim that administrative "legislation" could legitimately restrict rights defined by the Constitution or by National People's Congress legislation. A third observation is that the best possible justification of China's legislative structure, as it is, does not follow the logic of constitutional or rights-based limitations on the power to legislate. Instead it follows the logic of rulers, however small, effectively making their own rules, albeit on a principle of "democratic centralism" allowing for directives and incidental intervention from above. These observations are further explained in the following.

Above we referred to the Articles 8 and 9 of the 2000 *Legislation Law*, which say that only National People's Congress Laws may restrict certain fundamental rights. On the other hand, Article 5 of the *Legislation Law,* which says that "laws shall be made in order to embody the will of the people," does not use the term reserved to NPC legislation, "*falü* (法律, "statute")," but rather the more generic "*fa* (法)" in the combination "*lifa* (立法)." It thereby refers to the legislative process as a whole, to legislation produced by the People's Congresses and People's Governments at all levels. It evokes the principle not of parliamentary democracy, but that of rule according to democratic centralism, in its expanded Chinese version of the democratic "mass line."[26] This is of course in line with explicit general adherence to socialist principles. Rule according to democratic centralism is rule by theoretically undivided power, according to the principle "from the masses, to the masses." The ideas of the masses were to be concentrated and transformed into precepts for action, which were then to be propagated in such a way as to make people agree to them.

[26] *See* Xu Chongde, *supra* note 16, at 309.

Importantly, "the mass line" included a strong element of discipline. Once taken, a decision was to be obeyed.[27] Once made, an item of legislation was not to be challenged. Applied to legislation, this idea would rule out challenges to the validity or legality of superior level decisions (rules) from "below," *regardless of the level at which a relatively superior decision had been made*. To differentiate such decisions from mere commands and call them "rules" or "legislation" might perhaps require further argument; here it is only pointed out that "democratic centralist legislation" was intended to create legal rules, could be appealed to in protest of cadre/official misconduct, and was based on the notion of the unity of socialist law. At least theoretically, moreover, it was initially more concentrated in the hands of one People's Congress in China than it is now.[28]

The principle of "democratic centralism" contradicts that of protecting legal rights. Only government constrained by rights—rather than mere "government in accordance with law"—would explain the need for formal and principled constraints on rights-restricting powers, such as those which the 2000 *Legislation Law* appeared to have created. It would, while constraining the power to restrict rights by law (to "statutes"), also help to define legal rights, and require the possibility effectively to

[27] Stephen C. Angle in his "Decent Democratic Centralism", (2005) *Political Theory* 518, quotes a classic Leninist formulation: "The minority obeys the majority; party members have complete freedom to discuss and criticize before any issue is decided; after it is decided, everyone must implement the decision of the organization no matter what their view; the subordinate must implement the resolutions and directives of the superior, they may present their views to the superior, but they must still implement these resolutions and directives before they are changed by the superior. "

[28] The function of the National People's Congress (NPC) according to the PRC's first 1954 constitution was explained as follows by veteran constitution drafter and scholar Xu Chongde: "The NPC exercised the state's legislative power, that is, the entire nation's will [*yizhi*] is concentrated by it; it represented the highest interests of the entire nation; it turns the people's will into law and into statutes (…) Since the NPC concentrated the highest interests and uniform/united will of the entire nation and the people's interests and will were basically the same [*identical, that is, not among each other, but among different groups in society*], the NPC was the only organ exercising legislative power. It allowed the entire country to have uniform/the same [*tongyi*] principles to guide their action by, and avoided that 'the law came out from many different doors and at different paces (...) For the New China that had only just emerged from a situation of separation, friction and general strife, this was of utmost importance." Xu Chongde (徐崇德), *A Constitutional History of the People's Republic of China* (中华人民共和国宪法史, Fujian People's Press, Fuzhou: 2003), at 309.

challenge state action infringing rights. Articles 8 and 9 of the current *Legislation* Law, which were just mentioned, are gestures in this direction. But they remain weak gestures. Democratic centralism continues to be a fundamental principle of governance in China, inherent to its institutions, ruling out bottom-up challenges to political (including legislative) decisions once made. A tension between the idea of legal rights securing the position of the individual vis-à-vis the state by creating certainty while avoiding the compromise of justice, and that of "democratic-centralist" rule-making, therefore runs through the entire current legal and political system. It is this tension, perhaps, which best justifies the assessment that China is "in transition," although it is not yet clear where to. (It is also this tension which explains to some extent why Chinese courts have no explicit power to declare even very minor administrative regulations or normative documents illegal in the process of adjudication, as will be discussed further below.)

Inconsistency and incoherence between legislation at different levels, or at different branches of government at the same levels, remains an essentially unresolved problem in this structure.[29] At the central level, according to the *Legislation Law*, the State Council has the power to make "administrative regulations," firstly "in matters for which the implementation of laws requires this," and secondly in matters "within the administrative functions and powers of the State Council as provided for in Article 89 of the Constitution." Article 89, subsection 1 of the Constitution, however, merely states that the State Council may "make administrative regulations," without stating any limits of this power. On the basis of these provisions, then, it would appear that the State Council can make regulations—"legislate"—in any matter it pleases. Article

[29] The national, provincial, county and township levels should be imagined as "slanted" when we think of legislation, since People's Congresses are supposed to create or produce (*chansheng*) People's Governments at all these levels, and there is a general assumption of superiority of the People's Congresses over other state authorities at corresponding levels. This principle is in many ways compromised (see also main text).

56 in conjunction with Article 9 of the *Legislation Law* provides that for matters to be regulated by statutes (*falü*), the State Council may be empowered by the NPC or its Standing Committee to make administrative regulations, which are later to be replaced by laws. This is why there is a common distinction between "original" or "inherent" and "delegated" legislative power of the State Council.[30] "Matters to be regulated by laws," however, are not definitely enumerated in the *Legislation Law,* because the enumeration provided in Article 8, subsection 10, includes "*other* matters which must be regulated by statutes made by the NPC or its Standing Committee [*emphasis added*]." It seems reasonably clear, then, that those matters specifically mentioned in Article 8 of the *Legislation Law* should be regulated by the NPC or its Standing Committee. But neither from the end of administrative regulations, nor from the end of NPC legislation is there a clear account of the legislative competencies of the State Council.[31] In that sense, even our previous assessment of the unconstitutionality of the old *Measures* may suddenly seem shaky.

In addition, Article 86 of the *Legislation Law*, intended to address conflicts between "rules" (*guizhang*) made by national level ministries and "rules" (*guizhang*) made by local provincial level governments, provides merely that it is up to the State Council to decide which of them should be applied.[32] This means that these regulations are at the same level, and only in cases of practical conflict one may be chosen over the other by the State Council (if it is appealed to, and responds): until

[30] *See* Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, Cambridge: 2002) at 241 (explaining the distinction between delegated and inherent authority to legislate).

[31] Cheng Jie (程洁), in *The Essence of Constitutional Government: Open Government under the Rule of Law* (宪政精义: 法治下的开放政府, China University of Politics and Law Press, Beijing: 2002), at 299, argues that because of the extent to which the NPC has delegated power to "legislate," and because of the vagueness of the delegation, China's administrative organs [especially the State Council] have "become China's most powerful [authoritative] legislative organs."

[32] It can decide straightaway that the local regulation should be applied; or if it decides in favor of the ministerial regulation, the NPC must be applied to for a "resolution." Wang Lei, *supra* note 7, at 145. It is implied that a decision once made by the State Council or NPC would have the effect of a precedent and settle the matter for future cases; on the other hand it is not very clear to what extent such a decision would be publicized.

that has been done a judge, lawyer, or any other citizen would not be able to tell which one should be given priority.[33] Regarding local level legislation by the People's Congresses, the *Legislation Law* provides for a hierarchical principle of derogation of lower-ranking norms (Article 64). But it does not allow courts explicitly to state inconsistency between higher- and lower-ranking norms; whereas on the other hand it allows for incidental higher-level "corrective" intervention by governments and People's Congresses with lower-level legislation. This intervention is actually possible whether or not a lower-level norm contravenes previous higher-ranking ones,[34] and it occurs according to somewhat contradictory rules of (legislative) hierarchy. For instance, according to Article 88 of the *Legislation Law*, a People's Congress can *alter or annul* norms produced by the People's Government, in accordance with the idea that People's Congresses are above the People's Governments which they "produce" (*chansheng,* 产生). However, in the context of the closely connected *bei'an* (备案) or "filing" procedure, the purpose of which is to discover any contravention of law or inconsistencies among newly created norms,[35] a State Council regulation becoming effective in 2002 arrogated the power to review local People's Congress's legislation to the State Council, in a manner running counter to the hierarchy just barely established two years earlier by the *Legislation Law*.[36] In a recent move, the Standing Committee of the People's Congress passed a new *Regulation on the Filing Procedure*

[33] Moreover, the system does not provide any further principles helping one to decide that question. The assumption behind this arrangement has to be that inconsistency between norms is a kind of mishap—a malfunctioning of the "democratic centralist" process of legislation—and that the State Council's incidental intervention is an emergency measure to resolve crises.

[34] This practice does not support a distinction between principles and policies, as for instance used by Ronald Dworkin, which would be another reflection of rights-oriented legislation.

[35] The *bei'an* mechanism requires the examination of a great number of norms with a view to their potentially conflicting with a great number of other higher-ranking norms. Zhang Jun, '31 provinces set up a system for reviewing illegal red-letterhead documents (红头文件违法 31 省建备案审查制)', originally appearing in *China Youth Daily* (中国青年报), at http://www.peacehall.com/news/gb/china/2005/08/200508240107.shtml.

[36] And running counter to the idea of local autonomy. Wang Zhenmin (王振民), 中国违宪审查制度 (Chinese University of Politics and Law Press, Beijing: 2004), at 133.

for Administrative and Local Regulations, Specific Regulations and Special Economic Zones Regulations and a *Regulation of the Filing Procedure for Judicial Interpretations*, claiming the power to decide about conflicting legislation "back," and further stipulating that Judicial Interpretations produced by the Supreme People's Court are also to be filed (*bei'an*) for review by the NPC's Standing Committee.[37]

Against this complex institutional background, actual laws and regulations can themselves be bewilderingly complex and indeed inconsistent. Discussing the above-mentioned Sun Zhigang case and questions of constitutional review raised by it, for instance, Wang Lei points out that seventeen regulations and rules had been created at different local levels and by People's Congresses and People's Governments, and that the delegated power to do so, the relationship between these various regulations, and the way in which some of them exacerbated rights invasions resulting from the by itself already unconstitutional State Council *Measures* (technically also a "regulation"), were all problematic in various ways.[38]

The best way to understand the system briefly sketched above is that local legislative and government authorities have the power to make rules by virtue of an extension of the central power to rule to the periphery, and subject to a principle of

[37] 行政法规、地方性法规、自治条例和单行条例、经济特区法规备案 审查工作程序 and 司法解释备案审查工作程序; *see* "NPC clarifies the constitutional review procedure; Judicial Interpretation incorporates review [in the adjudicative process] (全国人大明确违宪审查程序 司法解释纳入审查)" at http://www.law-lib.com 2005-12-20 15:43:18.

[38] Wang Lei notes that in the area of internment and deportation, not only the State Council and the national Ministry of Public Security had created administrative regulations, namely the old *Measures* and *Implementation Regulations* for them; but also six provinces (Hunan, Guangdong, Heilongjiang, Hainan, Guizhou, and Sichuan.), four directly administered cities (Beijing, Chongqing, Tianjin, and Shanghai), four provincial capitals (Nanjing, Shenyang, Hangzhou, and Kunming), and three 'larger cities' (Shantou, Ningbo and Luoyang) had created local administrative rules or regulations. Of these seventeen, six had been created by local governments, and eleven by local People's Congresses. He says that that there is no principle explaining why in some cases the People's Congresses and in other cases the People's Governments had become active, and that there is also the phenomenon of "jumping an administrative level (*yueji*)," as when Hangzhou city created a regulation on internment and deportation, whereas the province in which it is situated, Zhejiang, had not created a provincial level local regulation. Most importantly, he tells us that local regulations extended the scope of application (people affected) of the State Council's original *Measures*, and the scope of powers given to the administration, thereby combining to make further rights invasion possible "on the basis of" such local regulations. Wang Lei, *supra* note 11, at 145.

incidental intervention from above—but not subject to independent determination of what counts as (valid) rules of the law, in a process of independent adjudication. The central power to rule is an idea whose reality is not a consequence of central law in the sense of basic principles being respected; rather, it rests on effective command structures. The power to issue commands and make rules is, it should be reiterated, founded on a theory of "representation of the will of the people." A centralist assumption underlying this structure may be that the will of the people is identical in different places and at different levels; but this assumption is not supposed to be tested through a review mechanism. Civic or official or judicial deference toward "legislation" in this broad sense characteristic of the Chinese system bears little similarity to deference toward law in systems with separation of powers.

Yet if rights protection is thought generally desirable, and in the light also of increasingly widespread "rights protection activity" throughout the country,[39] some kind of judicial scrutiny legislation seems all the more important in China because of the potential complexity and incoherence of its legislation,[40] and because of the perhaps more palpable danger of rights infringements occurring in a cascading structure in which local government authorities can make rules at their own convenience.

Thus far only the system of legislation according to the *Legislation Law* and Constitution has been considered. But as Wang Xingmao's case illustrated, this does not cover, by a long stretch, everything that may loosely be referred to as a

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[39] *See, e.g.,* Eastsouthwestnorth, *The Chen Xiwen Interviews*, 5 July 2005 at http://www.zonaeuropa.com/20050705_1.htm (a translation of interviews in which Chen Xiwen, a vice minister of the Office of the Central Leading Group on Financial and Economic Affairs, describes incident of rural unrest as a form of rights assertion by Chinese people).

[40] We have seen that according to explicit procedural rules of the *Legislation Law*, it is possible for there to be no answer to the question which piece of legislation should be applied in the context of administrative law enforcement or of judicial review of state action. From a constitutional and rights-oriented perspective, it would be possible to come up with a reasonable answer such as "the one that has less restrictive effects on citizens," but the examples given here have shown that this is not the answer which the text of the *Legislation Law* provides.

"regulation" by administrative authorities in their interaction with citizens. The *Legislation Law* assigns a special legal status to "statutes," "regulations," and "rules." But in practice, local authorities will often give precedence to lower-order norms, such as "notifications," "provisions," "commands," "letters," and "views," over "statutes" or "regulations." Such documents are issued by lower level administrative authorities, and are not necessarily made public even when they are used to "support" a particular decision. A generic colloquial term for these documents—often including the regulations and rules created according to the *Legislation Law*—is "red-letterhead documents," in a literal translation of *hongtou wenjian* (红头文件), on account of the red official letterheads such documents usually bear. Importantly, they can also include party documents, or (in many cases) party documents issued jointly by party and government authorities.

To quote the social anthropologist Zhou Qingzhi, who did extensive fieldwork in a poor county in the North:

> In a situation where the relationship between the [central] state and local government is mainly a political relationship maintained by virtue of power or of personal trust, administration in accordance with the law can only have the effect of either strengthening or weakening administrative power, but it will not ultimately result in establishing the relationship between the central state and local government as a systematic and legal relationship. As regards the essential meaning inherent in the idea of "administration in accordance with law," namely, the idea that individual political rights or economic positions ought to be protected, this is an idea which has, as it were, not even entered the thoughts of local government and its officials about "administration in accordance with law" yet; or to put it differently, it has just never occurred to them that they could consider things from this angle (...)
>
> To tell from the material I have accessed in my research, county government activities mainly rely on "policies" (red-letterhead documents).[41] The notion of administration in accordance with law is fairly weak among the government officials, not even to mention the idea that their own administrative acts could be restrained by law. [The author quotes this county's financial bureau head, interviewed in 1999, as follows:] "In reality, not all administrative matters can be handled in accordance with law. To handle

[41] "Policies" usually refers to party documents.

> [some] matters one must fall back on people; if one always consults the provisions [of laws and regulations], then nothing will get done. As I understand it, handling matters in accordance with "red-letterhead documents" counts as administration in accordance with law..." [42]

From a constitutional viewpoint, the problem with red-letterhead documents is that they may be applied to citizens with the same force as binding laws.[43] At the same time, courts will rarely make any assessment of their consistency with law and legal regulations, or with the Constitution. According to Article 12 section 2 of the *Administrative Litigation Law*, the courts must not accept litigation applications "directed at administrative bodies" (*xingzheng jiguan* 行政机关), decisions or orders "of generally binding force." A Supreme People's Court's judicial interpretation defines such acts as normative documents addressed by an administrative body to an unspecified number or group of persons, and allowing for repeated application.[44] This includes red–letterhead documents that would not qualify as "administrative legislation" according to the *Legislation Law*.[45]

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[42] Zhou Qingzhi (周庆智), *County Level Government Organization and Operation in China – a Sociological Study of County W* (中国县级行政结构及其运行—对 W 县的社会学考, Guizhou People's Press, Guiyang: 2004). In page 150 ff. of this book, Zhou describes an apparently irrational and almost obsessive practice of producing "documents" in the context of nearly all administrative tasks handled, so as to give oneself an appearance of rationality and authority. For the purposes of document production and distribution (Zhou describes eleven separate activities, respectively, involved in production and distribution), secretaries are employed outside the government budgeting plan (*bianzhi* 编制); and the need to pay for the production of documents, as well as to pay salaries to the secretaries, of course makes it necessary to find new ways of generating income through further exactions from the local population, on the basis of further red-letterhead documents. See the dialogue he renders at page 156 regarding the proposed financing of a nursery for plants by requisitioning and "developing" some land situated in the county.

[43] For a contrasting comparison with another civil law jurisdiction, *see* Maurer, Hartmut, *Allgemeines Verwaltungsrecht* (C.H. Beck Verlag, Munich: 2002), at 624 ff., 633.

[44] Article 3 of the 1999 SPC judicial interpretation entitled "On questions relating to the application of the administrative litigation law (关于执行行政诉讼法若干问题的解释)," at law.chinalawinfo.com/ newlaw2002/ SLC/slc.asp?db=chl&gid=26982. *See also,* Liu Xin (刘莘), "A short discussion of peculiarities of abstract administrative acts (简论抽象行政行为的特征)," at http://www.legaldaily.com.cn/gb/content/2001-07/29/content_21642.htm. Party policies, unless issued jointly with an administrative authority, cannot be the basis of a legal decision, but neither is there a mechanism for challenging them in litigation.

[45] *See* for a recent discussion Yi Yaping and Tang Yu, "On the justiciability of abstract administrative acts (轮抽象行政行为的可诉性)," 27 May 2005 at http://www.jcrb.com/zyw/n253/ca248638.htm..

In practice, the refusal by courts to accept administrative litigation cases for handling simply on account of a challenged concrete decision *involving* an "abstract" administrative decision down to township level is a well-known problem. It is also connected to the doctrine that courts must not pronounce administrative regulations illegal or invalid in the process of administrative adjudication.[46] In combination, these doctrines make it if not impossible, then at least risky, for judges to subject laws, rules and regulations produced by People's Governments or People's Congresses at whatever level to any explicit legal scrutiny. Academics have discussed the implications of the rule on "not accepting for handling" critically, [47] and small inroads have been made in practice to allow courts "not to refer to" (*bu cankao* 不参考) lower-ranking norms when they violate higher-ranking ones. In rare cases, judges will be explicit about inconsistency, but in doing so, they often take the risk of negatively affecting their professional evaluations and grading, their salaries; their careers.[48] (Therefore, in practice, the doctrine of "not accepting" challenges to abstract administrative decisions has far wider applications than doctrines regarding "ripeness"

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[46] See note 32 above on different views regarding this doctrine.

[47] Jiang Ming'an assumes that challenges to concrete administrative acts ostensibly based on abstract administrative acts ought to be accepted for handling, and that courts have an obligation to examine the legality of abstract administrative acts in such cases—but then emphasizes that courts must not publicly declare such acts invalid. Jiang Ming'an (姜明安, editor), *Administrative Law and Administrative Litigation Law* (行政法与行政诉讼法, Beijing University Press, Beijing: 1999 (10th imprint 2002)), at 173 f., says they must merely refrain from using them as a "legal basis," and should separately alert the issuing authority to the illegality of the act suggesting to change it. Wang Zhenmin argues that while this adequately reflects some (of the more daring) court practice, it is unreasonable. In 中国违宪审查制度, *supra* note 36, at 253, he discusses one of the cases in which a Chinese court did not "use for reference" certain regulations deemed in contravention of higher ranking law. See, for instance, "Case of Zhou Jianjun v Beijing City branch traffic police squad of Chaoyang District traffic police (周建军诉北京市公安交通管理局潮阳交通支队机动队案)."

[48] For instance, in 2003 a judge in Luoyang wrote into a judgement that a certain local regulation contravened a national regulation and *therefore* could not be applied. She was expelled from the party and disciplined (and nearly lost her job). *See* Wang Zhenmin, *supra* note 49, at 260 ff; Cheng Jie (程洁), "How to understand court supervision by local People's congresses (如何理解地方人大对法院的监督)," *21st Century Economic Herald* (21 世纪经济报道), 5 December 2003, at http://www.people.com.cn/GB/14576/ 15157/2230127.html.; and "Luoyang City 'Seed' Case Highlights Chinese Courts' Lack of Authority to Declare Laws Invalid" (2004) *China Law and Governance Review* (June issue) p. 253 (about administrative legislation). *See also* Jim Yardley, "A Judge Tests China's Courts, Making History," in *The New York Times* of 28 November 2005.

or "*Rechtsbeschwer,*" which merely block litigation against administrative regulations while they have *not yet* produced concrete, adverse effects for the person seeking to challenge them in court.).

The definition cited above would appear even to include the "regulation" used by the Lianyuan internment and deportation centre, a government-run entity under a Civil Affairs bureau, for asking for ransom. This is not to say that a court would in fact have considered such a "regulation" valid,[49] but rather that its rejecting an administrative litigation application against the imposition of a "fee" in accordance with the regulation would have been consistent with accepted practice in other administrative areas.[50] Courts are dependent for their finances on the local government's financial departments,[51] and local officials more generally are frequently viewed as virtually unable to operate without exacting illegal fees, fines, etc.[52]

It should be reiterated that "internment and deportation" and the abuses surrounding it have now ceased, at least as a common practice. But similarly burdensome practices and malpractices—the generation of illegal revenue through the imposition of fees and taxes,[53] the setting of compensation standards in land takings,[54]

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[49] A full discussion of the status and content of this document is not possible here, since only news reports allegedly quoting from it were available. For instance, it is not clear if the "regulation" expressly "authorized" detention for the purpose of extorting payments.

[50] There was no court decision on the present case, and no recorded decision on a similar case could be found.

[51] He Weifang criticizes the localization of judicial institutions in his contribution to this symposium volume (p. 4 of his draft). So far as the quality of adjudication is affected negatively by a perceived need on the part of judges or courts to generate additional income, it should be noted that this problem may be worse in poor areas where courts have insufficient funding to begin with. *See* for a highly insightful study of two different courts, one poor and one comparatively wealthy one, He Xin, 运转不良的法院？两个基层法院经济案件数量变化原因的经验考察, (on file with author; forthcoming in 法律与社会科学).

[52] Feng Xiaotong, *supra* note 14. For a discussion of illegal fees and fines, *see also* below at 35.

[53] Importantly, the national "agricultural tax" was scrapped in 2003. *See* Bernstein, Tom and Lü Xiaobo, *Taxation Without Representation in Rural China* (Cambridge: 2003), especially chapter 4, on the general problem of income generation. *See* Elfstrom, Manfred, "The Meaning of China's New Agriculture Policy," 21 February 2005, at chinaelections.org, on the abolition of the agricultural tax.

the imposition of fines sometimes brutally enforced [55]—on the basis of locally created norms persist and can be identified in virtually every area of peasant life, which bears a relation to the state and its services and policies. As is discussed in the following section, moreover, the irregular generation of income for the government, the party or its officials was, and is, practiced extensively and in a particularly arbitrary way when it affects "peasant" migrant workers in urban contexts, for instance in the context of public services such as education for migrant workers' children.

The practice of rule by red-letterhead documents, so far as it exists, obviously adds to the already considerable difficulties resulting from the legislation system as it is according to the Constitution and *Legislation Law.* It means that the power to make rules negatively affecting citizens is extensively exercised, in effect—though not according to the letter of the *Legislation Law*—at the very lowest ranks of government administration in China. But how can rule by red-letterhead document be tolerated in a system claiming commitment to "government in accordance with law?" It appears that this practice makes more sense if the point of "government in accordance with law" is seen in regulating and controlling the exercise of governmental power by officials, rather than in providing laws for citizens to rely on. Mechanisms of bureaucratic discipline and bureaucratic commands can perhaps be expected to work sufficiently well, to prevent contradictory or corrupt official behavior that would undermine the central state's purposes, even though official conduct thus regulated may more or less frequently infringe citizens' rights. We are reminded of the imperial principle of "ruling the officials, not the people," whereby the limits of control over

[54] Eva Pils, "Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan," forthcoming in the *Columbia Journal of Asian Law.*

[55] *See, e.g.*, chapter 4 of Bernstein, Tom and Lü Xiaobo (above note 49), especially at 73 ff. For reports on the enforcement of population control policies, in particular, see Teng Biao (滕彪), Notes on an investigation of population control practices in Linyi (临沂计划生育调查手记), 25 August 2005 (on file with author).

officials were dictated only by practical exigencies.[56] Of course, in comparison with total control over "the people," the exercise of control merely over "the officials" can be seen as more tolerant and lenient. But such exercise may still not measure up to the requirements of constitutional government.

Up to a point, this structure can be justified by the idea that central governmental power can extend into, but cannot at all times pervade society. If that is accepted as a fact, then it seems that not only the exercise, but also the justification of the exercise of central state power is limited by natural circumstances, such as the so-often mentioned fact of China's size, and its various regional disparities.[57] This idea of theoretically unlimited central power naturally limited in its exercise is opposed to the idea of generally applicable law, and opposed to the idea of constitutional rights and principles to be invoked by citizens. The official attitude which this structure encourages is that of "I am the law"[58]—an attitude which of course defeats the idea of law open to rational scrutiny, or of law that affects and protects citizens viewed as equals,[59] as citizens with equal rights.[60] It encourages, in other words, further fragmentation of the law in practice.

Fragmented citizenship and social bias

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[56] *See* William C. Jones, "Introduction" to *The Great Qing Code* (Oxford, 1994). (明主治吏而不治民.)

[57] Considering the way this "ransom" was rationalized by officials of such centers, we find that such "justification" included the need to maintain the internment and deportation centers and pay those who worked in them. Feng Xiaotong, *supra* note 13, at page 6.

[58] For a provocative, though in my view overly condemnatory, discussion of the Chinese Legalist tradition using the same characterization — *le droit c'est moi* rather than merely *l* é*tat c'est moi*—see Fu Zhengyuan, *China's Legalists: The Earliest Totalitarians and Their Art of Ruling* (Armonk, New York, 1996) at 66.

[59] To use a phrase used by Dworkin to characterize equality under the law. For an opposed, formal interpretation of equality *see* Joseph Raz, "Equality," Chapter 9 of *The Morality of Freedom* (Oxford: 1986).

[60] See Xixin Wang, "Rule of Rules: An Inquiry Into Administrative Rules in China's Rule of Law Context," in *The Rule of Law. Perspectives from the Pacific Rim* (Mansfield Center for Pacific Affairs: 2000), at 82, for a similar conclusion.

There is no area of law in which law is more clearly lacking effective generality than the area of household registration law, and no appeal which illustrates this lack more starkly, than peasants' and peasant migrants' appeal to a common Chinese citizenship, through the invocation of their constitutional rights. Let us revert to the cases of Wang Xingmao and Sun Zhigang and compare them. The former was an obscure peasant migrant worker, perhaps without papers, whose reaction to the measures taken against him was an attempt to commit suicide: an expressive but also tragic and abortive form of protest.[61] The traces we have of Wang Xingmao's very existence are scarce, and we are left to imagine what he might have said but probably did not say, by putting words into his mouth.

The latter was a young university graduate[62] who could have produced two of the three required kinds of documents and had merely not yet had time to apply for a temporary residence permit after his recent move to begin a new job[63]—and an urbanized citizen with some self-confidence, who apparently "talked back" to the officers who detained him, and was possibly killed because he "talked back."[64] For a number of reasons Sun made for a better "story"; and for a number of further reasons, his story could get into the Chinese media. His case attracted unprecedented public attention. The public media and academics celebrated, rightly, the abolition of the old *Measures* as a victory in the struggle for constitutionalism, in the struggle to establish in public perception that there can be such a thing as "bad law" (*e fa* 恶法), which deserves to be abolished.

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[61] *See generally* Sing Lee and Arthur Kleinmann, "Suicide as resistance in Chinese society," in Elizabeth J. Perry and Mark Selden (editors), *Chinese Society. Change, Conflict and Resistance* (London and New York: 2000), at 221.

[62] Sun's family was rural and he had lifted himself out of this situation by attending university. Wang Lei, *supra* note 11 at 135.

[63] Wang Lei, *supra* note 11 at 132. He was merely not carrying any documents on his person when detained.

[64] See Wang Lei, *supra* note 11 at 129. The expression used in Chinese is 顶嘴.

Yet Sun Zhigang's case, while not unusual as a case of death in interment as a vagrant,[65] was not so much a typical case of application, but instead a rather untypical case of misapplication of the *Measures* whose constitutionality was being challenged at that time.[66] In discussing Sun's case, it may have been possible for public media to discuss the case as a "freak" incident, without addressing in too great detail the allegations that internment and deportation malpractices were in some places systematic and organized for profit. Above all, a discussion of Sun Zhigang's case allowed for a challenge to the comparatively limited practice of interning people inaccurately designated as "vagrants," without directly and explicitly addressing the ugly fact that this practice overwhelmingly affected China's new underclass of peasants turned peasant migrant workers,[67] and without having to question the further legal distinctions attaching to "peasants" and "urban residents."

If part of the popular outrage in China over Sun Zhigang was a result of Sun's not being a typical target of internment for "vagrancy," then this is all the more reason for us to look into the legal aspects of the important distinction between peasants and urban residents in China. It is a distinction which helps to consolidate practices of local rule and misrule especially toward China's "peasantry (*nongmin* 农民)," its non-migrant part in the countryside according to the principle of "I am the law" which was mentioned earlier on, and its migrant part in the cities (*nongmingong* 农民工) according to a principle, simply, of discriminatory exclusion based by urban communities. This latter practice can be said to continue, even though it is a great

[65] This is also pointed out in the letter by He Weifang et al. to the Standing Committee of the NPC, *supra* note 14.
[66] Wang Lei mentions two lower-ranking administrative regulations which would be subject to the rule on conflicting legislation according to Article 86 of the *Legislation Law* considered above, *supra* note 11 at 144.
[67] Dorothy Solinger, "The creation of a New Underclass in China and its Implications", paper prepared for *POSRI International; Forum on China's Development: Key Challenges for China's Sustained Growth, Seoul,* Korea, 10-11 November 2004, available at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1065&context=csd.

improvement that in the context of "internment and deportation," the silently accepted routine practice of detaining "peasant" migrant workers arbitrarily has been broken by the abolition of the *Measures for Internment and Deportation of Urban Vagrants.*

The historical background for the household registration system in its current form was the shortage economy under Chinese socialism.[68] Today, in the process of the market transformation of the economy, it has become possible for many tens of millions of Chinese citizens to move outside the area of their household registration and find places to stay in the big cities. Indeed, urban economies rely on the supply of such migrants for their labor, and the breakdown of the market in Guangdong in 2005, when laborers in large numbers decided to look for better employment conditions in other regions, created serious problems. At the same time, the influx of migrants from the countryside into the cities is perceived by many urban citizens as requiring control and restriction.[69]

The current system is based on the so-called *Statutes on Household* Registration, which were passed by the Standing Committee of the National People's Congress in 1958,[70] a law[71] that continues in force, but has been very greatly modified by further laws. It requires that anyone living in the People's Republic of China must be registered as belonging to a certain household or work or study unit (Article 2), and provides procedures for "migration" and "temporary residence registration." Anyone moving out of their household registration area must apply for a "migration

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[68] For a further historical analysis, relating the current system to the old Chinese imperial system of registration for taxation purposes, *see* Yao Xiulan (姚秀兰), 户籍深翻与社会变迁—中国户籍法律是研究 法(Law Press China 律出版社, Beijing: 2004).

[69] *See* Hong Yiyi, Gan Xueming and Huang Wei 洪奕宜 甘雪明 黄伟, "We go wherever the treatment is better: a study on migrant workers' wages in Shenzhen reveals the reasons for labour shortages" (哪里待遇好，就到哪里去！ 深圳外来工薪酬调查揭示"民工荒"原因), *Southern Daily* 2 March 2005. For an interesting discussion on related points, *see* Yang Dali, "China's Looming Labor Shortage," *Far Eastern Economic Review* January/February 2005, p. 19.

[70] Passed on 9 January 1958 by the NPC. (*Hukou dengji tiaoli* 户口登记条例).

[71] As mentioned above the "statutes" were made by the Standing Committee of the NPC; as such, they would today be called "law."

certificate," and people wanting to move from the countryside to a city must submit evidence of having been employed or accepted at a university in the city, or of their "immigration" having been approved by local authorities (Article 10). After a certain time, if neither temporary residence registration nor a change of household registration can be obtained, the "migrant" must return to his or her place of household registration, (Article 16, the provision most clearly restricting freedom of movement[72]).

Just as in the area of internment of vagrants, so, too, in the area of household registration, many further regulations and rules were created subsequently, reflecting changing trends in migration policies. Overall, such regulations and rules (the majority of them local) effected a slackening of the control of migration as such, reflecting the increased need for labor in urban centers. At the same time, these new regulations gave restrictions a new character tailored to new purposes. Under current law, the problem is not so much that persons from the countryside cannot migrate, but that they take their rural status with them when they do so, remaining tied to their communities of origin in symbolic as well as material ways, even into the second generation. At the same time local urban "host" communities create their own, decentralized rules of "immigration" control.[73]

The *hukou* system also introduced a nominal distinction between so-called rural and urban *hukous*, and this distinction has allowed the state and party to discriminate between peasants and urban residents. Such discrimination initially occurred primarily

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[72] The right to move freely is not expressly guaranteed in the current Chinese Constitution. The right to move freely is protected by Art 12 ICCPR, which China has signed but not yet ratified. There is an argument, not discussed here for reasons of space, that the restriction also violates the constitutional right of Article 37, which can be understood as comprehending the right to move freely. *See* above p. 4 (note 10) on Article 37.

[73] A quota system was established by individual urban centers. Wang Fei-Ling describes a trend to abolish quotas in the period from 1997 to 2002 in "Reformed Migration control and New Targeted people: China's *Hukou* System in the 2000s," 2004 *The China Quarterly* 115, 119. *See* on the redesign of control with some improvements "Beijing re-adjusts its system for managing outsiders coming to Beijing; Statutes on managing outside workforce abolished" (北京调整外来人口管理制度 外来务工条例今废止) 25 March 2005, at http://www.people.com.cn/GB/14576/14957/3269291.html.

in policies of centralized (planned economy) work allocation and resource distribution, and later increasingly in the area of public services. Efforts are made occasionally to abolish this distinction.[74] But it would probably remain important even if the nominal distinction (for instance, the designation on one's national identity card as "peasant" or "non-peasant') were abolished, due to the necessarily local nature of the *hukou.* Continued dualism in other areas of law, exemplified by the legally important distinction between "rural" and "urban" land, would be likely to strengthen dualism in the perception of residents of different places.

According to a Ministry of Public Security statistic published in 2003, at the time of the abolition of the old *Measures for Internment and Deportation*, there were 130 million "migrant" people in China—about a tenth of the population. Of these, only over 50 million had obtained a "temporary residence" permit (which does not equal a residence registration, an urban *hukou*).[75] As an instrument to control and restrict migration, the household registration and temporary residence permit scheme can therefore hardly be considered a success. But that does not mean it was an entire failure. Even today the system "enjoys institutional legitimacy" in the eyes of experts on this system,[76] not least because it is perceived as an instrument of migration control by urban residents.[77] For one thing, the policing aspects of household registration

[74] *See* "Recent Hukou Reforms" synopsis by CECC, at www.cecc.gov/pages/virtualAcad/hreform.php.
[75] *Xinhua News*, 25 July 2003, "China Is Undergoing a New Round of Reforms of the Household Registration System" (中国正推行新一轮户籍制改革) at http://news.cyol.com/gb/news/2003-07/25/content_703810.htm. See also "Respecting the Rights of Migrant Workers," *People's Daily* of 20 September 2005, at http://www.chinadaily.com.cn/english/doc/2005-09/20/content_479267.htm, stating the same total number of migrant workers.
[76] Wang Fei-ling, Statement for the Roundtable discussion *China's Household Registration (hukou) System: Discrimination and Reform*, CECC, 2 September 2005, available at http://www.cecc.gov/pages/roundtables/090205/index.php?PHPSESSID=34f767a9a5c6bb39691ffab3ab3db906.
[77] *See* Chen Jieren (陈杰人), "Again we are being told that household registration can serve to limit [urban] population" (又闻"户籍限制人口"声), 28 July 2005, *Southern Weekend* (南方周末).

extend beyond migration control to aspects of collecting information on people "in the focus" (*zhongdian renkou* 重点人口) of public security and state security organs.[78]

For another, household or temporary residence registration remains the precondition of a number of state benefits and public services. Despite some reforms, the *hukou* and temporary residence permit system still works to keep those out who want to migrate because they are unqualified, uneducated, and poor—in other words, typically, keeping out peasants or "peasant migrant workers"—and withholds those benefits that might alleviate the effects of being unqualified, uneducated, and poor. To date, this system in many cases still determines where—and due to the poverty of some regions, whether—one has access to medical care, social welfare, and other public services.

For example, household registration affects access to education. The devolution of responsibility of public services has put disproportionate burdens on communities with a low income. Whatever funding is required to make up for lack of public funds has to be paid by the children's parents. Within these parameters, urban education is given disproportionate funding by the state, and the education for rural children stagnated or even deteriorated in recent years (while elite universities, for instance, expanded, but also became far more expensive).[79] It should be noted that tuition fees have risen dramatically for all Chinese, and all poor Chinese suffer; yet "peasants,"

[78] *See* Wang Fei-Ling in "Reformed Migration control and New Targeted people: China's *Hukou* System in the 2000s," 2004 *The China Quarterly* 115.

[79] For a report summarizing the findings of several expert studies on trends in education at different levels, *see* Shi Yan (石岩), "The Vexing Problem of Fairness in Chinese Education" (中国教育的公平之痒), *Southern Weekend,* 10 March 2005, at http://www.nanfangdaily.com.cn/southnews/jwxy/200503100975.asp.744 .It characterizes the trend in basic level rural education as one of clear degradation, citing the finding, for instance, that fifty percent of rural schools have difficulties in affording the most basic expenses to run these schools, and the finding that in half of the over two thousand counties studied, the annual schooling expenditure per student was less than ten yuan RMB, whereas it was well over seven hundred yuan RMB in Beijing and Shanghai.

with an average income at most a third of the average income of urban residents,[80] suffer more. Stories about migrant worker children and peasant children unable to attend school in this highly education-focused society abound; they include stories of children and youngsters or their relatives committing suicide for this reason.[81]

There have been strenuous and partly successful efforts, still ongoing, at improving the provision of schooling for these children,[82] and at improving healthcare[83] and in some cases labor insurance and pensions.[84] But the system that creates basic discrimination between peasants and urban residents, as well as between peasant migrants and their legally "urban" neighbors, remains in place.[85] Discrimination continues into the second generation, despite the fact that migrant

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[80] *See* for references to recent official statements putting the difference at about 1:3, Edward Cody, "China Addresses Plight of Farmers," *Washington Post* 23 February 2006, at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022202218.html. The United Nation's Development Programme For China's "China Human Development Report" dated 15 October 2005 and available at http://www.undp.org.cn/downloads/nhdr2005/NHDR2005_complete.pdf, puts the real ratio, counting in public services, at about 1:4 (at p. 27).

[81] *See* on the general situation, "Second Generation Migrants 民工第二代" by Shi Xin 师欣 in *Southern Weekend* of 2 December 2004, describing the suicide of a six-year-old Nanjing migrant's child unable to go to school. *See* also China Digital Times, "Tuition Killings – The Complete Record" 23 February 2006at http://chinadigitaltimes.net/2006/02/tuition_killings_the_complete_record_han_xin.php and Han Xin (寒心), "Tuition Kilings" (学费杀人) at http://www.sohoxiaobao.com/chinese/bbs/blog_view.asp?id=245033.

[82] On rural schools, *see* e.g. Yardley, Jim, "China plans to cut school fees for it poorest rural students," *New York Times* 15 March 2005. Anecdotal evidence suggests that the implementation of these reforms is imperfect, but that the situation has improved overall.

[83] *See* for details AFP, "Report highlights sorry state of China's health sector," 7 August 2005. *See* also Adams and Hannum: "Children's social welfare in China, 1989-1997: access to health insurance and education," *The China Quarterly* Volume 181 (March2005), 100, especially at pp. 104 ff.

[84] Currently, the system makes a clear discriminatory distinction between rural and urban residents and excludes peasants from almost all social welfare services. For an official overview, see State Council Information Office, "China's Social Security and Its Policy" September 2004, available at http://www.china.org.cn/e-white/20040907/.

[85] *See* Chen Jieren (陈杰人), "Again we hear people say that the household registration system should be used for population control' (又闻'户籍限制人口'声) in *Southern Weekend* of 28 July 2005, at http://www.nanfangdaily.com.cn/zm/20050728/xw/zy/200507280043.asp. *See* also on the process of cities "fencing in" their wealth Sun Chunying (孙春英), "Walking out of the town walls —a serialized report on the reform of the household registration system" (走出"围城"—户籍制度改革系列报道 (third part), 21 September 2001, at http://www.legaldaily.com.cn/gb/content/ 200109/19/content _24489.htm (see below).

workers often contribute a very substantial share indeed of urban public revenue, by paying taxes.[86]

For those unable to buy into urban resident status, a peasant *hukou* has some effects similar to those of belonging to a despised race. Details of the legal system, such as the legal obligation, until recently, to follow the *hukou* registration of the mother for newborn children, seem bound to support this perception; "peasant" women were made ineligible as spouses for "urban" men. Even the recent introduction of a right of choice in Beijing, for instance, is still based on the assumption that if both parents are "outsiders," their child born in Beijing will not obtain a Beijing household registration.[87] In a curious analogy to the principle of *ius sanguinis* employed in the citizenship laws of many European countries,[88] the division between urban residents and "alien" peasants is thus carried over into the second generation. In the Chinese case, the background for this is of course that migrant children are excluded from urban public services, as just discussed.

The consequences of the *hukou* system, moreover, reach beyond the regulatory content of centrally- or locally-created legal norms on registration and public services. The picture given here would be incomplete if it did not also mention the socially biased perception of "peasants" in China, and the further consequences of this bias,

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[86] *See* for instance "Peripheral Citizens—The Second Generation Migrant Worker" *China Newsweek* translated by Guo Xiaohong, Zhang Yunxing, and Zhang Tingting for China.org.cn, 26 December 2005, available at http://www.china.org.cn/english/2005/Dec/153200.htm. It refers to a study done by a researcher named Liu Kaiming, based in a Shenzhen research institute, on the astonishing example of Shenzhen. There, 42.5 billion Yuan out of a total public annual revenue of 118.3 billion Yuan were spent on one million registered urban residents in 2004, whereas Shenzhen's eight million rural migrants, responsible for eighty percent of this revenue, got "not one fen [penny]" according to the study. Even if "not one fen" is exaggerated, exclusion from basic public services of such a large proportion of the urban population would appear iniquitous.

[87] *See* "Big Reform in Beijing's Household Registration System, Newborns Can Be Registered Following Father's Hukou" (北京户籍管理重大改革 新生婴儿可随父亲报户口), *People's Daily,* 15 August 2003 at http://www.people.com.cn/GB/shizheng/1026/2019328.html.

[88] *See*, for example, the citizenship laws of Germany.

which are in part law-related, and illustrate the correlation between law and patterns of thought and action.

We find considerable contempt among some, although certainly not all, urban Chinese toward their "peasant" neighbors residing in cities and toward peasants actually living in the countryside.[89] Public discourse—which is to some extent censored—is rarely explicitly and viciously discriminatory; indeed published scholarly essays and news articles often emphasize the importance of improving peasants' lives. Yet they often do so by reflecting and reinforcing notions of peasant inferiority. Peasants are downgraded to "low quality" people in such discourse. To give a specific example, a middle school textbook specially designed for rural children and entitled *Common Knowledge on Rural Society*[90] tells its teenage readers that two of the three main characteristics of the Chinese peasantry are that "their number is great" while "their quality (*suzhi* 素质) is rather low." It further defines "population quality" as comprising "physical quality," "scientific and cultural quality," and "quality of understanding and notions" and—ironically but apparently without embarrassment—explaining "quality" as a result of native abilities as well as the environment in which one grows up.[91] The third characteristic of rural society mentioned in this primer is "a simple employment structure [i.e. most jobs are in farming];" interestingly, in this context, the phenomenon of "peasant migrant workers" is not mentioned at all. One

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[89] Gilboy and Heginbotham, quote "你真农民"("You're such a peasant") as an expression of contempt among urban residents, in "The Latin Americanization of China?," (2004) *Current History* 256. For a detailed sociological study, *see* Li Qiang (李强), *Peasant migrants and social stratification in China* (农民工与中国社会分层), Social Sciences Academic Press (Beijing: December 2004), especially chapter twelve. Li Qiang points out the discrepancy in perception among migrants, who feel they are regarded with contempt, and city residents who in the majority say they do not discriminate (pp. 222 ff.). *See* for a more anecdotal account also Du Lirong (杜丽蓉), *Report on the lives of [peasant] migrant workers in the cities* (城市民工生存报告), China Epoch Economy Press （中国世代经济出版社） (Beijing: July 2004).

[90] Zhu Qizhen (朱启臻, editor), *Common Knowledge on the Rural Society* (农村社会常识), China Environmental Sciences Press (中国环境科学出版社, Beijing, 2004), at pp. 13 ff.

[91] *See* on this topic in great detail Murphy, Rachel, "Tuning peasants into modern citizens: population quality discourse, demographic transition and primary education," *The China Quarterly* 2004, 1.

can only surmise that such mention would disturb the simplicity of the explanation for the "low quality" of "peasants" here provided.

The notion that peasants are of "low quality" is used in a variety of contexts to explain differential treatment at the level of wider policies, too. It has in recent years given rise to some debate and discussion. Many individuals, including scholars, in China have become concerned with the condition of China's peasantry, and sensitive to existing iniquities. Official language about "raising peasants' quality," in particular,[92] has come under attack.[93] But under current conditions, biased perception continues to influence how peasant citizens are treated. Discriminatory views translate back into laws and regulations, outside the scope of household registration law and public services, but nevertheless contributing to the relegation of "peasants" and "peasant migrants" to a new underclass. In the context of migrant workers there are, for instance, legal stipulations whereby compensation for the killing of a "peasant" will be a fraction of that for killing a registered urban resident, because compensation is to be calculated according to the average rural or urban income, respectively, *in the deceased person's place of registration*—a rule rightly perceived to be about *status* (*shenfen* 身份) rather than actual needs or losses.[94]

More importantly perhaps, the fact of bias may be responsible for a *lack* of law where "peasants" and "peasant migrant workers" are concerned. In the context of

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[92] For a recent example of the use of this phrase and related vocabulary, *see* Xinhua News, "Wen Jiabao: Planning both for urban and rural development, putting more energy into [solving] the three peasant problems (温家宝：统筹城乡发展 加大对三农支持力度)," 20 February 2006, at http://news.xinhuanet.com/politics/2006-02/20/content_4204867.htm.

[93] For instance, in 2002, constitutional scholar Cai Dingjian wrote an essay entitled *Peasant Quality and Democratic Elections*, in which he sharply criticized the idea that it is the "low quality" of peasants which would hinder thoroughly democratic elections in the countryside. Cai Dingjian (蔡定剑), "Peasant quality and Democratic Elections (农民素质与民主选举)" *China Reform* 中国改革 2002 vol 8 at p. 42.

[94] See Kong Fanjun (孔繁军), "Distinguishing Compensation Levels: Are City-Dwellers and Peasants The Same?" (区别赔偿：城里人乡下人就不一样?) in Southern Weekend (南方周末) 9 December 2004, at http://www.nanfangdaily.com.cn/zm/20041209/xw/sd/200412090043.asp. This practice relies on a Supreme People's Court judicial interpretation. In effect, the court is saying that "peasants" need less.

migrant workers, invidious practices include holding back wages from migrants for months or occasionally even years (they may then be effectively unable to leave their employer because they have no money, or are prevented from doing so because their employer has collected their identity card from them).[95] In 2005, mainland news services reported that research had demonstrated that in order to obtain payment of the then one hundred billion Yuan owed in back wages, "society" would have to spend three hundred billion Yuan.[96] At the beginning of 2006, Western news reports stated that the total figure of unpaid wages owed to migrant workers according to official estimates (still) translated into US $12 billion.[97] Cruel treatment of migrant workers includes fines and in some cases corporal punishment for workplace infractions, detention of "defaulting" workers described as "indentured workers" (*baoshengong* 包身工), physical exploitation, and child labor.[98]

In the countryside, the absence of law seems even more pronounced. It has been observed, for instance, that officials actively opposed the distribution of laws and regulations to peasants, remarking that this would make them harder to rule.[99] Efforts

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[95] *See* Solinger (*supra* note 67); *see* also "A virtual labour contract foreman's [*baogongtou*'s] twenty years of sadness and happiness" (虚拟包工头悲喜 20 年), *Southern Weekend* (南方周末), 26 January 2006, at http://www.nanfangdaily.com.cn/southnews/zmzg/200601260810.asp

[96] Cui Li (崔丽), "To obtain payment of 100 billion Yuan back wages social expenditures of 300 billion Yuan need to be incurred" (追讨 1000 亿元欠薪 需要支付 3000 亿元社会成本), *China Youth Daily* (中国青年报) 9 June 2005, available at http://finance.sina.com.cn/g/20050609/06591669209.shtml.

[97] *See* Tim Johnson, "China's migrant workers aren't getting paid," *Miami Herald*, 23 January 2006, at http://www.miami.com/mld/miamiherald/13692866.htm.; Mary-Anne Toy, "New China rises on the backs of migrant workers," *The Age*, 30 January 2006, at http://www.theage.com.au/news/world/new-china-rises-on-the-backs-of-unpaid-migrant-workers/2006/01/29/1138469606834.html.

[98] There are sporadic reports of such indentured labourers in the Chinese news media, for instance, "A modern version of indentured labourers, the blood-and-sweat story of 20 peasant workers [*mingong*] "(现代版包身工 20 多民工打工的辛酸血泪史) at *Zhejiang Online News* 浙江在线新闻网站, 9 January 2006, at http://society.zjol.com.cn/05society/system/2006/01/09/006435864.shtml.
See also Solinger (*supra* note 67), and Huang Rutong, (黄如桐) "The lives of the poor in present-day China"(当下中国穷人的悲惨生活), at http://www.peacehall.com/news/gb/pubvp/2005/11/200511201935.shtml. The author of the latter essay refers to numerous further studies, without, however, providing any citations.

[99] Kevin O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China," in Neil J. Diamant, Stanley B. Lubman, and Kevin O'Brien (editors), *Engaging the Law in China. State, Society, and Possibility of Justice* (Stanford, 2005), p. 32. *See* especially p. 33 (quoting a rural county official).

have included collecting copies of national legislation or central party policies back from peasants for the purpose of destroying them, and locking up or beating up those who distributed them among (fellow) peasants.[100] There is also a largely locally-driven practice of surveillance of rural citizens engaging in rights-protection activities, with the main purpose of preventing them from "escaping" to the capital (or provincial capital) to submit petitions to central party and government authorities and (in many cases) allege official corruption. If they do escape, they may be pursued and a local government may send out its own police to retrieve them from the realm of legality which they were trying to reach, and "escort" them back (sometimes with support from the local police in the capital).[101] The State Council's new regulation on petitioning, effective as of 1 May 2005, prohibits "jumping administrative levels in petitioning," and thus supports this practice up to a point.[102]

If some public perceptions of peasants seemed negatively biased, especially in the context of "population quality" discourse, sympathetic accounts of the lives of China's peasantry, which attempt to get at the truth in difficult conditions, may be suppressed. This was most famously the case with the book *Investigation Into China's Peasantry* by Chen Guidi and Chun Tao.[103] It was published in book form in 2004 but then soon banned; the authors were saddled with a defamation lawsuit, an abortive

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[100] O'Brien, Li Lianjiang *supra* note 100 at p. 34.

[101] One such instance is described by Jerome Cohen in his "China Trips Up Its Barefoot Lawyers," *Far Eastern Economic Review* (November 2005), at http://www.feer.com/articles1/2005/0511/free/p017.html. An explicit provision for "interning and deporting" (*shourong, qiansong* 收容, 遣送) unruly petitioners has been abolished, but the practice of "escorting back home" persists. *See* also Human Rights Watch, *"We Could Disappear At Any Time": Retaliation and Abuses Against Chinese Petitioners* (Dec. 2005), available at http://hrw.org/reports/2005/china1205/.

[102] P.R.C. Letters and Visits Regulation (信访条例) promulgated by the State Council, Jan. 10, 2005, effective May 1, 2005, at http://www.chinacourt.org/flwk/show1.php?file_id=99030.

[103] Chen Guidi and Chun Tao (陈桂棣, 春桃), *Investigation Into China's Peasantry* (中国农民调查). This book was published in January 2004 but then banned. The present essay uses a version downloaded in December 2004 from http://www.cdjp.org/gb/article.php/336/1, in which the section quoted from is part 2 ('Taxes as many as hairs on a cow'税费如牛毛 达标价更高) of chapter 4 ('How the scales are tilted' 天平是怎样倾斜的). *See also*, for a translated excerpt, 168 *Far Eastern Economic Review* (December 2004) at p.59.

legal procedure in which the main hearing took place in August 2004, but over a year passed without a judicial decision.[104] The great attention this publication received is doubtless partly due to the individual incidents of local rural despotism which it narrated, based on on-the-ground research. The authors sought to situate these events in their societal, political and legal context. Among other things, they wrote about fines imposed by village cadres on peasants, which reflect an attitude of superiority, demanding willing compliance with often unreasonable impositions:

> In the course of our investigation we discovered that many impositions were levied by the village cadres as they pleased. Some immediately struck one as absurd, even having a certain black humor to them, as though they were meant as jokes. But when it came to paying up, every penny had to be paid (…).
>
> We (…) discovered that in some rural townships and towns, even to register a marriage, fourteen different fees had to be paid: Apart from the fee for obtaining one's official marriage certificate, one had to pay a fee for a letter of introduction [to one's future spouse], a fee for the marriage notarization, a fee for the [compulsory] pre-marriage health check, a fee for health insurance for mother and child, a single-child guarantee deposit, a wedding banquet consumption fee, a pig-slaughtering fee, a fee for a greener environment wedding, a fee for a playground to be built later, a deposit guaranteeing adherence to the population control policies, a deposit to guarantee one would have children late in life, a conjugal love guarantee deposit, a golden wedding guarantee deposit, and so on.
>
> After the promulgation of the national *Environmental Protection Law*, in some places, they started treating the smoke rising from the stoves in peasants' homes as "environmental pollution" and really and truly imposed a "fee for emitting polluting substances." Those peasants who dared to speak up against this and sought explanations from the village cadres promptly had a "wrong attitude fine" slapped on them. The reason for this was expressed in a slogan of the time of the Cultural Revolution: "what matters is not how big the problem is, but what your attitude toward it is;" therefore the amount of the fine would depend on how wrong the peasant's attitude had been. [105]

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[104] *See* Pu Zhiqiang (浦志强) "We are still waiting for a judgement to come out – another letter to Fuyang Intermediate Court in the case of Chen Guidi et al.'s being sued for defamation"(浦志强：我们一直在等待判决—就陈桂棣等被诉诽谤案再致阜阳中院函), *Boxun* website, 15 November 2005, at http://www.peacehall.com/news/gb/china/2005/11/200511152156.shtml. *See* also Lawyer Pu's blog at http://puzhiqiang.blogchina.com/ for further documentation, and Liu Zhiming (刘志明), "The Rise of a new groups of 'public interest lawyers' on the mainland" (大陆崛起公益律师新群体), 5 May 2005 in *Phoenix Weekly* (凤凰周刊) at http://www.zijin.net/get/proses/2/2006_02_05_4393.shtml.

[105] Chen Guidi and Chun Tao, *supra* note 103.

Observers may sometimes see a kind of irrationality in a particular practice which is not necessarily apparent to those participants involved in the practice. The longer one thinks about it, the better such a practice will appear to "fit" the system at large. The *hukou* system and related practices discussed in the preceding paragraphs are irrational in various ways. Yet the household registration system "fits" the system of local power centers. It can be understood as one part of a larger system of nationally-created legal rules which help to perpetuate the injustices of local rules. In providing a basis for dividing up citizens into localized groups, and at the same time into two large and legally distinct "urban" and "rural" or "peasant" classes, it is the basis for fragmenting citizenship itself.

Fragmented citizenship explains to some extent why rule by local legislation and "red-letterhead documents" functions, and why local despotism is possible. It allows urban governments to reject responsibility for "outside" citizens living within their "territory." On the other hand, *hukou* is almost as inescapable as citizenship is at an international level. Of course it is not one's registration itself which subjects a particular citizen to a particular local government; yet the fact that registration matters so much appears to "tie" people considerably to their places of registration. In that sense, the *hukou* system connects to the methods of governance discussed in the previous section of this paper.

Other sets of rules instituting basic distinctions between "rural" and "urban" also contribute to this phenomenon. For instance, there is a categorical distinction between urban land on the one hand, and rural and suburban land on the other. Rural land is on principle collectively owned. In a manner of speaking, collective rural land ownership has the effect of tying peasants to their local communities, or to their land, in another way. It also leaves some of them constantly threatened by land requisitions

decided by adjacent urban governments whose officials are eager to "develop" and sometimes also to make profits for themselves, by transforming rural land into urban land and then selling it off to property developers.[106]

Fragmented citizenship, social bias, and local autocratic governance (fragmented law) may reinforce each other. It is when peasants are perceived as essentially different and inferior, that abuses affecting them will be more easily tolerated by urban residents who are typically in a better position to make their grievances heard or felt by the country's elite. The fear of waves of underclass people swamping urban centers may also make urban residents readier to accept restrictions on the freedom of movement "to curb migration" (even though migration does in fact take place at a large scale regardless), while denial of equal public services such as education to migrants and peasants will further consolidate these groups' underclass status. Members of the "elite," which probably will continue to be defined by party membership, education and wealth, may moreover discover interest in maintaining social injustices to avoid both personal loss and social turmoil.

The purpose of constitutional adjudication and constitutionality review.

Above it was first argued, on the basis of an analysis of the structure of Chinese legislation and other rule-making to date, that and in what way the Chinese legal system was incoherent. Then certain inegalitarian aspects of the Chinese legal system in its attitude toward peasants and peasant migrants were discussed, and related both to societal attitudes and to the fact of localized political autocracy, especially in the Chinese countryside. It was shown in what way the protection of constitutional rights of peasants, especially, was difficult, with a particular reference to the right to physical

[106] Eva Pils, "Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan,"forthcoming in the *Columbia Journal of Asian Law*.

integrity according to Article 37 of the Chinese Constitution. It was argued that peasants and peasant migrants "lost out" in the current Chinese legal system in a variety of ways.

The disadvantaged status of peasants could also be related to Article 33 of the Constitution, which guarantees each citizen equal protection before the law. On a substantive interpretation, the principle of equality before the law (Article 33 of the Constitution) is not just a right to be treated "according to the rules," whatever these rules are. It can be interpreted as also a right to have as little differentiation by legal rules as possible, ruling out insignificant differences as a basis for differential legislation, and effectively upholding general standards for all citizens. Even though the national law imposing a general registration requirement satisfies the formal requirement that everyone must be treated equally, related regulations—such as measures restricting household registration transfers, limiting temporary residence permits, and restricting public services to permanent residents—amount to invidious discrimination.[107] From a right to equality perspective, this system effectively institutes two classes of Chinese citizens, and severely disadvantages the peasant class.

But how can a substantive principle of equality be applied to a situation in which not coherent law, but instead legislative incoherence is partly responsible for inequalities? How can fragmented law not meeting the requirements of formal equality be required to measure up to strong, substantive egalitarian principles?[108] One answer to this difficult question seems to lie in the concept of *citizenship*, an egalitarian concept strongly implied in the language of the Chinese Constitution. It is the absence of a legally-safeguarded and meaningful common Chinese citizenship,

[107] As if of two Chinese children who are of the same age and whose families live in the same place, one is denied access to publicly financed education, while the parents of both pay city-levied taxes. Chen Jieren *supra* note 55.

[108] One should recall that the party-state's control over production and distribution of material goods, of which the *hukou* system was a part, was initially grounded in an egalitarian concern.

which helps to explain the peculiarity of Chinese legal and administrative practice as a maze of more and more local and specific rules, in which the distinction between the abuse of rules and abusive rules can cease to make any sense.

Another answer lies in the idea of constitutional government not as an aspect of the actual legal system, but as an aspect of what the system might be like. Constitutional government demands that all state conduct conform to constitutional principles. According to this logic it is the Constitution and its principles, which allow one to distinguish real law from the semblance of law created by "legal" regulations and red-letterhead documents; and in some cases real law may be represented only by constitutional principles, just as certain rights are guaranteed "only" by the Constitution. As we saw in the Sun Zhigang case, and as is perceived by many in China who place hope in constitutionalism, the verbal commitments to "rule in accordance with law" and to the supremacy of the Constitution are powerful promises.

Two different types of review of the constitutionality of state actions, including state legislation, can be juxtaposed, namely, "judicial review" by ordinary courts and "constitutional adjudication" on constitutional issues by special institutions outside the ordinary court system.[109] There are many overlaps. For instance, fundamental rights can be also protected by ordinary legislation allowing for court litigation against government in either system,[110] and courts may have the general obligation to examine the constitutionality of any action they review, and any law they apply, even if they do not have the power themselves to strike down parliamentary laws.[111]

[109] This is the language adopted, for instance, by John Ferejohn and Pasquale Pasquino in their "Constitutional Adjudication: Lessons from Europe," 82 (2004) *Texas Law Review* 1.
[110] This is the case with some but not all constitutional rights in China.
[111] For a discussion emphasizing that some legal systems operate without either form of constitutionality review, see Michael Dowdle, "Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: the Curious Case of China," 35 (2002) *New York University Journal of International Law and Politics* 1.

The Chinese system at present has neither judicial review nor constitutional adjudication in the above senses of these terms.[112] It is currently being discussed whether it could introduce either, or both. There is little explicit disagreement in Chinese government and academe over the general desirability of consistency in legislation, including consistency with the Constitution—although it was observed above that the idea of "unity" in legislation as a principle of socialist legislation, if connected to the basic ideas of democratic centralism, does not apparently cohere with the idea of coherent law for the protection of citizens' rights. The lack of effectively general application of legal norms such as laws, regulations, rules, and "red-letterhead documents"—as well as incoherence and confusion amongst them—would require a mechanism for fundamental challenges not only to incidental constitutional violations, but also to the entrenched forms of autocratic government discussed earlier on.

In this context, it is not particularly encouraging to note that current practices in the context of constitutionality and legality review of rules themselves reflect the spirit of autocratic rule by red-letterhead documents. According to Wang Zhenmin, the principle of the review of legal rules or norms in China under the current *Legislation Law* and Constitution is that "whoever created a norm, is responsible for review."[113] Wang critically juxtaposes this with the principle of independent constitutional adjudication. Some textual support for the principle identified by Wang can be found in the Constitution. It states in Article 62 that the NPC, which created the current Constitution, has the right to amend the Constitution and to supervise its enforcement. The NPC only meets for two weeks a year and is otherwise represented by its

[112] The same conclusion is reached by Wang Zhenmin in his assessment of the system, *supra* note 36 at p. 372. Juxtaposing the American and continental models, he speaks of judicial review and *independent* constitutional review.

[113] Wang Zhenmin, *supra* note 36, at p. 372. In Chinese, "谁制定规范谁负责审查." This phrase is curiously ambivalent and can refer both to review of adherence to the norm or review of the norm itself (e.g. a rule created at a lower level but by the same kind of state power). In both cases, Wang's criticism addresses a principle of autocratic supervision.

Standing Committee, which has the task, according to Article 67 of the Constitution, to interpret the Constitution and to supervise its enforcement.[114] It is apparently on the basis of Article 67 that Article 90 of the 2000 *Legislation Law* created the mechanism for constitutional review, which was used by three Beijing citizens in their much-noted suggestion to strike down the State Council *Measures for Internment and Deportation of Vagrants.*[115]

We saw already that the Standing Committees of People's Congresses at central and local levels can in certain cases annul or alter corresponding level government regulations, as well as lower level People's Congresses' regulations (see also Article 88 *Legislation Law*). Article 90 *Legislation Law* adds procedures for initiating review to this. Certain state organs[116] have the right to submit "requests" for a review of administrative regulations and local regulations,[117] to the NPC Standing Committee. Private individuals may submit "suggestions" to the NPC Standing Committee. Laws created by the NPC or its Standing Committee remain unreviewable, and "rules" created by ministries or by local governments are subjected to the State Council's *own* review procedure.[118] "Requests" submitted by specially entitled institutions to the NPC Standing Committee *must* be *answered* within two months. By contrast, while "suggestions" from ordinary people must be received and considered, there is no explicit requirement that they be responded to or "handled."

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[114] Wang Zhenmin discusses problems with this distribution of tasks, *supra* note 36, at p. 372 ff.

[115] *See* above, p. 3. See for a discussion of Article 67, Zhou Wei (周伟) ed., *Study on the Judicial Protection of Constitutional Rights* (宪法基本权利司法救济研究, Beijing: 2003), pp. 118, especially pp. 128 ff. The authors argue for judicial review of constitutionality.

[116] The organizations entitled to submit are the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuracy and the Standing Committees of the People's Congresses of the provinces, autonomous regions and directly administered cities.

[117] That is, *xingzheng fagui, difangxing fagui, zizhi tiaoli* and *danxing tiaoli* (行政法规，地方性法规，自治条例, 单行条例).

[118] Wang Zhenmin comments on the resulting confusion in review procedures, *supra* note 36, at p. 373.

We cannot know for sure whether there are dozens, or hundreds, or indeed thousands of "suggestions" for unconstitutionality review per year, so long as there is no public procedure for handling them. In that sense, the new procedure bears some resemblance with the amorphous and tragically ineffective petitioning process, which is an adaptation of a centuries-old system to contemporary conditions.[119] In relatively simple or uncontroversial cases, an assessment that the regulation in question is unconstitutional *or* contravenes higher-ranking law will apparently lead to an informal request by a working group within the NPC Standing Committee to the authority which made it, to alter or amend or revoke it accordingly.[120] Only if this request is unsuccessful will the abolition of the regulation by the NPC Standing Committee will be considered. The NPC Standing Committee may ultimately take a plenum decision to abolish the regulation.

The review suggestion mechanism supplies a procedure allowing ordinary Chinese citizens directly to challenge the constitutionality of administrative legislation (*xingzheng lifa* 行政立法). But it is a mechanism of autocratic self-control with hardly any similarity to adjudication, and no explicit requirement to connect the review process with any litigation in which judges are faced with challenges to the legality or constitutionality of the rule under review. Each institution is put in charge of its own rules. Thus the Constitution is watched over by the Standing Committee of the institution that created the Constitution—and an unconstitutional regulation should,in theory, be withdrawn or altered by the institution that created the regulation.

The abolition of rules as a result of the review process may moreover lack general effect. As argued above, much of administrative legislation and many abstract

[119] *See* Carl F. Minzner, "Xinfang: An Alternative to the Formal Chinese Legal System," *Stanford Journal of International Law* (forthcoming 2006).
[120] Article 91 of the *Legislation Law* says that it *may* submit a written suggestion.

administrative acts undermine the effective generality of law in China. As a result, the abolition of a national level regulation may in effect be insufficient to remedy unconstitutional practice;[121] while on the other hand review of lower level regulations (at the national or at lower levels) may result in inconsistency among review decisions,[122] or may lack impact if corresponding national legislation remains in effect.[123] This is particularly likely if review decisions remain unpublicized.

The "application of the Constitution" by judges is frequently discussed as an alternative to constitutional review, although it concerns a much broader range of issues. The authority of judges to apply the Constitution is perhaps best explained not by any self-referential or textual authority to pronounce what is legally correct but by the fact that judges are better placed to make impartial decisions, because, and if, they are independent. But so long as they cannot even accept challenges to "red-letterhead documents" for adjudication, courts are far from achieving such independence.

Much of the ongoing discussion over whether courts may apply the constitution in adjudication in China is of a doctrinal and text-oriented nature, and rarely addresses the political and institutional (power-related) impediments to judicial constitutionality review of state actions. On the basis of Article 67 of the Constitution, it is argued that the task of interpreting the Constitution lies *exclusively* with the NPC Standing Committee. From this understanding several further contentions have arisen: that it is not possible in China to file a lawsuit based on a public authority's infringement of a constitutional right; that courts may not cite the Constitution or "apply" it as a legal basis of their decisions; and that courts may not declare legislation or administrative

[121] Wang Lei does not explicitly mention that the 15 local norms relating to internment and deportation which he mentions *supra* note 7 at p.143 were later also abolished (replaced).
[122] By Local People's Congress Standing Committees according to Article 88 of the *Legislation Law,* according to a standard of "appropriate[ness]." This seems to include "constitutionality."
[123] If a challenge to the constitutionality of Guangdong "Re-education Through Labour" regulation succeeded, for instance, national RTL legislation could still be applied. It would not be wrong to strike down the Guangdong regulation because of Article 37, but wrong for an abolition not to be general.

acts unconstitutional. To give an example of opposition to the Constitution's "judicialization," Jiang Shigong argues that "the very text of the Constitution itself" prohibits it.[124] Claims like these derive support from the doctrine about "abstract administrative acts," which already curtails the powers of courts in the area of administrative litigation in a way making coherent adjudication difficult. They are further supported by the fact that the Supreme People's Court has so far not exercised its power to issue "judicial interpretations" explicitly to allow for any of the three aforementioned functions to be performed by Chinese judges.[125] No one, apparently, currently argues for the direct power of judges to strike down unconstitutional statutes or regulations, but there are proposals for the creation of an independent constitutional court.[126] The only known case in which the Supreme People's Court referred to a "constitutional right" as having been violated (by a government authority and several private parties) appears to have had virtually no effect on further judicial practice.[127] Considering what has been said above about the difficulties met when trying to challenge the validity (legality) of merely an "abstract administrative act," serious, principled and openly controversial constitutional rights adjudication by Chinese courts appears unlikely at the moment.

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[124] Jiang Shigong (强世功), "Misconceptions regarding the judicialization of the Constitution—discussing the confused idea of transition toward constitutionalism in light of the confused discourse on the judicialization of the Constitution," (宪法司法化的"误区"—从"宪法司法化"的话语悖论看国家转型的宪政悖论), 2003, at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23563.

[125] SPC "Answer regarding the non-application of the Constitution as a basis for criminal liability or sentencing decisions"(最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的批复), Judicial Interpretation 1955 no. 11298, 30 July 1955; SPC "Answer regarding the question how the courts when issuing legal documents should cite to normative documents" (最高人民法院关于人民法院制作法律文书应如何引用法律规范性文件的批复).

[126] Wang Zhenmin, *supra* note 36, pp. 168 ff and 372.

[127] Judicial Interpretation 1986 no. 31, 28 October 1986; and SPC "Answer on whether civil liability is incurred when a citizen's right to education was infringed by means of infringement of her right to reputation [identity theft]," 2001. *See* Wang Zhenmin, *supra* note 36 at pp. 206 ff.; and Huang Songyou (黄松有), "The judicialization of the Constitution and its significance —a discussion proceeding from the SPC's approving response today" (宪法司法化及其意义—从最高人民法院今天的一个 "批复"谈起), available at http://www.law-thinker.com/ show. asp?id=205, and Zhou Wei, (*supra* note) p. 161.

But all these current difficulties and deficiencies notwithstanding, several recent phenomena—such as the application of the new procedure in the Sun Zhigang incident, the enormous public attention given to the question of unconstitutionality, and the ongoing debate over "bad law"—are indicative of an important and possibly intensifying new attitude among Chinese people. This public attention has contributed to creating a new vocabulary around the concepts of rights, constitutionality, and citizenship, which inspires and changes China's political discourse.

Conclusion.

A combination of legal, social and political factors prevents Chinese peasants and peasant migrants from enjoying legal and constitutional rights as equal citizens; but on the above analysis, change entirely from within and through existing legal and political institutions is unlikely. This makes China different from countries such as the United States, which have passed through phases of particularly invidious discrimination against certain racial or "racialized" groups in society, and have been partly able to address these difficulties through legislation and judicial (constitutional) review. In China, it would be difficult to introduce an effective mechanism for independent adjudicative constitutional review of legislation without more clearly allocating rule-making powers to fewer authorities. To do so, China would have to break open the power structure that currently enables autocratic local rule; it would have to depart from the principles which provide limited justification to the one-party state. In the absence of such radical changes, the abolition of the household registration system (on constitutional grounds) and of other rules effectively tying peasants to their local communities might still alter and challenge the preconditions of local rule; but because local rule is so strong, abolition, or radical reform, appear

unlikely—despite numerous attempts to effect such reforms on the part of central government.[128]

Even so, in the absence of radical and comprehensive reform, judicial or constitutional review of legislation could still help to pose public challenges to unconstitutional state action. In current conditions, both forms of review might acquire more meaning from media reporting and public debate, which could to some extent complement the weak and often non-public procedures made available by the state. This was illustrated by the Sun Zhigang case. Judicial review, in particular, would require judges to be able to defy local control and work toward meaningful equality before the law by taking recourse to national law, the Constitution, and principles of justice.

Wronged Chinese citizens are now often readier to practice such defiance than their judges. Challenges to the legality or constitutionality of the (local) state's action can therefore not be characterized as incidental uses of a coherent and functional legal system, but should instead be understood as challenges to certain basic principles of the current political and legal system. Perhaps this is why such challenges so easily take on extra-"legal" forms; why they occur in the context of the amorphously complex petitioning system, and in the form of physical resistance to government. It is not clear whether, when alternative conceptions of political governance are proposed for China (as we may expect), they will aim to overcome inequality in Chinese society. The most dramatic assertions of important, violated constitutional rights to date occur entirely outside the courts. It is all the more significant that they do occur, for instance, when peasant and other petitioners coming to urban petitioning offices

[128] *See* also Solinger (*supra* note 67). Illustrating the difficulties with giving effect to central polices of this kind, the author says that the Sun Zhigang incident occurred within a year from Guangdong province enacting, in response to a central announcement, 'a ban on the detention of migrants lacking residency or work permits, provided they had an urban home and a regular job.'

drape themselves in white shirts with black characters reading “Uphold the Constitution and the Criminal Code!” Such activities seem to bring the Constitution more alive, than academic discussions about its status can—simply through the intensity with which constitutional rights of equal citizenship are demanded.